BASEBALL'S ANTITRUST EXEMPTION: THE LIMITS OF STARE DECISIS

Baseball, America's national sport, is followed religiously by millions of fans in the ballpark, before their television sets, and on the radio. While technology now allows the viewer to witness ball-field action in his own living room, the law relating to professional baseball is still mired in legal dogma dating to the crystal set age. Baseball's anomalous exemption from the coverage of the federal antitrust laws has been unsuccessfully challenged by two recent cases, *Flood v. Kuhn*[1] and *Salerno v. American League of Professional Baseball Clubs*.[2]

The Supreme Court has characterized the Sherman Act as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[3] In this spirit, the reach of the federal antitrust laws has been interpreted to extend across the entire spectrum of market activities.[4] Accordingly, the unique exempt status conferred upon baseball by the Supreme Court in 1922[5] warrants careful scrutiny.[6]

The purpose of this comment is to determine the impact of *Salerno*, *Flood*, and the earlier baseball decisions on the law-making processes, and further, to examine the rationale utilized to exempt baseball from the purview of the Sherman Act. Finally, the propriety of the Supreme Court's reinterpretation of statutes previously passed upon will be considered.

I. THE *Salerno* AND *Flood* CASES

In *Salerno v. American League*,[7] two former umpires fired by the American League charged the defendants with monopolization and conspiracy in restraint of trade in violation of the Sherman and Clayton Acts. The trial court, dismissing the action for lack of subject matter jurisdiction, based its decision[8] upon two prior Supreme Court

---

[1] 316 F. Supp. 271 (S.D.N.Y. 1970).

[2] 429 F.2d 1003 (2d Cir. 1970).

[3] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[4] The scope of the antitrust laws now includes real estate, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); theatre, United States v. Shubert, 348 U.S. 222 (1955); and football, Radovich v. National Football League, 352 U.S. 445 (1957).

[5] Federal Baseball Club of Baltimore, Inc. v. National League, 259 U.S. 200 (1922).

[6] See Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary, 82d Cong., 2d Sess., Report on Organized Baseball (1952). The subject of baseball has attracted a large number of articles and comments. See generally Gromley, Baseball and the Antitrust Laws, 34 Neb. L.R. 597 (1955); Hoffman, Is the NLRB Going to Play the Ball Game?, 20 Lab L.J. 239 (1969); Johnson, Baseball, Professional Sports and the Antitrust Acts, 2 Antitrust Bull. 678 (1957); Comment, Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws, 62 Yale L.J. 576 (1953); Comment, The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws, 81 Harv. L. Rev. 418 (1967).

[7] 429 F.2d 1003 (2d Cir. 1970).

[8] 310 F. Supp. 729 (S.D.N.Y. 1969).

rulings on the matter of baseball—*Federal Baseball Club of Baltimore, Inc. v. National League*,[9] holding that baseball was not within the Sherman Act's definition of interstate commerce, and *Toolson v. New York Yankees, Inc.*,[10] holding that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."[11]

The Second Circuit affirmed the trial court's dismissal on the grounds that even if professional baseball were subject to the antitrust laws, the complaint failed to relate alleged antitrust violations to the practices directed at the umpires. However, Judge Friendly, speaking for the court, acknowledged the dubiousness of *Toolson*, and the "unrealistic," "inconsistent," and "illogical" distinction between baseball and other professional sports.[12] While admittedly critical of the earlier cases, the court nevertheless insisted that the Supreme Court retains the exclusive privilege of overruling its own decisions.[13] The Supreme Court's recent denial of certiorari in *Salerno*[14] is unfortunate to the extent that it reflects an unwillingness to deal with contemporary political, social and economic developments. If the *Flood* decision reaches the Supreme Court, perhaps the Court will take that opportunity to rectify baseball's anomalous antitrust exemption.

In *Flood*, the plaintiff, a professional baseball player, was traded from the St. Louis Cardinals to the Philadelphia Phillies on October 8, 1969.[15] Under the terms of the Uniform Player's Contract, Flood's contract with the Cardinals could be freely assigned[16] to any of the

[9] 259 U.S. 200 (1922). The Court reasoned that "exhibitions of baseball . . . are purely state affairs," and hence, not interstate commerce. Id. at 208.

[10] 346 U.S. 356 (1953). The Court affirmed baseball's exemption but side-stepped a re-examination of the decision in *Federal Baseball* which held that the sport was not a subject of interstate commerce. *Toolson* reasoned that "Congress has had the ruling [*Federal Baseball*] under consideration but has not seen fit to bring such business under these laws by legislation," and that the baseball industry had relied for thirty years upon the assumption that it was not subject to existing antitrust legislation. 346 U.S. at 357. *Toolson* argued that if evils exist, Congress, if it chooses, should, by legislation, include baseball within the scope of the antitrust laws.

[11] 346 U.S. at 357.

[12] Judge Friendly commented that "we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled." 429 F.2d at 1005 (2d Cir. 1970).

[13] Id.

[14] 400 U.S. 1001 (1971).

[15] The defendants include the twenty-four major league baseball clubs of the American and National Leagues and their presidents, and Bowie K. Kuhn, individually and as Commissioner of Baseball.

Organized baseball consists of major league teams which comprise the American and National Leagues and the minor leagues which are a subsystem of the major leagues. No professional teams exist outside of this organization. Under the Major League Agreement, all teams are subject to certain regulations and the powers of the Commissioner of Baseball. 316 F. Supp. at 273.

[16] All professional baseball players must sign the Uniform Players Contract which includes an assignment provision. Also, Rule 9 of the Major League and Professional Baseball Rules provides in part: "A club may assign to another club an existing contract

major league clubs under a provision known as the reserve clause. The reserve clause, enforced both by Baseball Rules and Regulations and uniform contract terms,[17] restricts the player to negotiating with one and only one baseball club. In Mr. Flood's case, subsequent to October 8, 1969, he was restricted to playing for and negotiating with Philadelphia. The plaintiff alleged that the reserve system constituted a conspiracy among the defendants to offer him only a single, uniform contract, and that he was boycotted, in violation of the Sherman and Clayton Acts, from playing baseball for teams other than Philadelphia.[18] The district court, relying on *Salerno*, found for the defendants and directed judgment against Flood.

II. Antitrust Exemptions

Federal antitrust exemptions generally fall within two categories.[19] First, a limited number of activities are expressly exempted from the antitrust laws by statute. Certain agricultural[20] and fisheries[21] cooperatives, for example, have been exempted by statute. Similarly, labor unions have a limited statutory exemption from the antitrust

with a player. The player, upon receipt of written notice of such assignment is by his contract bound to serve the assignee." 316 F. Supp. at 274 n.7.

[17] Rule 3(a) of the Major League Rules and Professional Baseball Rules provides:

> No club shall make a contract . . . containing a nonreserve clause . . . . [t]he making of any agreement between a club and a player not embodied in the contract shall subject both parties to discipline; and no such agreement, whether written or verbal, shall be recognized or enforced.

316 F. Supp. at 274 n.4.

[18] Flood also maintained in three other counts:

> (1) that the reserve system constituted a violation of the antitrust laws of New York, California and other states, (2) that the defendants have restrained the plaintiff's free exercise of playing professional baseball in violation of the common law, and (3) that the reserve system is a form of peonage and involuntary servitude in violation of the anti-peonage and involuntary servitude statutes. 42 U.S.C. § 1994 (1964), 18 U.S.C. § 1581 (1964), and the thirteenth amendment.

Flood asserted three reasons why the court had jurisdiction to grant relief under the Sherman Act. First, he contended that the *Federal Baseball* and *Toolson* decisions do not bar the court from granting relief in light of the changing concepts of interstate commerce. Second, he asserted that the reliance interests of team owners are not violated in a request for prospective relief. Finally, he maintained that "the silence of Congress since 1953 argues for, rather than against, a judicial reexamination of the discretionary judgment exercised in *Toolson*." 316 F. Supp. at 272, 277.

The defendants relied heavily upon *Federal Baseball* and *Toolson*. They also maintained that the failure of Congress to legislate, in light of express invitations by the Supreme Court to do so, signifies that Congress has decided not to change baseball's status. Defendants further argued that professional baseball, unlike other league sports, has developed in reliance upon the exemption granted by *Federal Baseball* in 1922. Defendants' Post-Trial Memorandum.

[19] Section of Antitrust Law of the American Bar Association, Antitrust Developments, 1955-1968, 215-16 (1968) [hereinafter cited as Antitrust Developments].

[20] Capper-Volstead Act, 7 U.S.C. §§ 291-92 (1964); Cooperative Marketing Act of 1926, 7 U.S.C. §§ 451-57 (1964); and § 6 of the Clayton Act, 15 U.S.C. § 17 (1964).

[21] Fisheries Cooperative Marketing Act, 15 U.S.C. §§ 521-22 (1964).

laws under the Clayton and Norris-La Guardia Acts.[22] Finally, telephone, gas and other utilities have long been allowed to operate as monopolies at the price of government regulation.[23] All of these activities are excluded from the federal antitrust laws, however, by specific legislation. For the most part, without the statutory exemption, these activities would fall within the scope of the antitrust laws.

The second caegory of antitrust exemptions consists of those activities which fall outside the scope of "trade" or "interstate commerce" within the meaning of the Sherman Act. This non-commerce category has steadily withered.[24] Today, football and other professional sports[25] are covered by the antitrust laws as are other service-oriented businesses.[26] It is submitted that the baseball exemption is unique because it does not fall within either the statutory or non-commerce category of antitrust exemptions.

When the Supreme Court first considered the matter of organized baseball in 1922,[27] the Court held that professional baseball was immune from antitrust attack because it did not constitute a subject of interstate commerce within the meaning of the Sherman Act. Today, baseball is clearly engaged in interstate commerce. Whatever test is utilized by the courts, whether for constitutional or antitrust purposes, baseball's interstate contests and nation-wide television and radio broadcasts place the business of baseball clearly within the confines of the most stringent test of "interstate commerce."[28] Moreover, the argument that baseball is a "sport" rather than a "trade" fails to consider the multi-million dollar gate receipts and broadcast revenues;[29] if it is a sport, surely it is also a business.

The Supreme Court has denied antitrust exemptions to the theatre,[30] to boxing[31] and to professional football.[32] The Court recognized that few distinctions exist between baseball and these other activities[33] but, nevertheless, chose to hold other sports within the scope of the Sherman Act. However, the language in *Radovich v. National Football League*[34] strongly suggests that but for the prece-

[22] Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 (1964) and 29 U.S.C. § 52 (1964), and the Norris-La Guardia Act, 29 U.S.C. §§ 101-15 (1964).

[23] See P. Areeda, Antitrust Analysis, at 53-54 (1967).

[24] See Antitrust Developments, supra note 19, at 215-16.

[25] Radovich v. National Football League, 352 U.S. 445 (1957) and United States v. International Boxing Club, 348 U.S. 236 (1955).

[26] See, e.g., United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950) (real estate); and United States v. Shubert, 348 U.S. 222 (1955) (theatre).

[27] 259 U.S. 200 (1922).

[28] See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964).

[29] League members may now, by congressional action, pool their television rights. 15 U.S.C. §§ 1291-93 (Supp. IV, 1969).

[30] United States v. Shubert, 348 U.S. 222 (1955).

[31] United States v. International Boxing Club, 348 U.S. 236 (1955).

[32] Radovich v. National Football League, 352 U.S. 445 (1957).

[33] Id. at 452.

[34] 352 U.S. 445 (1957).

dent of *Federal Baseball*, the business of baseball would also be covered by the Sherman Act.[85] "In short," the Supreme Court observed in *United States v. Shubert*, "*Toolson* was a narrow application of stare decisis"[86]—not a reaffirmation of an exemption based upon baseball's falling outside "trade" or "interstate commerce" within the meaning of the antitrust laws. Given this reasoning, both *Salerno* and *Flood* rejected changes in market structure since 1922 or 1953 as academic. Therefore, it is no longer seriously contested that organized baseball does not constitute "trade" or that it is not engaged in "interstate commerce."

While the language of *Toolson* relates back to the earlier *Federal Baseball* decision, it represented a new approach in upholding baseball's exemption. Thus, the *Toolson* opinion has generally been interpreted to exclude the business of baseball on the ground that Congress did not intend to bring baseball within the antitrust laws, as distinct from the ground that baseball is exempt because of the lack of interstate commerce.[87]

The *Toolson* approach presumes congressional intent to exclude baseball from the ambit of the antitrust laws. Curiously, no explicit statutory exemption exists, nor is any legislative history cited in either *Toolson* or *Federal Baseball* to support this conclusion. Thus, the Supreme Court was clearly straining to maintain baseball's exemption.

For the Supreme Court to uphold *Federal Baseball*, *Toolson*, and now *Flood*, it would have to rely upon either of two arguments: first, that congressional silence on the matter means that the Congress has approved the earlier court decisions and has chosen to leave baseball free from antitrust regulation, or second, that the reliance interests are such that to overrule *Toolson* would create chaotic conditions in organized baseball.

A. *Congressional Intent to Exclude Baseball from the Sherman Act*

Congress has been unwilling or unable to clarify the antitrust status of baseball. While the legislative branch has neither modified nor overturned the Supreme Court decisions on baseball, it has specifically denied granting the industry congressional immunity from antitrust attack.[88] One line of thought reasons that Congress has had the rulings in baseball under consideration since 1922; it has refused to act, therefore, Congress must approve of the decisions.[89] In *Flood*, the

[85] The Court commented, " . . . were we considering the question of baseball for the first time upon a clean slate we would have no doubts [of including baseball within the Sherman Act]. But *Federal Baseball* held the business of baseball outside the scope of the Act." 352 U.S. at 452.

[86] 348 U.S. at 230.

[87] 429 F.2d at 1005.

[88] See Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary, 82d Cong., 2d Sess., Report on Organized Baseball at 230 (1952).

[89] See Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953); Radovich v. National Football League, 352 U.S. 445, 450-51 (1957); and Wisconsin v. Milwaukee Braves, Inc., 31 Wis.2d 699, 144 N.W.2d 1 (1966), cert. denied, 385 U.S. 990 (1966).

trial court made this argument and suggested that congressional silence may work to ratify the earlier Supreme Court decisions.

The argument against such an interpretation of congressional silence was persuasively articulated by Justice Frankfurter speaking for the Court in *Helvering v. Hallock*:[40]

> It would require very persuasive circumstances enveloping Congressional silence to debar this court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. . . . 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.[41]

Thus, the Court in *Hallock* was reluctant to attribute any controlling significance to congressional inaction. This approach sharply contrasts with the Court's reasoning in *Toolson* which rests, at least in part, upon congressional approval inferred from legislative silence.

Later attempts to construe *Hallock* narrowly on the ground that there Congress did not even consider the matter have proved unsuccessful. Justice Black, dissenting in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,[42] unsuccessfully urged that once Congress has considered the matter raised in an earlier decision and the legislative branch has not acted, then congressional silence indicates a willingness to leave the decision alone. In Black's view, the Court's reconsideration in *Boys Markets* of an earlier statutory interpretation was tantamount to judicial legislation. The majority of the Court, however, has followed the *Hallock* dictum that congressional inaction is inconclusive. In *Girouard v. United States*,[43] the Court stated that "it is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law."[44] Further, in *James v. United States*,[45] the Court overruled a fifteen-year old decision, in spite of legislative inaction. Similarly, congressional silence did not bar the

---

40 309 U.S. 106 (1940). In this case, the Supreme Court overruled an interpretation of the Revenue Act of 1926 set forth in Klein v. United States, 283 U.S. 231 (1931), Helvering v. St. Louis Union Trust Co., 296 U.S. 39 (1935), and Becker v. St. Louis Union Trust Co., 296 U.S. 48 (1935).

41 309 U.S. at 119-21.

42 398 U.S. 235 (1970). See Note, 12 B.C. Ind. & Com. L. Rev. 295 (1970).

43 328 U.S. 61 (1946). *Girouard* overruled an interpretation of the Nationality Act of 1940 set forth in United States v. Schwimmer, 279 U.S. 644 (1929), United States v. Macintosh, 283 U.S. 605 (1931), and United States v. Bland, 283 U.S. 636 (1931).

44 328 U.S., at 69-70.

45 366 U.S. 213 (1961). In this case, the Court held that embezzled money is taxable income to the embezzler under § 61(a) of the Internal Revenue Code, 26 U.S.C. § 61(a) (1964), overruling Commissioner v. Wilcox, 327 U.S. 404 (1946), which had excluded embezzled money from gross income.

Court from striking new ground in *Boys Markets*, although the Congress had been urged to modify the earlier decision.

Underlying the majority-Frankfurter approach is the sound notion that, given the realities of the legislative process, congressional silence alone must be inconclusive. This view takes into account the multiple possibilities which may have caused the legislative silence: more important legislation may have occupied the time of the members, or, an appropriate bill may have never been reported out of committee. The Black view, by attempting to extract congressional approval out of silence, is logically defective in that it insists upon a single conclusion where others can be as readily inferred.

Application of the Frankfurter theory argues strongly for the Court's reconsideration of the business of baseball from a more reliable reference point than mere congressional inaction. *Flood-Salerno* is not dissimilar from *Boys Markets* in that the Court is faced with a situation in which Congress has refused to act despite its being urged to do so.[46] The *Boys Markets* conclusion that congressional silence should not be interpreted as acceptance of an earlier decision is just as applicable to baseball's antitrust exemption as it was to the labor law issue decided in *Boys Markets*. If the Supreme Court should now choose to overrule the *Toolson* and *Federal Baseball* decisions, application of the *Boys Markets* principle that congressional silence is inconclusive provides an avenue for reaching that result.

In sum, congressional inaction is too tenuous to tie the hands of the Supreme Court. Further, the Court will not compromise our tripartite system of government if it prudently exercises the power to overrule an earlier decision. It should also be noted that even if the Court exercises such a power, Congress will retain final authority—it can overturn the Court's reinterpretation by amendment of the statute in question.

B. *Baseball's Reliance on its Exemption*

Perhaps the most persuasive argument to maintain baseball's exemption lies in the clubs' investments of millions of dollars in player contracts, new franchises, and long-term leases subsequent to, and purportedly in reliance on, *Toolson* and *Radovich*. Unlike the other professional sports, only baseball has developed under the umbrella of *Federal Baseball*. As the Court observed in *Radovich*, "[v]ast efforts

[46] See note 10 supra, where it is pointed out that the Court in Toolson v. New York Yankees, Inc., invited congressional action. The Court again invited congressional action in Radovich v. National Football League, 352 U.S. 445 (1957). The Court there acknowledged that distinctions between baseball and football were perhaps "unrealistic," "inconsistent," and "illogical." Nevertheless, the Court went ahead and made this distinction inviting Congress to eliminate possible "error or discrimination."

This history compares with *Boys Markets*, where the Court pointed out that the Reports of Special Atkinson-Sinclair Committee, A.B.A. Labor Relations Law Section-Proceedings 226 (1963), had urged, but failed to obtain from Congress, a modification of the Court's ruling in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

had gone into the development and organization of baseball since that decision [*Federal Baseball*] and enormous capital had been invested in reliance on its permanence."[47]

It is highly speculative, however, to suggest that chaos would result if baseball should be held within the scope of the antitrust laws. The other professional sports have certainly grown and prospered while operating without an antitrust exemption. The problem is essentially one of molding appropriate prospective relief, not repeatedly throwing the matter back in the lap of Congress. It is within the sphere of appropriate judicial action to apply such relief in light of baseball's purported reliance.

III. Application of Stare Decisis

The *Toolson* Court rigidly adhered to the precedent set in *Federal Baseball* and found that decision binding. In this respect, then, the Supreme Court strictly applied the judicial principle of stare decisis. This doctrine, predicated upon the desire to achieve stability, predictability, and continuity in the law, seeks to provide judicial guidance for private decision making; the public should be able to rely upon judicial decisions with some degree of certainty. The Supreme Court, however, has split over the question of the reinterpretation of statutes—Justices Brandeis and Black opting for a rigid application of stare decisis, while a majority, led by Justice Frankfurter, has affirmed the power of the Court to review any of its own decisions.

For Justice Brandeis, dissenting in *Burnet v. Coronado Oil & Gas Co.*,[48] upholding precedent was more important than correcting a rule once it had been established. Supporting this position, Justice Black, dissenting in *Boys Markets*, argued that any reinterpretation of a statute by the Court violated the arena of congressional action and usurped the legislative function. In the Brandeis-Black view, Congress, unlike the courts, is in the unique position to respond to political pressures and changed circumstances. "Having given our view. . . ," Justice Black maintained, "our task is concluded, absent extraordinary circumstances. When the Court changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature."[49] This theory suggests that it is beyond the constitutional power of the Court to reinterpret statutes.[50]

Justice Frankfurter firmly rejected the argument that it is out-

---

47 352 U.S. at 450.

48 285 U.S. 393 (1932). Justice Brandeis wrote, "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." Id. at 406.

49 398 U.S. at 258.

50 Justice Black maintained that reinterpretation of a statute is tantamount to an amendment of the statute, and, therefore, constitutes a usurping of the legislative powers of the Congress under Article I of the Constitution. However, he did not believe that stare decisis bars reconsideration of constitutional questions. Id. at 258-59.

side the Court's power to reinterpret a statute. Speaking for the Court in *Hallock*, Justice Frankfurter maintained that

> stare decisis is a principle of policy not a mechanical formula of adherence to the latest decision, however recent and questionable when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.[51]

The Frankfurter approach met head on the Court's responsibilities, frankly reconsidering and overruling an earlier decision. The *Hallock* language seems appropriate to the baseball line of cases because the exempt status conferred upon the industry clashes with the "more embracing" doctrine that the scope of the federal antitrust laws should be interpreted broadly. *Hallock* illustrates the willingness of the Court to reconsider an earlier statutory interpretation in order to effect the purpose of the statute. Accordingly, baseball should be considered in the light of contemporary interpretations of the Sherman and Clayton Acts.

Recently, the Court again adopted the Frankfurter approach in *Boys Markets*. The similarities pointed out above between *Boys Markets*, *Flood*, and *Salerno* call for similar treatment from the Supreme Court. Thus, the baseball decisions, to the extent that they rely solely upon the stare decisis doctrine, should give way to a new rule.

IV. Some Problems with Rigid Adherence to Stare Decisis

Society has multiplied the things it expects governments to do. Yet, as the baseball cases demonstrate, it remains quite unclear which branch of the government should do what. The Supreme Court has repeatedly urged the Congress to make any changes it deems necessary with respect to baseball, and thereby "correct" or modify the Court's 1922 *Federal Baseball* decision. This policy assumes that the primary responsibility for correcting judicial "error" should be borne by the Congress. But, the already overburdened Congress needs to be free to deal with new problems, rather than merely correct the "errors" committed by the judiciary. Standards of quality in decisional law should be met by the courts irrespective of action or inaction by the legislature.

Another undesirable consequence stemming from rigid adherence to precedent is that it inherently confines decision making to the past. Contemporary social, political, and economic values become subordinated to the thinking and response of an earlier age. Viable government is built upon flexible institutions providing for the accommodation of change. The judiciary cannot sidestep its responsi-

[51] 309 U.S. 106, 119 (1940).

bilities in this respect, particularly in cases such as baseball, where the Supreme Court itself has been the source of the "inconsistency."[52]

A more damaging consequence derives from the weakened respect for the legal system—a consequence which results from the Court's decision to draw an irreconcilable distinction between baseball and other professional sports. Why, one can reasonably ask, should one sport and not others be given protection from the antitrust laws?

Whatever may be said about the policy of judicial reinterpretation of statutes, failure to do so, as illustrated by the baseball decisions, has led to a confused situation in both Congress and the courts. Thus, when notions of stare decisis lock judicial thinking into a 1922, or even a 1953, legal framework, the law not only appears inconsistent, but periodically the courts are again confronted with either compounding the error or reversing a long-standing precedent. In light of the foregoing problems, the Supreme Court should at least reconsider the matter of baseball with a view towards weighing all the equities involved.

Conclusion

Rather than recognizing the shaky rationale of earlier decisions or changes in circumstances since 1922, the courts have instead urged that Congress correct any error in baseball's exemption from the antitrust laws. Baseball serves to illustrate the price of strict adherence to precedent. Distinctions between baseball and football, recognized as "illogical" and "inconsistent" by the Supreme Court itself,[53] have been affirmed. The *Flood* and *Salerno* cases demonstrate that litigation does not evaporate, and that dubious decisions of the past will periodically haunt future courts unless sound logic is the cornerstone of judicial precedents. Baseball's antitrust exemption was originally predicated upon the intrastate nature of its exhibitions. With *Toolson,* the Supreme Court shifted the basis of the exemption to congressional intent to exclude baseball from the ambit of the antitrust laws. It is suggested that this was nothing more than a mere rationalization. The only rationale left for the present exemption is simply that forty-nine years ago the Court held baseball not to be involved in interstate commerce.

In conclusion, it is suggested that the Supreme Court follow the lead of cases such as *Boys Markets* in which congressional silence did not prevent the Court from overruling its own interpretation of a statute. A flexible rather than static approach must be recognized by the courts if social change is to occur within the context of continuity.

Barton J. Menitove

[52] 429 F.2d at 1005.

[53] Radovich v. National Football League, 352 U.S. 445, 452 (1957).