H.R. REP. 103-871, H.R. Rep. No. 871, 103RD Cong., 2ND Sess. 1994, 1994 WL 685623 (Leg.Hist.)

**\*1** BASEBALL FANS AND COMMUNITIES PROTECTION ACT OF 1994

HOUSE REPORT NO. 103–871

November 29, 1994

[To accompany H.R. 4994]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4994) to apply the antitrust laws of the United States to major league baseball, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Baseball Fans and Communities Protection Act of 1994”.

SEC. 2. APPLICATION OF THE ANTITRUST LAWS TO MAJOR LEAGUE BASEBALL IN EXCEPTIONAL AND EXTRAORDINARY CIRCUMSTANCES.

The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding at the end the following:

“Sec. 27. (a) If unilateral terms and conditions of employment in restraint of trade or commerce are imposed by any party that has been subject to an agreement between 2 or more major league baseball clubs and the labor organization representing the players of major league baseball, such unilateral imposition shall be subject to the antitrust laws.

“(b) Subsection (a) shall not apply to a term or condition imposed solely with respect to a professional baseball player who is a party to a uniform player contract **\*2** that is assigned, at the time the imposition described in such subsection occurs, to a baseball club that is not a major league professional baseball club.

“(c) This section shall not be construed to modify, impair, or supersede the operation of–

“(1) the Act of September 30, 1961 (Public Law 87–331; 15 U.S.C. 1291 et seq.), or

“(2) any Federal statute relating to labor relations.

“(d) For purposes of this section, the term ‘terms and conditions' does not include a strike or a lockout.”.

EXPLANATION OF AMENDMENT

Inasmuch as H.R. 4994 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

Professional baseball is the only industry in the United States that is exempt from the antitrust laws without being subject to alternative regulatory supervision. There may have been a time when such singularity was a secret source of pride and distinction for the many who loved the game as perhaps the finest outward manifestation of the American way of life and culture that bound a diverse people together. That time has ended. The continuing baseball strike of 1994–which ended the regular season, which ended the possibility of a World Series for the first time in 90 years, and which has very nearly ended the love affair of the American people with their national pastime–has more than any other event or legal argument created the necessary political will to subject this business to the same rules of fair and open competition, of respect for the ultimate consumer, as all other business enterprises in this country.

The Committee's formal action of partially repealing the nonstatutory antitrust exemption–which Congress never initiated or endorsed but by which it has been saddled for over 70 years–is really the first step in ending a legal fiction about the game created and perpetuated by the Supreme Court, as perhaps one of its greatest indulgences. That indulgence, fueled first by sentimentality and then by risk-aversion, has now vested such complete power over the sport by its financial owners as to enable them to end the game at will.

The Committee now acts to end the illusion which has spawned very real economic consequences. It does so by partially repealing the nonstatutory exemption created by the 1922 decision in Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs.1 In so doing, the Committee responds to the current phase of a recurring crisis in baseball in a very limited, yet crucial, way: by subjecting the traditional parties to Major League Baseball's2 collective bargaining agreement–the players' union and owners–to the Nation's antitrust laws in the event one party unilaterally imposes an anticompetitive term or condition of employment**\*3** on the other.3 The legislation, H.R. 4994 (the “Baseball Fans and Communities Protection Act of 1994”), exempts minor league baseball from the scope of its coverage, and does not interfere with either the Sports Broadcasting Act4 or any Federal labor relations statute.

Congress enacted the antitrust laws a century ago to safeguard business freedom and consumer welfare in the economic sphere, much as personal liberties were safeguarded at the Nation's founding.5 Born in reaction to the massive consolidation of economic resources into well-integrated monopolies and cartels caused by the rapid industrialization in the mid-to late nineteenth century, the antitrust laws were conceived as statutes of general applicability. The history of antitrust legislation in Congress demonstrates a heavy presumption against any departure from this principle.

Unfortunately, this same presumption has not always obtained in the courts, as judicial rationales were constructed to declare the conduct of certain industries as lacking the sufficient nexus to interstate commerce to trigger the application of the Federal statutes, including the antitrust laws. Such a rationale was applied by the Supreme Court to the business of insurance in the 1868 decision of Paul v. Virginia,6 during an era when commerce was indeed more localized and before the advent of Federal regulation. To its credit, the Supreme Court by 1944 recognized that the reach of the Commerce Clause, through its own subsequent decisions and through the development of Federal regulatory agencies, made the Paul decision antiquated. In United States v. South-Eastern Underwriters Association,7 the Court set aside the anomalous rationale underlying its holding of 75 years earlier.

The judicially-created baseball exemption had no such logical development and denouement. Instead, the Supreme Court, in a fit of sentimentality and an act of denial, clung to the type of nineteenth century analysis found in Paul v. Virginia by holding that Federal jurisdictional requirements were not met with respect to the business of baseball. Whether this action in 1922 was the Court's way of attempting to bolster the game in the wake of the “Black Sox” scandal and the welcomed arrival of Judge Kenesaw Mountain Landis as Commissioner is unknown. But whatever the motive, it ceased to have any validity as developments unfolded in the succeeding decades. When the next antitrust challenge occurred 25 years later, the Supreme Court declined to reconsider its holding in light of changed circumstances, claiming “detrimental reliance” on behalf of the owner-beneficiaries.8 Moreover, the Court then shifted the burden of reconsideration to Congress, which had never statutorily authorized the spurious immunity in the first place. In a final stroke of audacity, the Court proceeded to preempt **\*4** State antitrust challenges through a convoluted estoppel theory akin to “admission by silence”: that because Congress had been silent on what the Court had wrought on its own initiative, then Congress should be construed to have approved the exemption, thereby entering and preempting the field even with respect to any State law to the contrary.9

The end result was the perpetuation of the business of baseball as a closed, cartelized industry in which the few, incumbent club owners possess inordinate economic power and every other party–players, fans, municipalities, minor league club owners, potential expansion team investors–remain economically marginalized. In a sense, the competitive landscape resembles the very type of business arrangements that spurred Congress to enact the antitrust laws in the first place.

The statism of the anticompetitive situation is obvious: since organized baseball began in 1871 right through the baseball strike of 1994, the same patterns of oligopolistic control are discernible: control over the players through the “reserve clause”; control over the franchises through collusive agreements; control over the Commissioner as agent and not activist. That the most recent strike is but one of a series of work stoppages in recent years appears no coincidence, given the unchanging intersection of an unfettered antitrust exemption together with what Judge Jerome Frank labelled a “peonage” labor arrangement.10

As indicated earlier, the action taken by the Committee is purposely narrow and targeted to deal with the most pressing problem connected with the antitrust exemption. As such, the Committee wishes to make clear that by applying the antitrust laws to baseball in the delineated circumstances of H.R. 4994, it is in no way endorsing the view that the exemption extends beyond the facts of Federal Baseball.11 Nor should the Committee's more limited action create any possible implication that a broader repeal of baseball's antitrust exemption is not indicated from a public policy standpoint–or that the courts are not the more appropriate forum to take this step if only the fortitude were found. However, if the record compiled before the Committee is considered a reliable guide to action, then there appears to be a strong agreement for sweeping, if not total, repeal.

HEARINGS

The Subcommittee on Economic and Commercial Law conducted oversight hearings on baseball's antitrust exemption on March 31, 1993, and September 22, 1994.

Witnesses at the March 31, 1993 hearing included the Hon. Bob Graham and the Hon. Connie Mack, U.S. Senators from the State of Florida; the Hon. Michael Bilirakis and the Hon. C. W. Bill Young, U.S. Representatives from the State of Florida; the Hon. Jim Bunning, U.S. Representative from the State of Kentucky; the Hon. Frank Horton, former U.S. Representative from the State of New York; Allan H. “Bud” Selig, chairman, Executive Council of **\*5** Major League Baseball, and owner of the Milwaukee Brewers, accompanied by Jimmie Lee Solomon, director of minor league relations for Major League Baseball; Stanley Brand, Brand & Lowell, and special counsel, Professional Baseball Leagues; Gary R. Roberts, vice dean and professor of law, Tulane University; Donald M. Fehr, executive director, Major League Baseball Players Association; James A. Michener, author of “Sports in America”; James W. Quinn, Weil, Gotshal & Manges; and Stephen Ross, professor of law, University of Illinois.

Mr. Bilirakis, Mr. Selig, Mr. Fehr, and Mr. Brand also testified at the September 22, 1994, hearing, along with the Hon. Sherwood L. Boehlert, U.S. Representative from the State of New York; John Feinstein, sportswriter and author of “Play Ball–The Life and Troubled Times of Major League Baseball”; and Adam Kolton, executive director, Sports Fans United.

COMMITTEE VOTE

On September 28, 1994, a reporting quorum being present, the Subcommittee on Economic and Commercial Law ordered H.R. 4994, amended with an amendment in the nature of a substitute, reported to the Committee on the Judiciary by voice vote. On September 29, 1994, a reporting quorum being present, the Committee on the Judiciary ordered H.R. 4994, as amended, reported to the full House by voice vote.

DISCUSSION

I. HISTORY OF BASEBALL'S ANTITRUST EXEMPTION

A. Early history

Although the game of baseball as we know it today had its genesis in 1842, the first professional association, the National Association of Professional Base Ball Players, was not organized until 1871. Soon thereafter, the formation of the National League of Professional Base Ball Clubs in 1876 led to the transfer of power over the game from the players to their financial backers.12 These financial backers–the National League club owners–soon began collaborating on issues such as player control, and by 1887 were requiring that the best players on each club (or team) be bound to that team through a “reserve clause.”13

**\*6** In response to the owners' reserve system and other unilateral practices–such as the capping of player salaries–the players, led by John Montgomery (“Monte”) Ward, a star pitcher and shortstop for the New York Giants, in 1889 organized a new league known as the Players' League. Most of the star players went to the new league for the 1890 season.14 The National League owners responded with cutthroat aggression; and Chicago White Stockings owner A.G. Spalding openly declared at the time: “I am for war without quarter. I was opposed at first, but now I want to fight until one of us drops dead.\*\*\* From this point on it will simply be a case of dog eat dog, and the dog with the bull dog tendencies will live the longest.”15 Within a year, the National League owners had eliminated the Players' League as a competitor.16 When the National League owners eliminated yet another competitor league (the American Association) after the 1891 season, their monopoly control over professional baseball was firmly established.17

Another brief period of economic competition in professional baseball began in 1899, with the formation of what was to become the American League. But by 1903, the American and National Leagues agreed that it would be less expensive if they were to collaborate in their business, rather than competitively bid for player services and fan support. The leagues formalized their cooperative intent in a “National Agreement,” which called for two separate but equal leagues that would honor each other's contracts (maintaining the reserve clause system for the leagues' mutual benefit), and provided for an annual “World's Series” to be played between the champion of each league.18 A National Baseball Commission was established, composed of the presidents of the two leagues and a permanent chairman. The National Agreement empowered the commission to control baseball by its own decrees, enforcing them without the aid of law, and answerable to no power outside its own.19

Soon thereafter, the death of major league player Addie Joss, and the financial need of his widow, inspired a benefit game organized by the players with proceeds to benefit Mrs. Joss. This experience galvanized anew the players' attention on their own future security.**\*7** Following the 1912 season, the players organized the Fraternity of Professional Base Ball Players of America–with the avowed purpose of eliminating the reserve clause and gaining for the players a larger percentage of the profits produced by the game.20

B. Origin of professional baseball's nonstatutory antitrust exemption

By the end of 1913, another league, the Federal Baseball League, was formed by a group of wealthy businessmen. Several major league players joined the new Federal League, even at the risk of being “blacklisted” by the two entrenched, cooperating major leagues.21 In 1915, after incurring significant financial losses, the Federal Baseball League brought an antitrust suit against the American and National Leagues, asking the court for a declaration that the National Agreement was anticompetitive and that the reserve clauses in individual player contracts were void.22 Subsequent to trial, and pending a decision by Judge Kenesaw Mountain Landis (later to become the first professional baseball commissioner), the Federal League reached a settlement with the American and National Leagues. In return for agreeing to dissolve the Federal League, its owners were to receive $600,000 each and owners of the Chicago and St. Louis Federal League franchises were permitted to purchase two existing major league teams.

The owners of the Baltimore Federal League franchise, denied the opportunity to purchase an existing major league team, filed their own antitrust suit.23 Following a trial, a jury found that the defendants had unlawfully conspired to destroy the Federal League, and that the Baltimore club had been damaged in the amount of $80,000 (which by law was trebled to $240,000).24 However, in 1921, the Court of Appeals for the District of Columbia Circuit reversed, holding that the antitrust laws did not apply to professional baseball because the sport was neither trade, nor commerce, nor conducted among the States.25 And in 1922, the Supreme Court affirmed the appeals court in a lengthy opinion delivered by Justice Oliver Wendell Holmes:

[T]he fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and **\*8** must arrange and pay for their doing so is not enough to change the character of the business. According to this distinction insisted upon in Hooper v. California, \* \* \* 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.26

Although this reasoning and result may have comported with the narrow view of interstate commerce as articulated in the earlier Hooper opinion, that narrow view had already been significantly undermined by statutes passed and judicial decisions rendered in the years intervening between Hooper and Federal Baseball.27 (The Hooper rationale was explicitly overruled in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).28) The Court's failure to recognize these developments and apply the antitrust laws to the burgeoning interstate business of professional baseball allowed the National and American Leagues to continue strengthening their cartel, and through it, their grip on the game and the players.

The power and influence of the National and American leagues during this period was vividly illustrated by professional baseball's “farm system,” by which major league clubs, through ownership and affiliation, were able to control minor league teams stocked with large numbers of players subject to long-term reserve clause requirements. The farm system, which was perfected by Branch Rickey's St. Louis Cardinals in the 1920's, strengthened the major league owners' control over baseball players in a number of respects. First, being bound by the reserve clause, players in the minor league system had no choice but to stay within that team's system or leave professional baseball altogether. Second, low minor league salaries helped pressure major league players to reduce their own salary demands, lest they lose their jobs to a minor **\*9** league player willing to work at the major league level for less. Third, major league owners were able to sell the contracts of minor league players bound by reserve clauses.29

The antitrust exemption conferred upon professional baseball by the Supreme Court in Federal Baseball went unchallenged for 25 years. The first challenge grew out of the 1946 attempt by entrepreneurs in Mexico to establish a competitive new league by recruiting players with promises of higher salaries. When the Mexican entrepreneurs succeeded in signing 18 major league players, the major leagues blacklisted all 18 players, and suspended them for 5 years.30 The major leagues also entered into agreements with foreign leagues in the Caribbean, South and Central America, and Canada not to hire the blacklisted players. And when the promoters of the Mexican League failed financially and abandoned their battle, the new leaders of that league entered into a like agreement with the major leagues, to honor each other's player contracts, including the reserve clause provisions.31

With no place left to play, one of the suspended players, Danny Gardella, brought suit under the antitrust laws challenging his blacklisting. Apparently, the Supreme Court's recent broadening in South-Eastern Underwriters of what constituted interstate commerce in the insurance context gave Mr. Gardella cause for hope. And in the 1949 decision of Gardella v. Chandler,32 the Second Circuit held, in opinions by Judges Learned Hand and Jerome Frank, that the advent of nationwide radio and television baseball game broadcasts, in conjunction with the interstate movement of teams, was enough to bring the business of professional baseball within the definition of interstate commerce for purposes of the antitrust laws. In his opinion, Judge Frank not only characterized the Federal Baseball decision as “an impotent zombie,” but pointed out that the exemption created by the decision had led to a pernicious restraint on basic human liberty:

I think [Federal Baseball] should be \*\*\* distinguished, if possible, because \*\*\* we have here a monopoly which, in its effect on ball-players like the plaintiff, possesses characteristics shockingly repugnant to moral principles that, at least since the War Between the States, have been basic in America, as shown by the Thirteenth Amendment to the Constitution, condemning “involuntary servitude,” and by subsequent Congressional enactments on that subject. For the “reserve clause,” as has been observed, results in something resembling peonage of the baseball player.33

Professional baseball quickly settled out of court with Gardella, but by 1951 found itself defending eight additional antitrust suits.34

**\*10** Uncertain of its chances in the courts, professional baseball turned to Congress. Three bills were introduced in the House–each of which would have codified a blanket antitrust exemption for all professional sports organizations. These bills were extensively studied by Representative Emmanuel Celler's Subcommittee on the Study of Monopoly Power (predecessor to the Subcommittee on Economic and Commercial Law), which recommended against their passage.35

Perhaps as significant as the Subcommittee's rejection of the bills was the rationale for the rejection that was provided in the Subcommittee's report. The report premised its reasoning and conclusions on the expectation that Federal Baseball would be overruled:

The Supreme Court's decision in the Federal League case has not been over-ruled. Nevertheless, as the various opinions in the recent case of Gardella v. Chandler demonstrate, it may be seriously doubted whether baseball should now be regarded as exempt from the antitrust laws. Since 1922, there have been important changes both in the operations of organized baseball and also in the Supreme Court's interpretation of the scope of the statutes enacted pursuant to Congress' constitutional power to regulate interstate commerce.36

The Subcommittee's assumption that the courts would apply more current interstate commerce jurisprudence to overrule the Court-created antitrust exemption of professional baseball proved to be mistaken. Notwithstanding the judicial and legislative developments in the area during the 1940's and the first years of the 1950's, Federal Baseball was reaffirmed by the Supreme Court in the 1953 decision of Toolson v. New York Yankees.37 The case was brought by George Toolson, a player in the New York Yankees' farm system who objected to his reassignment from the Newark, New Jersey, club to one in Binghamton, New York. When he refused to report to the Binghamton club, the club placed him on its “ineligible list,” barring him completely from playing professional baseball.38

The district court dismissed Mr. Toolson's claim without a trial, holding: “If the Federal Baseball Club case is, as Judge Frank intimates, an ‘impotent zombie,’ I feel that it is not my duty to so find but that the Supreme Court should so declare.”39 The Ninth Circuit affirmed.40 In a short per curiam opinion affirming the dismissal, the Supreme Court avoided reconsideration of the interstate commerce question, emphasizing instead professional baseball's 30-year reliance on the exemption:

The business [of baseball] has \*\*\* been left for thirty years to develop, on the understanding that it was not subject**\*11** 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.41

A series of court decisions holding other professional sports subject to the antitrust laws has only highlighted the anomalous status of professional baseball's antitrust exemption.42 Meanwhile, the phenomenal growth of baseball revenues from broadcast contracts,43 coupled with the continued judicial acceptance of baseball's reserve clause, has led to increasingly difficult labor relations44 and pressure for additional congressional scrutiny.45

The next chapter in this history is the Supreme Court's reaffirmation of Federal Baseball in the 1972 decision, Flood v. Kuhn.46 The case arose as a result of a trade between the St. Louis Cardinals and the Philadelphia Phillies. One traded player, Curt Flood, refused to accept the trade and sign a contract with the Phillies, and instead challenged the reserve clause by bringing an antitrust suit. Reiterating the rationale of its Toolson ruling, the Supreme Court again stressed the “reliance” factor and stated it was the responsibility of Congress, not the Judiciary, to change this longstanding anomaly.

**\*12** Justice Blackmun's majority opinion is perhaps best known for its frequent romantic homages to professional baseball's heritage and place in our Nation's history.47 While Flood followed the Court's decisions in Federal Baseball and Toolson, the Justices visibly wrestled with the bizarre results these decisions had wrought. Even the majority opinion characterized the exemption as “an anomaly” and “an aberration confined to baseball.”48 And in his dissent, Justice Douglas proclaimed professional baseball's antitrust exemption to be a “derelict in the stream of law that [the Court], its creator, should remove.”49 In the end, though, the majority concluded that “what the Court said in Federal Baseball in 1922 and what it said in Toolson in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.”50 In his concurring opinion, Chief Justice Burger emphasized this point by unabashedly declaring: “[I]t is time the Congress acted to solve this problem.”51

One of the more remarkable aspects of the Flood opinion is that after inferring congressional intent from congressional “positive inaction,” the Court went on to hold that Congress had preempted State antitrust law enforcement in the area.52 This judicial construction of the law has severely limited the States' power to enforce their own antitrust laws against professional baseball for activities covered by the judicially created exemption from Federal antitrust laws.

Ironically, in earlier times, the author of the original 1922 Federal Baseball decision that spawned professional baseball's nonstatutory antitrust exemption–Justice Oliver Wendell Holmes, Jr.–would have taken issue with the Court's illogical adherence to any precedent that flew in the face of fundamentally changed circumstances over the years. In criticizing such blind acceptance nearly 90 years prior to Flood and 35 years prior to his own opinion in Federal Baseball, Justice Holmes noted:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from the blind imitation of the past.53

C. Recent history–Loss of the reserve clause and the collusion cases

Professional baseball's reserve clause, as upheld in Federal Baseball, Toolson, and Flood, permitted the major league clubs to exclusively reserve the right to contract with and employ players, denying them the right to consider alternative job offers in baseball. **\*13** Baseball's owners insisted that the reserve clause was necessary to maintain the “competitive balance” of the game.54 However, developments since the Flood case have disproved this contention. In 1975, the reserve clause was invalidated and player “free agency” was born when an arbitrator ruled, in response to a grievance filed by major league players Andy Messersmith and Dave McNally, that the language of the uniform player's contract and certain major league rules did not provide the clubs with a legal right to perpetually reserve a player's services.55 The owners' loss of the reserve clause does not seem to have disrupted the competitive balance of the game, as prophesied by the owners, but rather to have enhanced it.56

Following the arrival of free agency in baseball, beginning in 1985, baseball owners organized a surreptitious industry-wide boycott of free agents that continued for several years and led the players to file three labor grievances alleging collusion.57 These “collusion cases” have been well documented in the press. A lead article in the Wall Street Journal described how then-Commissioner Peter Ueberroth chided the owners for being “dumb” and “stupid” in bidding on free agents; and he was quoted by an owner to have closed a meeting where the collusion was planned by saying, “Well, you are smart businessmen. You all agree we have a problem. Go solve it.”58

The first two grievances stemmed from the owners' agreement not to bid on each other's free agents during the 1985 and 1986 off-seasons; both times, the arbitrator found in favor of the players.59 But the owners' collusion had taken its toll. For example, it had left Atlanta Braves player Bob Horner no choice but to sign with a Japanese baseball club. And Montreal Expos star Andre Dawson had been able to sign with a new club only after he publicly announced he would sign a 1-year, nonguaranteed contract with the Chicago Cubs for any figure the Cubs chose–a figure that reportedly turned out to be a 60-percent reduction from his previous year's salary.60

**\*14** The third grievance concerned an “information bank” used by the owners in the 1987 off-season to share information about their various offers to free agents. The players alleged that the purpose and effect of the bank was to control player salaries and contract lengths. The players prevailed on this grievance as well,61 and the owners subsequently agreed to pay a record $280 million in damages stemming from the three grievance decisions.62 Had the antitrust laws also been available to the players, there could have been the additional deterrent effect of treble damages.

D. Scope of baseball's nonstatutory antitrust exemption

Although the Supreme Court has upheld professional baseball's reserve clause against antitrust challenge on three separate occasions, it is unclear how far the exemption extends. Baseball owners have asserted that the scope is practically unlimited, relating broadly to the entire business of baseball.63 A number of courts, however, have held that the exemption is limited in scope. In Henderson Broadcasting Corp. v. Houston Sports Ass'n.,64 a Federal district court in Texas held the exemption inapplicable to local broadcasting. And in Postema v. National League of Professional Baseball Clubs,65 a Federal district court in New York held the exemption inapplicable to alleged anticompetitive actions taken with respect to umpires.

More recently, two courts narrowed the scope of the exemption even further, holding that it applies only to the reserve clause system. Both cases concerned the owners' refusal to approve the relocation of the San Francisco Giants to St. Petersburg, Florida. The first case was Piazza v. Major League Baseball.66 In denying the owners' motion for summary judgment, the Piazza court explained that “[i]n 1972 . . . the Court in Flood v. Kuhn stripped from Federal Baseball and Toolson any precedential value those cases may have had beyond the particular facts there involved, i.e., the reserve clause.”67 Piazza's rationale was adopted by the Supreme Court of Florida in Butterworth v. National League of Professional Baseball Clubs,68 in which the court reversed a lower court ruling that had quashed a civil investigative demand issued in connection with the State's antitrust review of the owners' refusal to approve the relocation. The court noted the disagreement among the courts **\*15** as to the scope of professional baseball's antitrust exemption, but embraced the Piazza court's determination that Flood repudiated the stare decisis “rule” of Federal Baseball and Toolson (namely, that the business of baseball is not interstate commerce and thus not subject to the Sherman Antitrust Act)–and left only the stare decisis “result” (namely, the exemption of baseball's reserve system from Federal antitrust law):

As explained by the district court in Piazza, prior to Flood lower courts were bound by both the rule of Federal Baseball and Toolson (that the business of baseball is not interstate commerce and thus not within the Sherman Antitrust Act) and the result of those decisions (that baseball's reserve system is exempt from the antitrust laws). Because Flood invalidated the rule of Federal Baseball and Toolson by declaring that baseball is interstate commerce, the Piazza court concluded that no rule from the earlier cases binds the lower courts as a matter of stare decisis. Instead, lower courts are only bound by the disposition of the case based upon the facts presented, namely that the reserve system is exempt from the antitrust laws.69

Recognizing the current judicial uncertainty over the scope of professional baseball's antitrust exemption, the Committee wishes to make it abundantly clear that in taking action to permit the antitrust laws to apply to certain conduct in the particular context of H.R. 4994, the Committee is in no way endorsing a view that the exemption extends beyond the facts of Federal Baseball, Toolson, or Flood–or even endorsing the application of the exemption in those specific factual circumstances. At the same time, the Committee does not wish to repeat the mistake of the Celler Subcommittee on the Study of Monopoly Power, which in 1952 chose not to act to repeal baseball's nonstatutory exemption, based in part on the assumption that the Supreme Court would overrule Federal Baseball.70

E. Application of the antitrust laws to other sports

Since the Supreme Court's decision in Federal Baseball, the courts have held the antitrust laws to apply to other professional sports, including professional football, basketball, and hockey.71 The scope of activities prohibited under the antitrust laws as applied to these other sports is circumscribed in important respects, however, by two antitrust doctrines of general applicability–the “rule of reason” and the nonstatutory labor exemption. A description of these judicially created doctrines follows.

**\*16** The rule of reason

Section 1 of the Sherman Act literally prohibits “every contract, combination or conspiracy in restraint of trade.” But the Supreme Court quickly recognized that every commercial agreement “restrains” trade in some fashion–even if only between two parties– and that Congress surely did not intend for courts to construe the Act to invalidate every agreement, but rather, only those agreements imposing an unreasonable restraint on competition.72 Some types of agreements–such as price fixing–have been shown repeatedly by their nature and necessary effect to be so plainly anticompetitive that no further elaborate study is needed to establish their illegality; they are “illegal per se.”73 For most types of agreements, however, the reasonableness of a challenged restraint can only be evaluated by balancing its procompetitive and anticompetitive effects–through an analysis of the facts peculiar to the business, the history of the restraint, and the reasons why the restraint was imposed.74 The requirement that such a balancing analysis be undertaken is known as the “rule of reason.” The courts have long recognized that a professional sports league is a joint venture, whose product–a series of contests leading to a championship–requires a level of business coordination beyond that required in most other industries.75 Accordingly, in evaluating the joint conduct of sports teams acting under the auspices of their league, courts have generally applied the more tolerant “rule of reason.”76

Nonstatutory labor exemption

In order to more closely harmonize the Nation's antitrust and labor laws, beginning in 1914 Congress by statute has chosen to **\*17** protect from antitrust assault the formation of labor unions and their organizational and collective activities as sanctioned under the labor laws.77 In addition, in order to further encourage Congressional policy favoring collective bargaining, as embodied by the National Labor Relations Act,78 the courts have recognized that certain union-employer agreements should be accorded a limited nonstatutory labor antitrust exemption.

The Supreme Court first set forth the nonstatutory exemption in 1965 in Amalgamated Meat Cutters v. Jewel Tea Co, in which a three-justice plurality held that a restriction on the number of hours butchers could be required to work was not in violation of the antitrust laws because the union had obtained it “through bona fide, arm's length bargaining in pursuit of its own labor union policies, and not at the behest of or in combination with nonlabor groups.”79 The Court elaborated the exemption 10 years later in Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, holding that a picket to secure a contractor's agreement to subcontract plumbing and electrical work only to firms with a current contract with the union violated the Sherman Act. The Court explained the rationale for and the limits to the nonstatutory labor exemption as follows:

The non-statutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.80

However, it is well established that implied exemptions to the antitrust laws, such as the judicially created nonstatutory labor exemption, are strongly disfavored81 and are to be construed as being no broader than is clearly necessitated by the public policy requiring their recognition.82 Thus, the nonstatutory labor exemption set forth in Jewel Tea and Connell is inherently limited.83

**\*18** In 1976, in Mackey v. National Football League,84 the Eighth Circuit, while concluding that the nonstatutory labor exemption would apply to some restraints imposed by professional sports team owners in connection with collective bargaining agreements, held that the particular player restraint involved in that case was outside the scope of the exemption.85 (The restraint at issue in Mackey was the so-called “Rozelle Rule,” named after then-NFL commissioner Pete Rozelle, whereby an NFL team signing a player after the player's contract with another team expired was required to provide the player's former team with compensation, which could even take the form of other players or draft choices.) Mackey held that the nonstatutory labor exemption applies only where the restraint: (i) primarily affects only parties to the collective bargaining agreement relationship; (ii) concerns a mandatory subject of collective bargaining; and (iii) is a product of bona fide arm's-length bargaining.86 The Mackey three-pronged test has become the standard used to apply the nonstatutory labor exemption in other sports player restraint cases.87

The court in Mackey did not address the extent, if any, to which the nonstatutory exemption continues after the expiration of a collective bargaining agreement.88 But in recent years a number of courts have considered the issue. For example, in the 1987 decision in Bridgeman v. National Basketball Association, a Federal district court in New Jersey held the exemption lasts only so long as the employer continues to impose a particular restriction unchanged from the expired agreement, and reasonably believes that the challenged practice or a close variant of it will be incorporated in the next collective bargaining agreement.89 In the 1988 decision in Powell v. National Football League (“Powell I”),90 a Federal district court in Minnesota, reviewing the lawfulness of certain restraints on player free agency unilaterally imposed by the NFL, held that the nonstatutory labor exemption continues only until the parties have reached an “impasse” in their collective bargaining.91 And in 1991, in Brown v. Pro Football, Inc., a Federal district court in the District of Columbia ruled that the nonstatutory labor exemption ends simultaneously with the expiration of the collective bargaining agreement.92

**\*19** In contrast, two courts have held that the nonstatutory labor exemption continues to apply even after impasse, for so long as the “labor relationship” continues between the players' union and the owners: Powell v. National Football League (“Powell II,” reversing Powell I);93 and National Basketball Association v. Williams.94 The Powell II and Williams decisions have been widely criticized by legal commentators,95 and both the Bush and Clinton Justice Departments have filed amicus briefs in opposition to the positions reflected in these cases.96 Powell II and Williams, in extending the duration of the nonstatutory labor exemption beyond impasse, create a potentially interminable immunity from the antitrust laws. By sanctioning conduct which would otherwise be seen as collusive, the decisions certainly do not appear to serve any legitimate antitrust policy; as the dissent in Powell II noted, such an indefinite exemption eliminates “the owners' fear of the antitrust lever; therefore, little incentive exists for the owners to ameliorate anticompetitive behavior.97 \*\*\*” And by impeding constructive labor management dialogue and making collective bargaining even more difficult to achieve in the future,98 the decisions seem to turn on its head the original rationale for the nonstatutory labor exemption–the encouragement of collective bargaining.

F. Historical arguments concerning outright repeal of baseball's antitrust exemption

The merits (and demerits) of the nonstatutory antitrust exemption granted professional baseball by the Supreme Court in Federal Baseball have been extensively reviewed and debated in the seven decades following the decision. There have been a number of congressional**\*20** bills and hearings concerning the issue.99 And two congressional committees have previously filed reports.

The first report, filed in 1952 by the House Judiciary Subcommittee on the Study of Monopoly Power, chaired by Emmanuel Celler, recommended against adoption of legislation that would have codified professional baseball's antitrust exemption.100 The Celler Report concluded that a legislative grant of complete immunity to baseball would be unwise because of the potential that such power would be used arbitrarily:

If a blanket immunity were granted, all appeals to the courts from a possibly arbitrary decision by the rulers of professional baseball would be foreclosed. In the past the reserve clause has been employed as a war measure to fight the development of competing leagues, sometimes at the expense of individual players. Although instances of arbitrary exercise of power have been rare, they have occurred in the past. The possibility, however remote, that power will be misused in the future makes it unwise perpetually to preclude resort to the courts in such cases.101

A second congressional report grew out of the investigation conducted by the House Select Committee on Professional Sports. The Select Committee was established by the House of Representatives in 1976, with a mandate to investigate the apparent instability prevailing in professional baseball, basketball, football, and hockey, and to assess and report on the need for any remedial legislation.102 In its 1977 Final Report, issued after some 28 hearings, the Select Committee concluded that “adequate justification does not **\*21** exist for baseball's special exemption from the antitrust laws\*\*\*.”103

During and subsequent to the hearings conducted by the Select Committee, the Justice Department has consistently and forcefully advocated full repeal of baseball's antitrust exemption. In 1976, Deputy Assistant Attorney General Joe Sims was unequivocal in expressing the Department's view that the exemption should be lifted:

Simply stated, I know of no economic or other data which supports in any way the conclusion that professional sports should be exempted from the antitrust laws. That being the case, this question should be laid to rest, unless and until baseball or another professional sports industry comes forth with a compelling case to apply different commercial rules to their business than are common in this country.104

Sims further explained that current antitrust principles, including rule of reason analysis, would recognize and take into account those practices within a sport or league that are “essential to the continuing viability of the sport or league,” and noted that several sports antitrust decisions have in fact taken industry needs into account in their analyses.105 According to Sims, “[t]he availability of this sort of an analysis\*\*\* marks as absurd any claim that the antitrust laws cannot rationally be applied to the professional sports business.”106 These views were reiterated by the Reagan Justice Department during a 1982 hearing, when Deputy Assistant Attorney General Abbott B. Lipsky, Jr. testified:

It has been the position of the Antitrust Division for some time that baseball's exemption is an anachronism and should be eliminated. I reaffirm that position today. I know of no economic data or other persuasive justification for continuing to treat baseball differently from the other professional team sports, all of which are now clearly subject to the antitrust laws. As I stated earlier, antitrust courts have sufficient flexibility in the rule of reason analysis to take into account any special considerations that may be found to exist in baseball.107

For their part, baseball's owners have repeatedly sought congressional support for the antitrust exemption granted in the Federal Baseball case,108 focusing on a number of rationales they believe justify their exemption. As the Committee reviews the owners' arguments, it is important to note that, as with any other group advocating an antitrust exemption, the burden of persuasion lies with the owners.109 It is also important to note that a number of the potential**\*22** concerns raised by the owners and set forth in the following pages are not implicated by H.R. 4994, which relates only to the unilateral imposition of anticompetitive terms and conditions of employment.

1. Baseball is not a business

The rationale for professional baseball's nonstatutory exemption from the antitrust laws, as articulated by Justice Holmes in the Federal Baseball case, was that professional baseball was not “trade or commerce in the commonly accepted use of those words.”110 However, as of 1993, Major League Baseball has exploded into a $1.9 billion-per-year industry,111 and it is now indisputable that it not only involves interstate commerce, but constitutes a significant interstate financial enterprise.112 Much of this growth has occurred in the last 20 years, with gross revenues having grown more than tenfold since 1975.113 And the indirect fiscal impact of professional baseball is even more significant: the most recent strike has been estimated to have cost an average of 1,249 full- and part-time jobs per major league city, and to have cost the local economy of each major league city an average of $1.16 million per home game.114

Despite the size and financial impact of professional baseball, its owners have long asserted that their industry is distinguished by its lack of profitability,115 and prior to the most recent strike had predicted industrywide losses of some $100 million for the 1994 season.116 However, it has also been noted that baseball franchises may have strong incentives to generate paper losses in order to obtain tax writeoffs and obtain more favorable financial conditions during negotiations with labor unions and municipalities.117 As a **\*23** result of these and other factors, Stanford Economics Professor Roger G. Noll, in his capacity as a consultant for the players union, reported that, had the owners not significantly underestimated their projected 1994 revenues and overstated their 1994 expenses, they would have shown a profit of between $50 million and $140 million had the season continued uninterrupted.118 Moreover, the debate about current operating income does not account for the perhaps more salient issue of the overall capital value of a baseball franchise, which has increased dramatically in recent years.119

Historically, obtaining fair and accurate financial data and projections concerning professional baseball has proven difficult.120 As a result, at the Subcommittee's September 22, 1994 hearing, Chairman Brooks sought full disclosure of the owners' books and financial**\*24** data.121 In response, Major League Baseball provided the Committee with summaries of financial information for the various clubs in the aggregate for the years 1975–1992, along with an unedited copy of the 1994 Noll Report.122 Unfortunately, this information is not adequate to permit the Committee or the public to evaluate objectively the clubs' true financial condition. For example, the owners failed to provide the Committee with any club-specific financial data, tax returns, information concerning actual “salaries” and “ expenses” paid to a club owner's own family members, information pertaining to related party transactions, stadium leases, and broadcast agreements and the clubs' broadcast allocation agreement.123 Absent this information, it is impossible to assess Professor Noll's contention that Major League Baseball clubs have significantly understated their revenues and overstated their expenses.124

2. Effect on the minor leagues

Another argument offered in support of the continuation of professional baseball's antitrust exemption is that it is necessary to preserve the minor league system. Currently, the various minor league teams are bound to major league affiliates through the Professional Baseball Agreement (PBA), pursuant to which, among other things, the major league teams contribute to the payment of minor league player costs.125 The owners of the major league and minor league baseball clubs assert that if the antitrust exemption were repealed, the major leagues would reduce or eliminate this so-called “subsidy” payment.126 The owners further argue that certain **\*25** aspects of the operation of minor league baseball, such as its reserve clause (by which players are bound to teams for up to 6 1/2 years), would be susceptible to legal attack if the exemption were repealed.127

The Committee traditionally views with extreme skepticism those who argue that their particular industry is in need of a special shield from the antitrust laws in order to survive. As Representative Watt remarked to Mr. Selig at the Subcommittee's September 22, 1994 hearing:

How is [the argument in support of baseball's antitrust exemption] different from any other industry? I mean, \*\*\* if I buy that, then I guess I buy exempting IBM and a number of other industries from antitrust also. I, for the life of me, can't understand why you think baseball has any more vested public interest in those things than any other business would have.128

However, repeal of the exemption would not necessarily have any impact on the major leagues' continuing need to develop player talent to remain competitive. As University of Illinois Law Professor Stephen Ross explained:

The bottom line is that major league owners spend over $5 million annually on player development because it is a prudent investment to do so, not out of altruistic charity to small and medium-size minor league communities. Whether that money is spent directly on players in their own farm system, or indirectly on players purchased from independent minor leagues, the prudence of the investment will not be affected by the antitrust exemption.129

It is also instructive to note that even with (and arguably because of) its exemption, Major League Baseball has sought to dramatically increase the share of player development costs borne by minor league franchises and their local communities in recent years. This is illustrated by the Professional Baseball Agreement negotiated between Major League Baseball and the minor leagues in 1990. The agreement reduced the major league teams' share of minor league operating expenses, required the minor leagues to make new and higher payments to the major leagues out of ticket **\*26** revenues, and required the minor leagues (and their home communities) to make a variety of costly stadium facility improvements.130 These changes came on top of a series of rules changes adopted prior to 1990 that further constrained the minor leagues' ability to operate profitably.131

The owners have also argued that repeal of the exemption will jeopardize the minor leagues by preventing them from maintaining their current method of operations, and that “unlike the other major sports,” baseball needs a special minor league structure in which it can develop its future players.132 But this assertion does not fully account for the fact that major league professional hockey, a sport subject to the antitrust laws, relies on a complex system of amateur, semi-professional, and minor league programs that are heavily subsidized by the major league teams. Evidence submitted during the investigation of the Select Committee on Professional Sports indicated that professional hockey spends an amount on player development comparable to that spent by professional baseball.133

Further, any possible impact that repeal of baseball's antitrust exemption might have on the minor leagues may well be mitigated by the fact that in such event the operations and key agreements pertaining to the minor leagues would be subject to a “rule of reason” analysis, thereby protecting those restraints whose procompetitive effects outweigh any harmful impacts on competition.134 Even if some aspect of baseball's minor league operations was found to be unreasonably restrictive–such as the reserve clause restrictions–players could continue to agree to similar restrictions on their movement, on an individual contractual basis or as part of a collective bargaining agreement. Removing baseball's antitrust exemption should not change the fact that major league owners have strong negotiating leverage when dealing with prospective minor league players, and the vast majority of minor leaguers are therefore likely to prove amenable to long-term contracts binding them to a team for a specified period of time.135

The greater threat to the viability of the minor leagues would appear to be the continued availability of the antitrust exemption to the major leagues. For example, if the major league owners jointly conspired to eliminate whole divisions of the minor leagues, the exemption could leave the minor league franchises powerless to fight back from a legal perspective. In such an event, as University of **\*27** Maryland Professor Arthur T. Johnson has noted: “[t]he preservation of baseball's antitrust exemption \*\*\* guarantee[s] that the major leagues' dominance will go unchallenged. There will be no guarantee that the current number of minor league teams will be maintained.”136 These very concerns were highlighted during the contentious negotiations leading up to the 1990 Professional Baseball Agreement, when Major League Baseball threatened to completely sever its relationship with the minor leagues.137 It was reported that in light of such developments, the minor leagues began fashioning a lobbying strategy to repeal the antitrust exemption.138 The fact that the 1990 Professional Baseball Agreement was ultimately agreed to by the parties does not diminish the future risk to the minor leagues. Indeed, Eddie Einhorn, an owner of the Chicago White Sox, has complained about spending over $3 million to develop one prospect who may not even make it to the minor leagues, and has previously proposed that the major leagues disband the minor leagues and instead contribute to a centralized development program into which players would be drafted.139

3. Effect on franchise relocations

Defenders of the antitrust exemption also contend that it is necessary in order to enable professional baseball to protect local communities and fans against abandonment by teams seeking more lucrative venues.140 They point to the 1984 Ninth Circuit decision in Los Angeles Memorial Coliseum Comm'n v. National Football League (“Raiders I”),141 in which the owner of the Raiders football team and its new home community (Los Angeles) successfully challenged on antitrust grounds the National Football League's refusal to permit the Raiders to relocate from Oakland under the League's three-fourths owner approval rule.142 However, it is important to note that in Raiders I, the district court did not hold that the NFL's restrictions on franchise relocations were per se unlawful, but rather, allowed the jury to evaluate the restriction under the **\*28** rule of reason.143 The court of appeals made it clear that there was ample room for the NFL to apply franchise relocation rules in a manner that did not unreasonably restrain competition, explaining that restrictions on team movement should withstand antitrust scrutiny where they are:

closely tailored to serve the needs inherent in producing the [professional sports league's] “product” and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised. Fan loyalty and location continuity could also be considered.144

And a subsequent Ninth Circuit decision reviewing the damage award stemming from the Raiders' move to Los Angeles specifically held that the NFL franchise relocation rule was not necessarily unlawful in all cases–but only that it was unreasonable as applied by the owners under the particular facts involved. See Los Angeles Memorial Coliseum Comm. v. National Football League (“Raiders II”).145

It is important to recognize that the application of “rule of reason” antitrust analysis in Raiders I and Raiders II has not disabled professional sports leagues from preventing objectionable franchise relocations. In 1984, the NFL was able to block the Philadelphia Eagles from moving to Phoenix.146 And, in 1985, the National Hockey League reached an agreement with the St. Louis Blues, keeping the Blues from moving to Saskatchewan.147 Moreover, the National Basketball Association, while ultimately approving the San Diego Clippers' 1984–1985 move from San Diego to Los Angeles, first won a court ruling that under its rules it could block the move.148

Furthermore, an antitrust exemption is a suspect means of protecting local communities against franchise relocation. Franchise relocation worries flow directly from a symptom of classic cartel behavior: the suppression of product output, or supply, below demand in order to increase price, and profits, for the benefit of the cartel members.149 Because the incumbent baseball club owners may exercise their franchise power not only to restrict relocations of existing clubs, but also to limit the formation of new clubs, many communities desirous and fully capable of supporting a major league club are unable to obtain one; and communities that have a club **\*29** know they keep it only at the owner's pleasure and at the risk of other communities' efforts to “steal away” one of the few existing major league teams for themselves. This chronic shortage of clubs gives incumbent owners powerful leverage during negotiations with their home communities over taxes and community-subsidized stadium construction and renovation.150 And because the individual clubs, though part of an organized league, maintain their separate financial identities, they have an incentive to act in their own interest when casting a vote on a franchise expansion or relocation. For example, the notes of the owners' meeting to discuss the San Francisco Giants' proposed relocation to St. Petersburg indicate that a major consideration leading some owners to oppose the franchise move was that their own revenues would be adversely affected.151

To date, baseball refuses to publicly commit to oppose any franchise relocation not agreed to by the community threatened with losing its club, or even to give the home community a “right of first refusal”–either of which would serve as a more straightforward means of preventing harm to fans and communities.152 Indeed, under the supposed “stabilizer” of the Major League Baseball nonstatutory antitrust exemption, both major league and minor league professional baseball have experienced widespread franchise relocations and threats of relocations, impacting scores of communities. Since 1950, Major League Baseball has permitted eleven relocations,153 with litigation ensuing after a number of the moves.154 **\*30** At least as importantly, during this same period major league franchises have threatened to move many more times.155 As commentators have noted, by simply exploring options for playing in other cities, teams have procured all manner of largess.156 As for the minor leagues, between 1987 and 1993 alone, forty-nine franchises moved–one out of every four minor league teams.157 The smaller communities appear to have an especially difficult time retaining their minor league franchises; nearly two-thirds of the franchise relocations between 1987 and 1993 occurred from communities with a population of less than 100,000.158 This trend has been exacerbated by recent stadium facility improvement requirements imposed on minor league clubs and their communities by Major League Baseball through the 1990 Professional Baseball Agreement.159

4. Effect on broadcast relationships

Another concern voiced in relation to the possible repeal of baseball's antitrust exemption is that it might unreasonably intrude upon the owners' ability to jointly negotiate national broadcast contracts. However, the Sports Broadcasting Act, which provides a limited antitrust exemption to enable the member clubs of professional sports leagues to jointly pool their separate rights in sponsored telecasting of their games to sell to a purchaser, clearly applies to professional baseball.160 Therefore, any congressional repeal of baseball's nonstatutory antitrust exemption would not prejudice professional baseball's ability to jointly negotiate such agreements with the networks. Major League Baseball would be in precisely the same position as the other major professional sports–governed by both the Sports Broadcasting Act and the antitrust laws.

Repeal of baseball's nonstatutory antitrust exemption, however, would permit the antitrust laws to apply to unreasonable restraints of trade imposed by a league on individual teams with respect to **\*31** their local broadcast rights. Well-established case precedent exists limiting sports leagues' latitude in abusing their local broadcast market,161 and there is no reason to conclude that baseball cannot live under the same rules as govern the other professional sports leagues. Indeed, antitrust rules in this area should serve to increase overall consumer choice and welfare, by permitting a team to broadcast more of its own games than a league might otherwise permit.162 For example, a recent antitrust action brought by the Connecticut Attorney General resulted in a settlement permitting State residents to view professional basketball games involving the Boston Celtics as well as the New York Knicks.163

5. Role of the baseball commissioner

It has also been asserted that professional baseball need not be subject to the antitrust laws, because of the existence of a strong and independent commissioner.164

Although the Committee does not accept the premise of this argument–that private regulation is sufficient to justify an antitrust exemption–close examination of the relevant history and facts indicates that baseball's commissioner has not been characterized by “strength” and “independence.” The argument is even further diminished by the fact that Major League Baseball has been operating without an even nominally independent commissioner in the two years since Fay Vincent's departure.165

The office of the commissioner was created in 1919, following the infamous “Black Sox” scandal–in an effort to restore public confidence in the integrity of the game.166 The owners at the time chose Federal Judge Kenesaw Mountain Landis to be the first commissioner.167 He served as commissioner for almost 24 years, and **\*32** is generally credited with restoring to the game a certain degree of the respectability it had lost during the “Black Sox” scandal.168

However, since Judge Landis' tenure, the independence–not to mention the strength–of baseball's commissioners has been uneven, to say the least. Happy Chandler served as Commissioner from 1945 until 1951, when the owners failed to reappoint him, reportedly because he had supported union activities of umpires, and had advocated the admission of African–Americans into the major leagues.169 Chandler was followed by Ford Frick, who served from 1951 until 1965, but was perceived by many to be dominated by Dodgers owner Walter O'Malley.170 Retired Air Force Lieutenant General William Eckert served only from 1965 until his firing in 1968.171 Eckert was followed by Bowie Kuhn, formerly outside counsel to Major League Baseball. Kuhn's 15-year tenure was scarred by his failure to receive the owner's support for another term, despite his very active campaign to remain as commissioner.172 Peter Ueberroth followed Kuhn in 1984. While Ueberroth was perhaps the strongest commissioner since Judge Landis, his single term was marred by the collusion cases brought by the players in the mid-1980's.173 As Smith College Professor Andrew Zimbalist has written:

Ueberroth stands out among baseball's commissioners in his ability to discipline and galvanize the owners behind a clear economic project. Unfortunately for the owners, the project involved collusion and left them saddled with a $280 million settlement.174

Ueberroth's successor, Bart Giamatti, died in 1989, after just 5 months in office.175 He was followed that same year by Fay Vincent, who was “relieved” of his duties in September 1992, when powerful owners objected to his proposed division realignment plan, his allocation of expansion fee revenues, and his perceived intermeddling in the owners' labor negotiating strategies.176 As an anonymous owner reportedly remarked after Vincent's assignment of a minority share of $190 million in expansion fee revenues to the American League: “That's it. Fay Vincent is history. Every American**\*33** League Owner I've talked to\*\*\* has serious doubts about renewing Vincent's contract.”177

At the conclusion of his service, Vincent pointedly warned that the “[o]wners have a duty to take into consideration that they own a part of America's national pastime in trust. This trust sometimes requires putting self-interest second.”178 But since Vincent's departure, Major League Baseball has operated without outside supervision, having instead chosen to police itself through an owner-dominated executive council headed by Milwaukee Brewers owner Bud Selig.179 The commissioner's position has remained empty for more than 2 years.

The powers of the vacant commissioner's office were recently weakened by an owners' “Restructuring Committee.” Previously, the linchpin of the commissioner's authority derived from a clause in Article I of the Major League Agreement and the Commissioner's contract bestowing upon him powers to take any and all actions deemed to be in the “best interests” of the game.180 The newly adopted Restructuring Committee's recommendations prevent future commissioners from using the “best interests” powers with respect to a whole host of matters–including issues relating to the expansion, sale, and relocation of teams; scheduling; interleague play; divisional alignment; and revenue sharing among the owners.181 Moreover, the commissioner is explicitly proscribed from using the “best interests” powers with regard to collective bargaining matters, so that he would have no power, for example, to end or prevent a play-stopping decision by the owners to stage a lockout of players over bargaining issues.182 Significantly, the new guidelines do not attempt to resolve the issue of whether the owners have the power to fire the commissioner without cause183 –the core dispute in Fay Vincent's 1992 departure, and a key consideration relative to the widespread call for the next commissioner to be truly “independent.”

After reviewing the changes the owners made to the commissioner's office, former commissioner Ueberroth commented:

Basically, the commissioner seems to have no portfolio, power or job. That's what it looks like from a distance. I think the changes dramatically change the position. There will be the appearance of more responsibility, but substantially less authority. That's the recipe for a non job.184

**\*34** II. H.R. 4994

On August 12, 1994, Major League Baseball experienced its eighth baseball work stoppage since 1972185 –more stoppages than in professional basketball, football and hockey, combined.186 This most recent work stoppage ultimately led to the cancellation of the remainder of the regular season and the World Series. The strike has become the longest-running strike in professional sports history, and the only sports work stoppage not only to result in the complete loss of post-season play, but to threaten to carry over into the next season. The emotional and financial damage to professional baseball and the country caused by the strike is tangible, and has been well noted by the media and the fans.187 This course of events has crystallized for the public the peculiar tendency of professional baseball to be forced to resort to strikes and lockouts as a means of resolving labor disagreements–a result, in large part, of its judicially granted antitrust exemption.188

H.R. 4994 would subject Major League Baseball's owners and players to the Nation's antitrust laws in the event one of those parties unilaterally imposes an anticompetitive term or condition on the other. While the case for a far broader repeal of the antitrust exemption is compelling, at this late juncture in the 103d Congress, the Committee opted to respond legislatively to the most urgent competitive problem facing Major League Baseball–its failure to be subject to the same antitrust rules as the other sports in the event of a breakdown of the collective bargaining process and the unilateral imposition of terms by one of the parties. As such, the legislation was specifically drafted so that it would not implicate issues relating to other activities, such as the operation of the minor leagues or franchise relocation.

The hearing record provides clear evidence that the availability of antitrust remedies as a last resort, while not a panacea, has contributed**\*35** in a positive fashion to resolving several labor disputes experienced in other professional sports. The case of professional football is illuminating. For example, in 1987, after the failure of negotiations both during and after the expiration of the collective bargaining agreement and an unsuccessful player strike, a number of players brought an antitrust challenge against the owners' unilateral imposition of a “Right of First Refusal/Compensation System,” which was included in the expired collective bargaining agreement.189 A Minnesota Federal district court ultimately ruled that the owners' unilateral imposition of the “Right of First Refusal/Compensation System” was unlawful,190 and the NFL owners and players were then able to enter into a new collective bargaining agreement.191 Likewise in professional basketball, several judicial decisions and settlements, reached during antitrust litigation between the players and the National Basketball Association after the breakdown of collective bargaining, have facilitated–and then been incorporated into–new collective bargaining agreements.192 **\*36** This has permitted professional basketball to continue operating without significant interruption.

Despite its neutral and narrowly written goals, H.R. 4994 has been criticized by some as being unfair. For example, at the Committee's September 29, 1994 markup, it was asserted that the bill would give professional baseball players a unique “choice” of remedies by allowing them to proceed under either the labor laws or the antitrust laws.193 However, there is no language whatsoever in the Committee-approved bill which would grant baseball players any rights not enjoyed by professional players of other sports. The legislation merely subjects any unilateral imposition of employment terms and conditions to possible challenge under the antitrust laws. It does not specify that any particular unilateral imposition would necessarily violate the antitrust laws; nor does it alter the operation of the rule of reason or the nonstatutory labor exemption.

It was further asserted that the bill would somehow create a risk of sweeping the minor leagues within its coverage, by subjecting them to the direct impact of antitrust claims, challenges and litigation.194 But again, close examination of the bill indicates that by intent and application, it could only grant rights to major league players. While it is far from clear that as a public policy matter the minor leagues should be entitled to any antitrust exemption,195 H.R. 4994 is nonetheless specifically limited to the unilateral imposition of terms, outside of a collective bargaining agreement, involving the major leagues.

Finally, it was asserted at the Committee's markup that Congress should not become involved in any labor strike “when there is no national security interest involved” and that the Committee should not take sides in the current strike.196 This argument also misses the point. The Supreme Court has repeatedly and affirmatively solicited Congressional action in response to the Court's grant of antitrust immunity in its now-discredited Federal Baseball decision.197 By failing to repeal the exemption in the face of the Supreme Court's granting professional baseball a unique antitrust exemption, Congress has effectively taken sides in an ongoing labor dispute. Given this history, it should not now require a “national security interest” to remedy such an inequitable anomaly.

The Committee wishes to make it clear that by supporting a narrowly crafted limitation on baseball's nonstatutory antitrust exemption, as reflected in H.R. 4994, it does not intend to imply in any way that a more comprehensive response is not also justified–or to imply that the courts should not act decisively themselves to correct this misinterpretation in an appropriate case. Indeed, the record before the Committee appears to provide a clear and compelling**\*37** case in support of outright repeal of baseball's antitrust exemption.

SECTION-BY-SECTION ANALYSIS

Section 1

This section states the bill's short title, the “Baseball Fans and Communities Protection Act of 1994.”

Section 2

Section 2 of the bill amends the Clayton Act to add a new section 27 partially removing the judicially created antitrust exemption for professional baseball.

Proposed new section 27(a) of the Clayton Act provides that if unilateral terms and conditions of employment in restraint of trade or commerce are imposed by any party that has been subject to an agreement between two or more Major League Baseball clubs and the labor organization representing the players of Major League Baseball, such unilateral imposition shall be subject to the antitrust laws.

The reference in section 27(a) to the unilateral terms and conditions being imposed “in restraint of trade” is intended to incorporate the same limitations as are presently set forth in the antitrust laws; such reference is not intended to create a new requirement, in addition to that imposed generally by the antitrust laws and their attendant bodies of jurisprudence. The references to “major league baseball” include the major league clubs comprising the National and the American Leagues,198 and any similar new clubs that may be established in the future.

The phrase “unilateral terms and conditions of employment” is taken from the law of labor-management relations. It refers to terms and conditions of employment imposed by employers on their employees, or vice versa, outside the context or beyond the duration of a collective bargaining agreement.

The phrase “shall be subject to the antitrust laws” is intended to incorporate the entire jurisprudence of the antitrust laws, as it exists and as it may develop.

By subjecting the unilateral imposition of terms and conditions of employment to the antitrust laws, the Committee does not intend to create any implication that such imposition would necessarily be unlawful under the antitrust laws. Rather, such imposition would merely be subject to challenge under the antitrust laws, as would be the case in other professional sports.

In so applying the antitrust laws, the various judicial doctrines which have developed over the years with regard to professional sports leagues would, depending on the applicable facts, apply to professional baseball. Thus for example, Major League Baseball owners would presumably be able to benefit from the rule of reason where appropriate with respect to analyses of player restraints,199 and the players would be able to seek equitable relief to invalidate such restraints to the same extent as players in other professional **\*38** sports.200 And in the context of an antitrust challenge to a unilaterally imposed term unchanged from an expired collective bargaining agreement, the defending party may be able, depending on the applicable facts and judicial construction, to incorporate the nonstatutory labor exemption into its substantive defense.201 However, in the case of a new term or condition–one that was not contained in the expired collective bargaining agreement or one that is imposed in a form changed from the expired agreement–the term or condition would appear to fail the second and third prongs of the Mackey test. That is to say, it would not be a subject of collective bargaining, nor the product of bona fide arm's-length negotiations.202

Proposed new section 27(b) of the Clayton Act would exempt from the application of subsection (a) any term or condition intended to apply solely with respect to a professional baseball player who is a party to any uniform player contract that is assigned, at the time of the imposition of the term or condition occurs, to a baseball club that is not a major league professional baseball club. This section clarifies that the bill does not confer any rights under the antitrust laws on any minor league players (i.e. players who are not on the roster of a major league club or who are not a free agent).

Proposed new section 27(c) of the Clayton Act clarifies that the legislation shall not be construed to modify or affect the rights or duties that any person may have under Federal labor law. All currently available processes and remedies under labor-related laws continue to be available to the parties. For example, the parties' duty to bargain collectively, under sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (b)(3), will be unaffected by this legislation. Similarly, the legislation will also not affect the operation of the Sports Broadcasting Act, 15 U.S.C. S 1291 et seq., which explicitly permits the owners of professional **\*39** baseball and other sports leagues to pool their separate rights in sponsored telecasting of their games.

Proposed new section 27(d) of the Clayton Act excludes from the term “terms and conditions” as used in section 27 any strike or lockout. Thus, both sides are permitted to continue to use the respective remedy available to them, and the use of that remedy cannot be challenged under the antitrust laws. This merely codifies the existing antitrust understanding applicable to collective bargaining in other industries.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 4994, the following estimate and comparison, prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. Congress,

Congressional Budget Office,

Washington, DC, October 4, 1994.

Hon. Jack Brooks,

Chairman, Committee on the Judiciary,

House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 4994, the Baseball Fans and Communities Protection Act of 1994, as ordered reported by the House Committee on the Judiciary on September 29, 1994. CBO estimates that enacting H.R. 4994 would result in no significant costs to the federal government or to state and local governments. Also, enactment of this bill would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply.

H.R. 4994 would remove major league baseball's exemption from antitrust laws if the club owners unilaterally impose terms and conditions of employment on the players. By removing the antitrust **\*40** exemption under these circumstances, this bill would allow the labor organization representing the players to challenge the owners' decision in federal court. Enactment of H.R. 4994 would impose additional costs on the U.S. court system to the extent that additional antitrust cases are filed. However, CBO does not expect any resulting increase in case load or court costs to be significant.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman, who can be reached at 226–2860.

Sincerely,

James F. Blum

(For Robert D. Reischauer, Director).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 4994 will have no significant inflationary impact on prices and costs in the national economy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CLAYTON ACT

\* \* \* \* \* \* \*

Sec. 27. (a) If unilateral terms and conditions of employment in restraint of trade or commerce are imposed by any party that has been subject to an agreement between 2 or more major league baseball clubs and the labor organization representing the players of major league baseball, such unilateral imposition shall be subject to the antitrust laws.

(b) Subsection (a) shall not apply to a term or condition imposed solely with respect to a professional baseball player who is a party to a uniform player contract that is assigned, at the time the imposition described in such subsection occurs, to a baseball club that is not a major league professional baseball club.

(c) This section shall not be construed to modify, impair, or supersede the operation of–

(1) the Act of September 30, 1961 (Public Law 87–331; 15 U.S.C. 1291 et seq.), or

(2) any Federal statute relating to labor relations.

(d) For purposes of this section, the term “terms and conditions” does not include a strike or a lockout.

**\*41** DISSENTING VIEWS

As introduced, the “Baseball Fans and Community Protection Act of 1994” (H.R. 4994) contained a number of fundamental flaws. First, the language of the original bill would have pre-determined that the antitrust laws were to apply (“the antitrust laws shall apply”) in the event the baseball players' union challenged an attempt by the club owners to unilaterally impose a term or condition of employment (such as a salary cap). So, the bill itself would have directed the district court to find what is normally the issue to be decided in these cases. That is, whether it is appropriate for the antitrust laws to apply or whether, instead, the parties should be required to continue the collective bargaining process. In effect, H.R. 4994 would have decided the issue of antitrust applicability before the suit authorized by the bill was ever filed.

Secondly, the original bill was inconsistent with the provisions and intent of the Norris-LaGuardia Act (29 U.S.C. S S 101–115). That statute strictly prohibits the federal courts from issuing injunctions in labor dispute cases. Despite this longstanding federal policy of non-intervention, H.R. 4994 would have imposed an “automatic injunction”, the effect of which would have been to stay the implementation of any unilateral term or condition of employment pending the outcome of the union's antitrust action.

The substitute sponsored by Congressman Synar and favorably reported by the House Judiciary Committee, is an admitted improvement over the original version of H.R. 4994. (For example, the language explicitly imposing a stay has been removed.) However, we continue to be concerned about both the propriety and timing of this legislation and oppose its enactment. Simply put, Congress should not intervene in an ongoing collective bargaining dispute unless a national security interest is involved. Clearly, as important as baseball is to our national psyche, a baseball strike is not a national security matter. The decision to legislatively move ahead on this matter at this point is also highly questionable. It would make more sense for Congress to revisit the basic issue of baseball's antitrust exemption next year, when the emotion and acrimony surrounding the current strike hopefully will have subsided.

Furthermore, the language of the substitute contains potentially inconsistent provisions that must be clarified. The new subsection 27(a) of the Clayton Act states that the unilateral imposition of a term or condition of employment “in restraint of trade \*\*\* shall (emphasis added) be subject to the antitrust laws.” Then, subsection 27(c) says that this language “shall not be construed to modify, impair, or supersede the operation of \*\*\* (2) any Federal statute relating to labor relations.” When read together what do these two provisions mean? Does the language preserve the non-statutory labor exemption as it has been construed by the courts? Does this language require that the baseball players' union decertify**\*42** itself before bringing the action under subsection 27(a)? Or, does it mean that the union could pursue an antitrust suit under subsection (a), without foregoing any of its rights or remedies under federal labor law?

At the Judiciary Committee markup, the substitute's sponsor indicated that its language was intended to place baseball teams on equal footing with all other organized employers with respect to the interplay between the labor and antitrust laws. Congressman Synar assured Committee members that subsection (c) of the substitute was added to make clear that baseball teams would have the same rights and defenses that are enjoyed by all other professional sports leagues and all other organized employers. That is, subsection (c) was intended to make all of the exemptions to the antitrust laws, particularly the statutory and non-statutory labor exemptions, available to baseball teams in any antitrust action brought under the substitute.

While we were pleased to hear Congressman Synar indicate that the substitute would allow the baseball teams to retain all of the usual exemptions and defenses in this area, we are concerned that the language of the substitute does not say this as clearly as it should. Specifically, we remain concerned that the language of the substitute could allow the players' union to pursue antitrust remedies in federal court while retaining all of their rights under the National Labor Relations Act. If so, they would be permitted to continue their strike and could continue to file unfair labor practices complaints with the National Labor Relations Board (NLRB). Such a result would not be consistent with the preponderance of the caselaw on the so-called non-statutory labor exemption. In such cases, the courts have generally ruled that a union must elect between labor law remedies and antitrust remedies. The question, here, is whether the labor exemption applies after a collective bargaining agreement has expired. The only circuit court of appeals that has decided this question, held in Powell II that the labor exemption survives an expired agreement as long as there is an “ongoing collective bargaining relationship.” Powell v. NFL, 930 F.2d 1293, 1302–03 (8th Cir. 1989), cert. den. 498 U.S. 1046 (1991).

The Powell II litigation began when the National Football League Players Association's (“NFLPA”) ended their 1987 strike. Initially, the NFLPA challenged the NFL's continued adherence to the free agency rules of the expired collective bargaining agreement. By the time Powell II got to the Eighth Circuit, however, the NFL had unilaterally implemented its “Plan B” free agency system after a collective bargaining impasse had been reached.

The Eighth Circuit disagreed with a district court finding that the exemption ended when the parties reached a bargaining impasse. The court noted that the labor laws provided the opposing parties in a collective bargaining relationship with “offsetting tools” through which either side could seek resolution of their labor dispute. The court reasoned that to allow the players to “pursue an action for treble damages under the Sherman Act [once impasse has been reached] would \*\*\* improperly upset the careful balance established by Congress through the labor law.” Id. at 1302. The court concluded that the labor laws, not the antitrust laws, govern disputes over terms and conditions of employment:

**\*43** The labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this “level playing field” as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise. 930 F.2d at 1303.

The same rationale was followed in the most recent labor antitrust decision involving the expiration of a collection bargaining agreement in a professional sports league. NBA v. Williams, Civil Action No. 94 CIV. 4488 (S.D.N.Y. July 18, 1994). The collective bargaining agreement between the National Basketball Association (“NBA”) and the National Basketball Players Association (“NBAPA”) expired this summer. Nevertheless, the NBA teams have continued to operate under the terms of that expired agreement, including the salary cap and free agency provisions. After the NBAPA threatened to sue the NBA under antitrust laws for continuing to apply these terms, the NBA filed suit against the NBAPA and representative players. The NBA sought a declaratory judgment that the federal labor laws governed the dispute between the parties and that, as a result, it lawfully could continue to apply the terms of the expired agreement. The NBAPA and representative players counterclaimed, alleging the continued imposition of the salary cap and free agency rules violated and antitrust and was not protected by the labor exemption.

Judge Duffy of the Southern District of New York found that both sides were “simply using the court as a bargaining chip in the collective bargaining process” in what was “a labor dispute that does not belong in litigation.” Williams, slip op. at 6–7. The court found that the rationale of the Supreme Court precedent establishing the nonstatutory labor exemption and the policies of the federal labor laws “mandate that the appropriate standard to apply in the Powell II standard.” Id. at 24.

The court concluded that the labor laws control in such disputes. Quoting from Professor (now Judge) Winter's seminal work on the interplay between the federal labor and antitrust laws, the court explained that:

Collective bargaining seeks to order labor markets through a system of countervailing power. Thus, it is often referred to by economists as bilateral monopoly. If such a structure is to be protected by law, then logically the antitrust claims between employers and employees must be extinguished. William, slip op. at 24 (quoting Jacobs & Winter, Antitrust Principles. 81 Yale L.J. at 22.)

The court declared that the antitrust laws did not apply in what was purely a labor dispute between the NBA and the players' collective bargaining representative. According to those labor laws, the NBA could lawfully continue to operate under the terms of the expired agreement. The court closed with the following suggestion to the parties:

**\*44** [The] Parties are once again urged to pursue the only rationale course for the resolution of their disputes; that is, of course of collective bargaining pursued by both sides in good faith. No court, no matter how highly situated, can replace this time honored manner of labor dispute resolution. Rather than clogging the courts with unnecessary litigation, the parties should pursue this course. Williams slip op. at 28–29.

It is important to emphasize that neither the NFL nor the NBA have an antitrust exemption. It should be further pointed out that the National Hockey League (NHL)–currently involved in a work stoppage–is also generally subject to the federal antitrust laws.1 There is also considerable speculation that there could be a work stoppage in the NBA within the month. Nevertheless, all three of the other professional sports leagues have seen considerable labor strife, not dissimilar to that which we are witnessing with respect to baseball. It would appear that labor strife in professional sports has more to do with economics, than it has to do with the applicability of the federal antitrust laws.

Baseball's antitrust exemption has received considerable criticism and has been “under fire” for many years. The Synar substitute, of course, would not repeal many aspects of baseball's antitrust immunity. However, at this point, it might be useful to point out the problems that outright repeal of the antitrust exemption would bring with it. For example, the relationship between the major league teams and their minor league affiliates would be seriously undermined if the antitrust exemption is repealed in its totality.

Specifically, the major league teams currently enter into contracts with minor league players that bind those players to a particular club under a “reserve clause” for a period of six and one-half years. That reserve clause–which no longer applies to major league players after a certain number of years of service–would be subject to challenge under the federal antitrust laws as a restraint on trade. No major league team would have the financial incentive to continue to invest large sums of money in the minor leagues in such an uncertain situation. Specifically, why should they invest in minor league player development if they had no on-going assurance that the players (they had initially signed) would remain part of their organization for a reasonable evaluation period? In addition, the amateur draft which provides the bulk of players for the minor leagues would also be subject to a challenge under the federal antitrust laws. Consequently, it is important for Congress to recognize that the business relationship between the major league clubs and their minor league affiliates would be altered if legislation unconditionally repealing the antitrust exemption were to be enacted.

Furthermore, there are other aspects of major league baseball that are currently exempt that could be challenged under the antitrust laws if the exemption was removed in its entirety. For example, the territorial broadcasting rights that each team is allocated **\*45** for specific regions of the country could be challenged. Similarly, the reasonableness of the rules governing franchise expansion and franchise relocation decisions could also be challenged under the antitrust laws if the exemption were to be removed. The point is that a number of baseball's everyday business operations would become the focus of antitrust litigation, bringing with it confusion, delay and the threat of treble damage awards.

The substitute attempts to limit its scope of labor disputes between the major league players and the owners, thereby not having any impact on the minor leagues. Once again, during the Committee's markup, Congressman Synar attempted to allay concerns about the language of the substitute. He stated: “It specifically exempts (the) minor leagues from the repeal of the antitrust law exemption in the bill.” Nevertheless, concerns have been raised about the language in subsection (b) of the substitute from the minor league perspective. They note that it does affect some minor league players in that the recent “Basic Agreement” between the major league owners and the players' union involved certain aspects of minor league contracts and affects the rights of minor league players carried on major league rosters. The bill needs to be further amended to ensure that there is no adverse impact on the minor leagues.

To summarize, the problem with the substitute version of H.R. 4994 is that the players' union may not be required to elect between labor law remedies and antitrust remedies, a result that would be inconsistent with policies previously established by Congress and the federal courts with respect to labor disputes. The Major League Baseball Players' Union could be permitted to retain its rights and remedies under labor law while, at the same time, seeking an antitrust law treble damage award in federal court. That result would amount to Congress picking sides in a highly publicized labor dispute–a dispute with no national security implications. The enactment of H.R. 4994, as reported by the Judiciary Committee would be a bad precedent and serious public policy mistake. Congress should not intervene but, rather, allow the collective bargaining process to continue.

Hamilton Fish, Jr.

Henry J. Hyde.

F. James Sensenbrenner, Jr.

George W. Gekas.

Howard Coble.

Steven Schiff.

Jim Ramstad.

1 259 U.S. 200 (1922).

2 “Major League Baseball” is an unincorporated association, consisting of the 28 major league baseball clubs; the term is commonly used to describe the operations of the American League and the National League in professional baseball.

3 While the antitrust laws apply to the realm of professional sports in numerous ways, many of the antitrust issues raised in the professional sports context concern allegations of player restraints imposed by team employers. See generally Warren Freedman, Professional Sports and Antitrust 72 (1987); Ethan Lock, “The Scope of the Labor Exemption in Professional Sports”, 1989 Duke L.J. 339, 344–345.

4 15 U.S.C. S 1291 et seq.

5 The antitrust laws have been aptly termed the “charter of economic liberty.” Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

6 75 U.S. (8 Wall) 168 (1868).

7 322 U.S. 533 (1944).

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

9 Flood v. Kuhn, 407 U.S. 258, 284–285 (1972). See also infra note 52 and accompanying text.

10 Gardella v. Chandler, 172 F.2d 402, 409 (2d Cir. 1949).

11 See infra notes 63–70 and accompanying text.

12 See generally Geoffrey G. Ward and Ken K. Burns, Baseball: An Illustrated History 23–24 (1994) [hereinafter Ward & Burns]. In February 1876, Chicago White Stockings owner and coal magnate William A. Hulbert met with seven other club owners “eager as he was to tighten their grip on the game” and formed the National League of Professional Base Ball Clubs. There were eight charter members: Boston, Chicago, Cincinnati, St. Louis, Hartford, New York, Philadelphia, and Louisville. Id. at 24.

13 A “reserve clause” seeks to give a club owner the perpetual right to bind, or “reserve,” a player to a team. In 1879, the National League owners adopted Boston Red Stockings owner Arthur Soden's proposal to secretly “reserve” 5 players per team–and thus the “reserve system” was born. See Lee Lowenfish and Tony Lupien, The Imperfect Diamond: The Story of Baseball's Reserve System and the Men Who Fought to Change It 18 (1980); Ward & Burns, supra note 12, at 24 (“[T]o solidify their power, [Chicago White Stockings owner] Hulbert and his allies soon added a reserve clause to the contracts of the five best men on every team: this required that each play only for his current employer and, in effect, ‘reserved’ his services in perpetuity. Players who objected too strenuously were fired, then blacklisted.”). The number of reserved players was enlarged to 11 per team in 1883, to 12 in 1885, 14 in 1887–and by the early 1890's, the reserve clause was in the contract of every professional baseball player. See Michael Canes, The Social Benefits of Team Quality, in Government and the Sports Business 83 (1974).

14 See generally Andrew Zimbalist, Baseball and Billions 5–6 (1992) [hereinafter Zimbalist, Billions].

15 Quoted in Ward & Burns, supra note 12, at 39.

16 Although the National League initially reacted to the Players' League by commencing a salary war and giving tickets away to build attendance, the Players' League at first held its own financially. Several National League owners then sought court injunctions to prevent players from moving to the Players' League; but the courts rejected the owners' requests for injunctions, on the ground that the reserve clause contracts lacked “mutuality” –as players could be dismissed by the clubs with a mere 10 days' notice, yet were obligated to play for the clubs their entire baseball playing lives. See Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (1890). Ultimately, however, the National League owners were able to coopt the backers of the Players' League through a combination of financial inducements and merger proposals. See, e.g., Zimbalist, Billions, supra note 14, at 6; Robert Berry et al., Labor Relations in Professional Sports 49 (1986) [hereinafter Labor Relations]; E.C. Alft, Jr., The Development of Baseball as a Business: 1876–1900 [hereinafter Alft], in Study of Monopoly Power: Hearings before the Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary, Part 6, Organized Baseball, 82d Cong., 1st Sess. 1432–1443 (1951) [hereinafter 1951 House Hearings].

17 See, e.g., Zimbalist, Billions, supra note 14, at 6 (“The AA dissolved after the 1891 season with four of its teams added to the NL”). The National League soon reaped the harvest of its monopoly power as player salaries fell an average of 40 percent in 1893, while team profits rose. See Alft, in 1951 House Hearings, supra note 16, at 1443.

18 See Ward & Burns, supra note 12, at 65–67; see also Dan Abramson, Baseball & the Court, in Constitution 68, 69–71 (Fall 1992) [hereinafter Abramson].

19 See generally Ward & Burns, supra note 12, at 65–66.

20 See id. at 121. Like the short-lived Brotherhood of Professional Base Ball Players founded in the 1880's by Monte Ward, which was crushed along with Ward's Players' League (see supra notes 14–16 and accompanying text), the fraternity was a precursor to the current Major League Baseball Players' Association (MLBPA). The MLBPA was formed in 1954 primarily as an outgrowth of player unhappiness over the lack of progress in bargaining for an improved pension plan. But between 1954 and 1966, the MLBPA's legal counsel was Judge Robert Cannon, a man who aspired to be baseball's commissioner and supported the reserve clause. As a result, the MLBPA did not prove to be an active force until after 1966, when Marvin Miller, a longtime negotiator for the United Steelworkers, was chosen as the MLBPA's first executive director. See Zimbalist, Billions, supra note 14, at 17.

21 See Ward & Burns, supra note 12, at 121–123.

22 See id. at 123.

23 See generally Ward & Burns, supra note 12, at 123, 127; Lionel S. Sobel, Professional Sports and the Law 1–7 (1977) [hereinafter Sobel].

24 See generally Abramson, supra note 18, at 72; Sobel, supra note 23, at 56 n.18; National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 Fed. 681, 682 (D.C. Cir. 1921), aff'd, 259 U.S. 200 (1922). Private persons injured in their business or property by reason of a violation of the antitrust laws are entitled to recover treble damages. Clayton Act S 4, 15 U.S.C. S 15. In addition to compensating injured plaintiffs, treble damages serve to punish wrongdoers and enlist private plaintiffs in the work of detecting, punishing, and thereby deterring anticompetitive conduct.

25 National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 F. 681 (D.C. Cir. 1921), aff'd, 259 U.S. 200 (1922).

26 Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 208–209 (1922) (citing Hooper v. California, 155 U.S. 648 (1895)).

27 Hooper was itself a decision by a Court believing that it was constrained to follow precedent–in that case the precedent of Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). Both Paul and Hooper dealt with the extent of State regulatory authority; Federal authority was not at issue. Moreover, at the time of Paul, Congress had made scant use of its Commerce Clause powers, and the Supreme Court's Commerce Clause analysis at the time of Paul had generally treated the “interstate commerce” threshold as a bright line dividing Federal and State authority. See, e.g., Welton v. Missouri, 91 U.S. 275, 282 (1875); Steamship Co. v. Postwardens, 73 U.S. (6 Wall.) 31 (1867); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). With the creation of the Interstate Commerce Commission in 1887, however, Congress clearly had signaled an intent to assert its authority over key business sectors having interstate ramifications. The Sherman Act of 1890 had, of course, gone even further, forbidding “[e]very contract, combination \*\*\*, or conspiracy in restraint of trade or commerce among the several States.” By 1922, there were a number of Supreme Court opinions indicating that the Court had increasingly broadened its view of the activities that came within the Federal Government's Commerce Clause Powers, while holding that recognition of Federal authority in no way diminished State authority unless Congress clearly preempted the field. See, e.g., Southern Ry. v. Reid, 222 U.S. 424, 434–435 (1912); Swift & Co. v. United States, 196 U.S. 375, 398 (1905); Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204, 209–210 (1894); County of Mobile v. Kimball, 102 U.S. 691, 699–702 (1880).

28 322 U.S. 533 (1944). Hooper had rested upon the notion that the issuance of insurance policies throughout several States did not constitute interstate commerce. But South-Eastern Underwriters held that a fire insurance company conducting substantial interstate business was involved in interstate commerce, and that it was therefore subject to the Sherman Act. Id. at 541 (“This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of [these] companies' methods of doing business.”).

29 See Abramson, supra note 18, at 72–73. See also Benjamin Rader, Baseball: A History of America's Game 134 (1972); Neil Sullivan, The Minors: The Struggles and the Triumph of Baseball's Poor Relation from 1876 to the Present 99–100 (1990); Lance Davis, Self–Regulation in Baseball, 1909–1971, in Government and the Sports Business 349, 365 (1974); Murray Polner, Branch Rickey 86 (1982).

30 See Abramson, supra note 18, at 73.

31 See Sobel, supra note 23, at 7–19.

32 172 F.2d 402 (2d Cir. 1949).

33 Id. at 409 (citations omitted).

34 See Zimbalist, Billions, supra note 14, at 13.

35 See 1951 House Hearings, supra note 16; Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary, Organized Baseball, H. Rep. No. 2002, 82d Cong., 2d Sess. (1952) [hereinafter Celler Report].

36 Celler Report, supra note 35, at 228.

37 346 U.S. 356 (1953).

38 See generally Abramson, supra note 18, at 74.

39 Toolson v. New York Yankees, 101 F. Supp. 93, 95 (S.D. Cal. 1951), aff'd, 200 F.2d 198 (9th Cir. 1952), aff'd, 346 U.S. 356 (1953).

40 Toolson v. New York Yankees, 200 F.2d 198 (9th Cir. 1952), aff'd, 346 U.S. 356 (1953).

41 Toolson v. New York Yankees, 346 U.S. at 356, 357 (1953) (emphasis added).

42 See infra note 71 and accompanying text.

43 According to Marvin Miller, former executive director of the Major League Baseball Players Association, player salaries rose insignificantly in the 20 years after World War II, despite steep inflation, and by 1967 the average major league player salary was only $19,000. See Abramson, supra note 18, at 74.

The average major league player salary for 1993 reportedly was $1.2 million. See Timothy K. Smith and Erle Norton, “Throwing Curves,” Wall St. J., Apr. 2, 1993, at A1 [hereinafter Smith & Norton]; Andrew Zimbalist, “Field of Schemes,” The New Republic, Aug. 15, 1994, at 11 [hereinafter Zimbalist, Field]. At this level overall players' salaries equal 50 to 58 percent of Major League Baseball revenue. See Smith & Norton, supra. Such percentages are not considered particularly high for a labor-intensive business such as professional baseball: for example, advertising agencies and consulting firms generally spend between 50 percent and 60 percent of revenue on worker pay, and law firms can spend as much as 75 percent on employee salaries. Id. It is also important to recognize that a major league player's average professional life is less than 6 years; and that the median baseball player salary for 1993 reportedly was $410,000–far less than the average salary. See Andrew Zimbalist, “Baseball Economics and Antitrust Immunity,” 4 Seton Hall J. Sport Law 287, 291 (1994) [hereinafter Zimbalist, “Immunity”] (“Of those who make it [to the Major Leagues], only one in eight stays for more than six years”); Zimbalist, Field, supra.

44 The industry's labor difficulties were highlighted by the 1966 holdout of the Los Angeles Dodgers' star pitchers Sandy Koufax and Don Drysdale. Koufax and Drysdale, who were primarily responsible for their team's World Series victory in the previous year, held out for 32 days into the season before settling with the team for a combined contract of $240,000, after having threatened to bring suit against the team under California's anti-peonage laws. See Abramson, supra note 18, at 75.

45 One of the better known attempts by Congress to review baseball's unique antitrust status occurred in 1958, when then-New York Yankees manager Casey Stengel and star center fielder Mickey Mantle testified before the Senate Subcommittee on Antitrust and Monopoly. Stengel's testimony included an extended speech highlighted by his famous double talk (known as “Stengelese”), by which he managed to speak for 45 minutes without ever taking a position on the pending legislation.

Asked by Tennessee Senator Estes Kefauver why a bill should be passed, Stengel answered with rambling testimony marked by bursts of laughter from the audience:

Mr. Kefauver. Mr. Stengel, I am not sure that I made my question clear. [Laughter.]

Mr. Stengel. Yes, sir. Well that is all right. I am not sure I am going to answer yours perfectly either. [Laughter.]

Mantle then brought down the house by stating, “My views are just about the same as Casey's.” Organized Professional Team Sports: Hearings before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 85th Cong., 2nd Sess. 13, 24 (1958). See also Ward & Burns, supra note 12, at 354–355.

46 407 U.S. 258 (1972).

47 Justice Blackmun's opinion for the Court included references to Ring Lardner's short stories; Ernest L. Thayer's poem, “Casey at the Bat”; and some 88 professional baseball player greats. Id. at 262–264.

48 Id. at 282.

49 Id. at 286 (Douglas, J., dissenting).

50 Id. at 285 (emphasis added).

51 Id. at 286.

52 Id. at 284–285 (embracing the lower courts' reasoning that State antitrust regulation would conflict with Federal policy and that national uniformity is required relative to the regulation of baseball and its reserve system; and that, as the burden on interstate commerce outweighs the States' interest in regulating baseball's reserve system, the Commerce Clause precludes the application of State antitrust law).

53 Oliver Wendell Holmes, Jr., “The Path of the Law,” 10 Harv. L. Rev. 457, 469 (1887).

54 See generally Zimbalist, Billions, supra note 14, at 13–14. See also, e.g., Inquiry Into Professional Sports: Hearings before the House Select Comm. on Professional Sports (Part 1), 94th Cong., 2d Sess. 19 (1976) [hereinafter 1976 Select Committee Hearings (Part 1)] (statement of Bowie K. Kuhn) (“We believe that a reserve system remains necessary to ensure the continuation of ‘honest and vigorous' competition in Baseball.”).

55 See Professional Baseball Clubs, 66 LA 101 (1975), aff'd sub nom. Kansas City Royals v. Major League Baseball Players Ass'n, 409 F. Supp. 233, aff'd, 532 F.2d 615 (8th Cir. 1976). See also Zimbalist, Immunity, supra note 43, at 290. (The district and circuit courts held that the arbitration provision of the collective bargaining agreement was broad enough to cover the dispute in question–namely, the players' grievances.)

56 See James Quirk and Rodney D. Fort, Pay Dirt 284–285 (1992) [hereinafter Quirk & Fort] (explaining various studies showing no statistical distinction with regard to competitive balance in the American League in the 14 years following the introduction of free agency, and indicating that the National League actually experienced increased competitive balance under free agency). See also Zimbalist, Billions, supra note 14, at 14, and authorities cited therein (argument that reserve clause could preserve competitive balance rebutted by prevalence of player sales over the years).

57 See generally Major League Baseball Players Ass'n v. The 26 Major League Clubs, Grievance No. 86–2 (1987) (Roberts, Arb.) [hereinafter Grievance No. 86–2]; Major League Baseball Players Ass'n v. The 26 Major League Clubs, Grievance No. 87–3 (1988) (Nicolau, Arb.) [hereinafter Grievance No. 87–3]; Major League Baseball Players Ass'n v. The 26 Major League Clubs, Grievance No. 88–1 (1990) (Nicolau, Arb.) [hereinafter Grievance No. 88–1].

58 John Helyar, How Peter Ueberroth Led the Major Leagues in the “Collusion Era,” Wall St. J., May 20, 1994, at A1 [hereinafter Helyar].

59 See Grievance No. 86–2, supra note 57; Grievance No. 87–3, supra note 57.

60 See Zimbalist, Billions, supra note 14, at 25.

61 Grievance No. 88–1, supra note 57.

62 See, e.g., Murray Chass, “Record Collusion Damages Reported,” N.Y. Times, Nov. 4, 1990, at G1.

63 See, e.g., Butterworth v. National League of Professional Baseball Clubs, 1994 Fla. LEXIS 1531, \*9 (Fla. 1994). However, in answer to Chairman Brooks' question as to whether baseball's antitrust exemption should give baseball owners the right to conspire to squash the development of a rival league by denying it access to stadiums and broadcast revenue, Mr. Selig responded: “No, I do not believe it does.” Baseball's Antitrust Exemption: Hearings before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103d Cong., 2d Sess. (Sept. 22, 1994) (forthcoming) [hereinafter September 1994 House Hearings] (tr. at 70).

64 541 F. Supp. 263 (S.D. Tex. 1982).

65 799 F. Supp. 1475 (S.D.N.Y. 1992).

66 831 F. Supp. 420 (E.D. Pa. 1993).

67 Id. at 436 (quoting and citing Flood v. Kuhn, 407 U.S. 258, 282–283 (1972)). But see Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 (7th Cir.), cert. denied, 439 U.S. 876 (1978); accord Professional Baseball Schs. & Clubs v. Kuhn, 693 F.2d 1085, 1086 (11th Cir. 1982). Major League Baseball reportedly has settled the Piazza suit, which concerned both antitrust and defamation allegations, through a payment in excess of $6 million and a written apology. See Michael Bamberger, “Baseball Apologizes to Rejected Investors,” Phil. Inquirer, Nov. 3, 1994, at D5.

68 Butterworth v. National League of Professional Baseball Clubs, 1994 Fla. LEXIS 1531 (Fla. 1994).

69 Id. at \*12 (citing Piazza, 831 F. Supp. 420, 437–438 (E.D. Pa. 1993)).

70 See supra notes 35–36 and accompanying text.

71 See Radovich v. National Football League, 352 U.S. 445 (1957) (professional football); Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (professional basketball); Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972) (professional hockey). Indeed, in every other instance in which a court has had to decide whether an organized sport is subject to the antitrust laws, the court has decided in the affirmative. See Desson v. Professional Golfers Ass'n. of America, 358 F.2d 165 (9th Cir.), cert. denied, 385 U.S. 846 (1966) (professional golf); Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir.) (professional bowling), cert. denied, 384 U.S. 963 (1966); Amateur Softball Ass'n. of America v. United States, 467 F. 2d 312 (10th Cir. 1972) (amateur softball).

72 See United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

73 See, e.g., National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 692 (1978); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). The Supreme Court has established that it is only after considerable experience with certain business relationships that courts may classify those relationships as per se violations of the Sherman Act. See United States v. Topco Assocs., 405 U.S. 596 (1972); accord Broadcast Music v. Columbia Broadcasting Sys., 441 U.S. 1 (1979).

74 See Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 691 (1978).

75 See, e.g., Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 86 (1984).

Some professional sports leagues have argued that their teams' separate ownership should be disregarded and the league treated as a “single entity” for purposes of antitrust analysis. See, e.g., Los Angeles Mem. Coliseum Com'n v. National Football League, 726 F.2d 1381, 1387 (9th Cir.), cert. denied, 469 U.S. 990 (1984); San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974). See also Gary Roberts, The Single Entity Status of Professional Sports Leagues Under Section 1 of the Sherman Act: An Alternative View, 60 Tul. L. Rev. 562 (1986); Myron C. Grauer, Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model, 82 Mich. L. Rev. 1 (1983). Since there can be no “contract, combination, or conspiracy in restraint of trade” unless the conduct involves two or more separate entities, such treatment would immunize sports leagues against most antitrust liability. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). However, the courts have rejected the argument that sports leagues constitute a single entity. See, e.g., Los Angeles Mem. Coliseum Comm'n v. National Football League, supra; North Am. Soccer League v. National Football League, 670 F.2d 1249, 1257–1259 (2d Cir.), cert. denied, 459 U.S. 1074 (1982).

76 See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 86 (1984); Los Angeles Mem. Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1386 (9th Cir. 1984). Indeed, Congress has codified this more favorable, rule-of-reason treatment of joint ventures that do not involve naked anticompetitive collusion, first for R&D joint ventures in the National Cooperative Research Act of 1984, Pub. L. 98–462, 98 Stat. 1815, and more recently for production joint ventures in the National Cooperative Production Amendments of 1993, Pub. L. 103–42, 107 Stat. 117.

77 In response to Loewe v. Lawlor, 208 U.S. 274 (1908), in which the Supreme Court held a union's nationwide secondary boycott of nonunion-made hats to be violative of the Sherman Act, Congress enacted Section 6 of the Clayton Act, 15 U.S.C. S 17, explicitly exempting the operation of labor organizations from the antitrust laws by stating that labor is not an article of commerce. To bolster section 6, Congress subsequently enacted section 20 of the Clayton Act, 29 U.S.C. S 52, and later the Norris-LaGuardia Act, 29 U.S.C. S S 101–110, 113–115, to prevent the antitrust laws from being used to enjoin labor organizational and strike activities that are authorized under the labor laws.

78 29 U.S.C. S S 151 et seq.

79 381 U.S. 676, 689–690 (1965).

80 421 U.S. 616, 622–623 (1975).

81 See, e.g., United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350–51 (1963) (“Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.”).

82 See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105–106 (1980); Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963).

83 Connell, 421 U.S. at 621–622.

84 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

85 Id. at 615–616.

86 Id. at 613–614. The Eighth Circuit ruled that the “Rozelle Rule” met the first 2 prongs of the standard, but that there was no bona fide arm's length bargaining over the Rule. Rather, the court held, the Rule had simply remained unchanged since being unilaterally promulgated by the NFL in 1963. Id. at 616.

87 See, e.g., Powell v. National Football League, 930 F.2d 1293, 1297 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991); McCourt v. California Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 964 (D.N.J. 1987); Zimmerman v. National Football League, 632 F. Supp. 398, 403–404 (D.D.C. 1986); Wood v. National Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984). The Mackey court concluded that the Rozelle Rule did not meet the third prong of the test–that the restraint be a product of bona fide arm's-length bargaining–because the Rule had originally been unilaterally imposed by the owners, and had simply been carried forward in later agreements without ever being the subject of bona fide arm's-length collective bargaining.

88 See Mackey, 543 F.2d at 616 n.18.

89 675 F. Supp. 960, 967 (D.N.J. 1987).

90 678 F. Supp. 777, 788–789 (D. Minn. 1988), rev'd, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991).

91 The court defined “impasse” as the point at which “there appears no realistic possibility that continuing discussions concerning the provision at issue would be fruitful.” 678 F. Supp. at 788.

92 782 F. Supp. 125, 130 (D.D.C. 1991), appeals docketed, Nos. 93–7165, 94–7071 (D.C. Cir. Sept. 27, 1993, Mar. 31, 1994).

93 930 F.2d 1293, 1304 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991). The court concluded that the NFL's “Right of First Refusal/Compensation” system–a successor to the “Rozelle Rule” –satisfied the Mackey test. The court noted that the system had been incorporated into the recently expired collective bargaining agreement, as well as the previous one, both of which had been “negotiated in good faith and at arm's length.” 930 F.2d at 1303. The court also noted that negotiating impasses were often temporary and in fact could ultimately help move negotiations forward–that under the labor laws, impasse is regarded as “a recurring feature in the bargaining process and one which is not sufficiently destructive of group bargaining to justify withdrawal.” Id. at 1299 (citing Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404 (1982)). The court held that an agreed restraint thus “conceived in an ongoing collective bargaining relationship” and “clothed with union approval” would continue to be insulated from antitrust challenge for as long beyond impasse as labor grievances before the National Labor Relations Board are still pending or possible. Id. at 1302–1304.

94 857 F. Supp. 1069 (S.D.N.Y. 1994) (player challenge to restraints imposed from an expired collective bargaining agreement without the players union's consent), appeal docketed, 94–7709 (2d Cir. Jul. 19, 1994).

95 See, e.g., Ethan Lock, Powell v. National Football League: The Eighth Circuit Sacks the National Football League Players Association, 67 Den. L. Rev. 135, 151–153 (1990); Daniel C. Nester, “Labor Exemption to Antitrust Scrutiny in Professional Sports”, 15 S. Ill. U. L.J. 123, 136–140 (1990); Note, “Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption,” 104 Harv. L. Rev. 874, 891 (1991); Note, “When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports”, 94 Colum. L. Rev. 1045, 1064–1065 (1994); Note, Powell v. National Football League: “Modified Impasse Standard Determines Scope of Labor Exemption”, 1990 Utah L. Rev. 381, 395–397.

96 See Supreme Court Brief for the United States as Amicus Curiae, Powell v. National Football League, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (No. 89–1421), cert. denied, 498 U.S. 1040 (1991); Second Circuit Brief for the United States as Amicus Curiae, National Basketball Association v. Williams, On Appeal From an Order of the United States District Court for the Southern District of New York (No. 94–7709).

97 930 F.2d at 1307 (Heaney, J., dissenting).

98 Powell II has had the effect of forcing the football players' union to decertify and cease all bargaining in order to permit its members to bring an antitrust challenge. See Powell v. National Football League (“McNeil”), 764 F. Supp. 1351 (D. Minn. 1991).

99 There have been numerous bills and resolutions introduced relative to Major League Baseball's antitrust exemption. See, e.g., Flood v. Kuhn, 407 U.S. 258, 281 n.17 (1972) (listing 16 bills that had been considered by Congress between 1953 and 1972). See also, e.g., H.R. 11078, 93d Cong., 1st Sess. (1973); H.R. 3789, 94th Cong., 1st Sess. (1975); H.R. 11382, 94th Cong., 2d Sess. (1976); H.R. 11940, 95th Cong., 2d Sess. (1978); H.R. 1239, 96th Cong., 1st Sess. (1979); H.R. 2129, 96th Cong., 1st Sess. (1979); S. 1303, 96th Cong., 1st Sess. (1979); S. 1476, 96th Cong., 1st Sess. (1979); H.R. 3287, 97th Cong., 1st Sess. (1981); H.R. 3094, 98th Cong., 1st Sess. (1983); H.R. 2687, 100th Cong., 1st Sess. (1987); H.R. 2593, 101st Cong., 1st Sess. (1989); H.R. 2976, 102d Cong., 1st Sess. (1991); S. Res. 172, 102d Cong., 1st Sess. (1991); H.R. 5489, 102d Cong., 2d Sess. (1992); H.R. 108, 103d Cong., 1st Sess. (1993); H.R. 1549, 103d Cong., 1st Sess. (1993); S. 500, 103d Cong., 1st Sess. (1993); H.R. 4965, 103d Cong., 2d Sess. (1994); S. 2380, 103d Cong., 2d Sess. (1994); S. Amdt. 2601, 103d Cong., 2d Sess. (1994); H.R. 4994, 103d Cong., 2d Sess. (1994).

Congress has conducted a number of hearings on the matter over the years. See Flood v. Kuhn, 407 U.S. 258, 281 n.18 (1972) (listing hearings conducted between 1953 and 1972). See also, e.g., Inquiry into Professional Sports: Hearings before the House Select Comm. on Professional Sports (Part 1 and 2), 94th Cong., 2nd Sess. 425–439 (1976) [hereinafter 1976 Select Committee Hearings]; Antitrust Policy and Professional Sports: Hearings Before Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. 23 (1982) [hereinafter 1982 House Hearings]; Baseball's Antitrust Immunity: Hearing before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary on the Validity of Major League Baseball's Exemption from the Antitrust Laws, 102d Cong., 2d Sess. 406 (1992) [hereinafter 1992 Senate Hearings]; Baseball's Antitrust Exemption: Hearings before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103d Cong., 1st Sess. (1993) [hereinafter March 1993 House Hearings]; Can a Weak Commissioner Protect the “Best Interests” of the Game? St. Petersburg, Florida Hearings before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. (March 21, 1994) (forthcoming); September 1994 House Hearings, supra note 63.

100 See supra notes 35–36 and accompanying text.

101 Celler Report, supra note 35, at 230.

102 Final Report, Inquiry Into Professional Sports, House Select Comm. on Professional Sports, 94th Cong., 2d Sess. 3 (1977) [hereinafter 1977 Select Committee Report].

103 Id. at 60.

104 1976 Select Committee Hearings (Part 2), supra note 99, at 288.

105 Id. at 289.

106 Id.

107 1982 House Hearings, supra note 99, at 23.

108 See generally supra note 99 and accompanying text.

109 As the Justice Department has repeatedly noted:

[T]he burden of proof for purposes of the decision making process should be on the proponents of continuing antitrust immunity to show a convincing public interest rationale for abandoning competition. Each existing or proposed exemption should be justified in terms of empirically demonstrated characteristics of the specific industry that make competition unworkable. The defects in the marketplace necessary to justify an antitrust exemption must be substantial and clear.

Report to the President and the Attorney General of the National Commission for the Review of The Antitrust Laws and Procedures (Jan. 22, 1979). See also 1976 Select Committee Hearings (Part 2), supra note 99, at 299 (statement of Joe Sims) (“the proponent of an antitrust exemption has the burden of establishing the necessity of getting that antitrust exemption.”); 1982 House Hearings, supra note 99 (statement of Abbott B. Lipsky, Jr.) and accompanying text.

110 259 U.S. at 208.

111 Roger G. Noll, Baseball Economics in the 1990's: A Report to the Major League Baseball Players Association 8 (Aug. 1994) [hereinafter Noll Report] (to be printed at appendix 1 of September 1994 House Hearings, supra note 63). This report was based on owner-provided financial data covering the years 1991–1993, and on pre-strike forecasts for 1994.

112 See id.; Flood v. Kuhn, 407 U.S. at 282. See also Quirk & Fort, supra note 56, at 1–2 (in July 1991, Financial World estimated the annual revenues for Major League Baseball to be even greater than those of the other professional sports leagues: $1.35 billion, as compared to $1.3 billion for the National Football League, $606 million for the National Basketball Association, and $465 million for the National Hockey League).

113 March 1993 House Hearings, supra note 99, at 129 (statement of Donald Fehr). See also Zimbalist, Billions, supra note 14, at xiii (noting that attendance at Major League Baseball games rose 47 percent between 1977 and 1991, attendance records were set in 6 of the 7 years between 1985 and 1991, and annual revenues for Major League Baseball grew from $718 million in 1985 to nearly $1.4 billion in 1990).

114 The United States Conference of Mayors, The Economic Impact of the Baseball Strike: A Survey of Major League Cities 2 (Sept. 1994). See also Matthew Purdy and Richard Sandomir, Colleagues or Competitors? 28 Owners in the Spotlight, N.Y. Times, Aug. 22, 1994, at sec. 1, p. 1 [hereinafter Purdy & Sandomir]; Steve Rushin, Casualties of War, Sports Illustrated, Oct. 10, 1994, at 37 (discussing impact of strike on nonplayer employees).

115 See, e.g., September 1994 House Hearings, supra note 63 (tr. at 59–60).

116 See Noll Report, supra note 111, at 8, 10.

117 See Smith & Norton, supra note 43. One way owners can obtain tax writeoffs is to assign a high share of the purchase price of a baseball franchise to the value of its players–allowing an owner to depreciate, or deduct from taxable income from other businesses, a certain share of the purchase price every year. See generally Zimbalist, Billions, supra note 14, at 34–36; Charles C. Euchner, Playing the Field: Why Sports Teams Move and Cities Fight to Keep Them 45 (1993) [hereinafter Euchner]. When asked to comment on whether this tax shelter situation is fair, Bill Veeck, former owner of the Indians and the White Sox, argued: “Look, we play the ‘Star–Spangled Banner’ before every game. You want us to pay income taxes too?” Bill Veeck, The Hustler's Handbook 328 (1965).

The case of the Texas Rangers is illustrative of the clubs' municipal subsidy leveraging incentive. The Rangers have posted a profit only once in the past 5 years. However, Rangers co-owner (and Texas Governor-elect) George W. Bush recently admitted that such losses are just “for book purposes, not for cash purposes. Cash-flow-wise the Rangers are doing very well.” Quoted in Ken Herman, “Bush the Business Man: Baseball Has Been Very Good to Him, Candidate Admits, Hous. Post, Oct. 9, 1994, at A33. Bush also credited himself and his franchise co-owners for their entrepreneuralism in building “a brand-new ballpark which adds franchise stability.” Id. However, this new $190 million ballpark (named “The Ballpark”) was actually financed for the Rangers by the taxpayers of the city of Arlington, Texas–through $135 million in local public bonds backed by a half-cent sales tax, along with money expected to be paid by the Rangers through future revenue to be generated by The Ballpark. See id. Even before Arlington considered building The Ballpark for the Rangers, it had been estimated that the net loss over a 30-year period to the city for its various subsidies paid to obtain and retain the Rangers would be well over $21 million. See Mark S. Rosentraub, “Financial Incentives, Locational Decision–Making and Professional Sports: The Case of the Texas Rangers Baseball Network and the City of Arlington, Texas, in 1977 Select Committee Report,” supra note 102, at 201, 208–212 (unpublished paper by University of Texas at Arlington Urban Studies Professor Rosentraub, presented to the 1976 Select Committee on Sports and reprinted by the committee as appendix I–4 to its 1977 Final Report). See also Michael K. Ozanian and Brooke Grabarek, “Foul!,” Financial World, Sept. 1, 1994, at 18, 19–20 (explaining that stadium revenues have replaced local media revenues as the most important factor in franchise value and profitability, and noting that the Baltimore Orioles, Cleveland Indians, and Texas Rangers are examples of midsize market clubs who will be in Major League Baseball's upper echelon in terms of operating income this year–despite their lower-than-average media revenues–because of their publicly financed new ballparks).

118 See Noll Report, supra note 111, at 16. See also Smith & Norton, supra note 43 (“The scant figures that have trickled out over the years indicate that team owners go to considerable lengths to inflate expenses and deflate revenue.”). Club representatives have been quoted as questioning their own financial data. Toronto Blue Jays President Paul Beeston has acknowledged: “Anyone who quotes profits of a baseball club is missing the point. Under generally accepted accounting principles I can turn a $4 million profit into a $2 million loss, and I can get every national accounting firm to agree with me.” Quoted in Zimbalist, Billions, supra note 14, at 62. And several years ago an owner anonymously stated that what all the spending (e.g., for franchises and players) “shows is just how healthy the industry really is.” Quoted in Peter Gammons, “Rich Man's Game,” Sports Illustrated, Dec. 11, 1989, at 60.

119 For example, the Baltimore Orioles franchise was sold for $12 million in 1979, $70 million in 1989, and $173 million in 1993–the highest amount ever paid for a sports franchise. See Purdy & Sandomir, supra note 114. Even the Seattle Mariners, one of baseball's weakest teams financially and on the field, sold for $6.5 million in 1977, $13 million in 1981, $77 million in 1988, and $106 million in 1992. See Zimbalist, “Immunity,” supra note 43, at 287, 299. Likewise, the price to enter the league as an expansion franchise, through the payment of expansion fees to existing teams, has steadily risen from the $1.9 million the New York Mets and the Houston Colts each paid in 1962 to the $95 million that the Colorado Rockies and the Florida Marlins each paid in 1993. See Zimbalist, Billions, supra note 14, at 141.

120 The cries of the organized baseball team owners concerning player salaries have been heard since at least 1881, when Chicago White Stockings owner A.G. Spalding declared: “Salaries must come down, or the interest of the public must be increased in some way. If one or the other does not happen, bankruptcy stares every team in the face.” Quoted in Smith & Norton, supra note 43. Eighty-four years later, in 1965, the book No Joy in Mudville examined “the decline and fall of baseball.” See id. However, the major leagues have only experienced one team bankruptcy filing in their history. See Zimbalist, Billions, supra note 14, at 72, 217 n.73 (citing Labor Relations, supra note 16, at 78).

121 September 1994 House Hearings, supra note 63 (tr. at 60–61).

122 See supra note 111.

123 At the September 22, 1994 hearings, Mr. Selig, although initially offering to provide information only under a “controlled procedure,” later appeared to withdraw this precondition:

Mr. Brooks. Controlled procedure is not what we had in mind. I mean, that is what we are trying to avoid. We would like to take an open look at them, as we can at the publicly disclosed financial statements of every corporation in the country \*\*\*.

Mr. Selig. I understand that.

Mr. Brooks. Not a controlled procedure. That word is––

Mr. Selig. I understand that, Mr. Chairman. We have obviously turned over all of our information and we would be very happy to sit down and give you all the information that we have.

September 1994 House Hearings, supra note 63 (tr. at 60–61). However, in a November 8, 1994 letter to the Subcommittee on behalf of Major League Baseball, the owners' outside lawyers insisted on unspecified confidentiality protections for certain additional information. Id., to be reprinted at appendix 1.

124 Even if Major League Baseball's assertion of unprofitability were accurate, this would not serve to justify an exemption from the Nation's competition laws; experience has shown that unprofitable firms can collude to impair consumer welfare. See, e.g., Martin Tolchin, “U.S. Sues 8 Airlines Over Fares: Computers Called Price Fixing Tools,” N.Y. Times, Dec. 22, 1992, at D1 (reporting the Government's filing of antitrust suit accusing the eight largest American airlines of using a computerized reservation system to fix airfares, and that the airlines responded by saying it is wrong for the Government to be adding to the troubles of an industry that has lost $7 billion in the last 2 years); United States v. Airline Tariff Publishing Co., 836 F. Supp. 9 (D.D.C. 1993)(approval of consent decree in airlines price fixing case); Joe Davidson, “Six Big Airlines Settle U.S. Suit on Price Fixing: Scheme Using Data System May Have Cost Public $2 Billion in 4 Years,” Wall St. J., Mar. 18, 1994, at A2 (reporting the filing of a proposed consent decree concerning six remaining defendant airlines, under which they agreed to modify the ticket reservation system at issue).

125 Professional Baseball Agreement between the American and National Leagues of Professional Clubs and the National Association of Professional Baseball Leagues (1991) [hereinafter Professional Baseball Agreement].

126 See, e.g., March 1993 House Hearings, supra note 99, at 65 (statement of Jimmie Lee Solomon) (“the many benefits of minor league baseball \*\*\* flow directly from the Major League Clubs' financial support of this system.\*\*\* [I]n 1992 the Major League Clubs spent over $211 million on this player development system.”); September 1994 House Hearings, supra note 63, at 49 (statement of Stanley Brand) (“Without support from the Major Leagues which might not be available if the exemption were stripped, minor league baseball in these [small] towns could go the way of the 5 and 10.”).

127 See, e.g., March 1993 House Hearings, supra note 99, at 117 (statement of Stanley Brand). See also Zimbalist, Billions, supra note 14, at 105–106 (describing mechanics of minor league player reserve clause).

128 September 1994 House Hearings, supra note 63 (tr. at 137) (statement of Representative Watt).

Equitable arguments for the restrictions mandated by the current minor league system are called into doubt by the fact that fewer than 1 out of 10 minor league players ever achieves a viable major league career (see Zimbalist, Billions, supra note 14, at 106), and that the average salary earned by top players in the minors represents only about 4 percent of a major league salary (see Zimbalist, Billions, supra note 14, at 85). For a detailed account of the personal costs exacted by collusive minor league behavior in restricting player movement, see the testimony of former minor league player Roric Harrison before the Senate Judiciary Subcommittee on Antitrust, Monopolies and Business Rights. 1992 Senate Hearings, supra note 99, at 406.

129 March 1993 House Hearings, supra note 99, at 177 (statement of Stephen Ross). Indeed, it has been asserted that the minor leagues would be better off if they were operated independently from the major leagues. See Neil Sullivan, The Minors, at ix (1990) (noting that on several occasions over the years, the minor leagues were in a position to operate independently, yet chose to accept the “artificial hierarchy” of the major leagues rather than assume the potential economic risks–and rewards–of independence).

130 See Professional Baseball Agreement, supra note 125, at Art. VII (F) and Attachment A. See also Jon Scher, The Major League/Minor League Scorecard, Baseball Am., Jan. 10, 1991, at 13; Jon Scher, Majors, Minors Set to Sign Long-Term Deal, Baseball Am., Jan. 10, 1991, at 13; Mike Dodd, Minor Leagues Have Until 1995 to Upgrade Ballparks, USA Today, Sept. 2, 1993, at 2C. The General Manager of one minor league team described the new Professional Baseball Agreement as follows: “All of a sudden, we [the Class A Asheville Tourists] go from being a fairly profitable, fairly solid club to struggling to break even again. So if you have the [San Diego] Chicken coming in on a Friday night and it gets rained out, you're in trouble.” See Jon Scher, Minor League Notebook, Baseball Am., January 25, 1991, at 16 (quoting Ron McKee).

131 As early as 1988, a minor league owner stated: “[e]very year, [the major leagues] do something that makes it more impossible for us to operate. Every year, the major league teams change the rules a little bit to make it harder for us.” See Bill James, The Bill James Baseball Abstract 1988, at 19 (quoting unidentified minor league owner).

132 See March 1993 House Hearings, supra note 99, at 63 (statement of Jimmie Lee Solomon); September 1994 House Hearings, supra note 63 (tr. at 137) (statement of Allen “Bud” Selig).

133 1977 Select Committee Report, supra note 102, at 56.

134 See supra notes 74–76 and accompanying text.

135 See March 1993 House Hearings, supra note 99, at 228–231 (statement of Stephen F. Ross).

136 Arthur T. Johnson, Minor League Baseball: Fact Versus Myth 8 (1994) (unpublished paper) [hereinafter Johnson, Minor League Baseball].

137 See supra notes 125, 130–131 and accompanying text. The Associated Press reported that, “The chief negotiator for the major leagues said the commissioner's office would begin discussions to start new minor leagues and clubs outside the \*\*\* current minor league governing body.” Ronald Blum, AP Sports News, available in LEXIS, Nexis Library, AP File (Nov. 18, 1990). And the Sporting News reported that Major League Baseball was “sending out franchise applications” and that as soon as leases were signed, the major leagues would abandon attempts to reach a deal with the minor leagues. Majors, Minors Can't Agree, Sporting News, Nov. 26, 1990, at 37.

138 Mark Maske, Major-Minor Reconciliation Effort Begins; Vincent ‘Planning on \*\*\* New System,’ Wash. Post, Nov. 27, 1990, at E4 (reporting that members of the minor leagues' executive committee were so concerned about the negotiations that they were “eyeing possible legal measures against the majors” and “seeking to determine what congressional support [they] might have for challenging the major leagues' exemption from federal antitrust laws”).

139 See Jack Sands and Peter Gammons, Coming Apart at the Seams: How Baseball Owners, Players, and Television Executives Have Led Our National Pastime to the Brink of Disaster 98 (1993).

140 See, e.g., March 1993 House Hearings, supra note 99, at 48–49 (statement of Bud Selig).

141 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984).

142 Originally, the rule required unanimous consent of all owners for a club relocation into the “home territory” of another team–including consent of the owner who would face the new competition. When an earlier Sherman Act challenge to the rule by the Los Angeles Memorial Coliseum Commission was dismissed for lack of ripeness, 468 F. Supp. 154 (C.D. Cal. 1979), the NFL revised the rule to require a 3/4 majority for any relocation. See Los Angeles Mem. Coliseum Comm'n, 726 F.2d at 1384–1385.

143 See 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984). See notes 74–76 and accompanying text.

144 Los Angeles Mem. Coliseum Comm'n, 726 F.2d at 1397 (citations omitted).

145 791 F.2d 1356 (9th Cir. 1986), cert. denied, 484 U.S. 826 (1987).

146 See Professional Sports Community Protection Act of 1985: Hearings on S.259 and S.287 Before the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. 61 (1985) [hereinafter Senate Community Protection Hearings] (statement of Pete Rozelle, NFL Commissioner).

147 See id. at 84; Los Angeles Times, June 28, 1985, pt. III, at 12, col.1.

148 See National Basketball Ass'n v. SDC Basketball Club, 815 F.2d 562 (9th Cir.), cert. dismissed sub nom. Los Angeles Memorial Coliseum Comm'n v. National Basketball Ass'n, 484 U.S. 960 (1987); Michael A. Cardozo and Jeffrey A. Mishkin, “Does a League Have a Right to Determine Where Teams Play?” Nat'l L.J., Nov. 30, 1987, at 23–24.

149 See, e.g., Zimbalist, Billions, supra note 14, at 123–124; Quirk, An Economic Analysis of Team Movements in Professional Sports, 38 Law & Contemp. Probs. 42, 43–47 (1973) [hereinafter Quirk, Team Movements].

150 Some observers have noted that soon after Mr. Selig defended baseball's antitrust exemption as the protector of franchise stability at the 1992 Senate hearings, he was reported to have threatened to move the Brewers out of Milwaukee unless the city agreed to finance the building of a new stadium for the team. See Zimbalist, Immunity, supra note 43, at 303; Dave Van Dyke, Brewers: If You Build It; New Stadium Vital to Keep Franchise, Chi. Sun–Times, May 17, 1993, at 101. Likewise, Holy Cross Political Science Professor Charles C. Euchner has chronicled the means by which the Chicago White Sox used the leverage of possible relocation to negotiate public concessions relative to the building of a new stadium for the White Sox:

Some experts predicted that organized baseball would reject a move of the White Sox from the third largest market in the nation, but at no time did the baseball hierarchy intercede to restrain the bidding. In fact, the American League president injected himself into the process, only to strengthen the White Sox's bargaining position, when he argued that Comisky Park was inadequate.

Euchner, supra note 117, at 148 (citing correspondence from Robert Brown, President of the American League, to Mary O'Connell of the fans' organization Save Our Sox (undated)).

151 See Minutes of Special Meeting, Nov. 10, 1992, reprinted in March 1993 House Hearings, supra note 99, at 246–252.

152 When the controversy surrounding the National Football League Raiders brought this issue to Congressional attention, various bills were introduced to regulate professional sports franchise relocation. One bill, S. 259, was reported by the Senate Committee on Commerce, Science and Transportation in the 99th Congress. S. 259 would have imposed requirements for league consideration of team relocations, with judicial review. The team seeking to relocate would have been required to give notice, stating the justification for the move, based on 12 specified factors. The league would have had to hold a public hearing, and articulate the reason for its decision on the record. The league's decision would have been subject to judicial review, under which the decision could be overturned if not supported by substantial evidence. And the local community would have retained the option of challenging the league's decision under the antitrust laws. See S. 259, 99th Cong., 1st Sess. S S 5–7, 10 (1985).

153 See, e.g., Arthur T. Johnson, Municipal Administration and the Sports Franchise Relocation Issue, Pub. Adm. Rev. 519–520 (Nov.–Dec. 1983). Contrary to popular assertion, many of the moves, such as the relocations of the Dodgers and the Giants to California, were completely unrelated to lack of fan support. See, e.g., Quirk, Team Movements, supra note 149, at 60.

154 Both Seattle and Milwaukee filed antitrust suits following the transfer of local baseball franchises. See 1976 Select Committee Hearings (Part 2), supra note 99, at 425 (Seattle's lawsuit, stemming from Mr. Selig's moving the old Seattle Pilots team to Milwaukee, was settled through the award to Seattle of a new expansion team in 1977); Wisconsin v. Milwaukee Braves, Inc., 144 N.W.2d 1 (Wis.), cert. denied, 385 U.S. 990 (1966) (application of State antitrust laws to Major League Baseball's approval of the Braves' relocation was held to unconstitutionally interfere with interstate commerce).

155 See, e.g., Euchner, supra note 117, at 5 (“At some point in the past decade, virtually all professional franchises publicly threatened to move to a different city in order to extract the [financial] benefits they desired from local governments.”); Zimbalist, Immunity, supra note 43, at 313 (“The standard ploy for a [Major League Baseball] franchise is to threaten to move the team.”).

156 See, e.g., Zimbalist, Immunity, supra note 43, at 313 (“Such threats have consistently brought owners either more favorable rental contracts for their teams, . . . or stadium retrofits . . . or entire new stadiums with a wide array of revenue-generating accoutrements. . . .”); Euchner, supra note 117, at 24 (“Even though teams infrequently move, threats of transfers drive cities into expensive bidding wars. . . . The number of cities seeking teams is so large that franchises always have plausible alternatives for their current sites.”); id. at x (“New stadiums are only the beginning. The willingness to threaten departure has secured for teams a variety of land deals, lower taxes, more revenues from parking and concessions, control of stadium operations, guaranteed ticket sales, renovation of stadiums with luxury seating, control over neighborhoods and transportation systems. The list goes on.”).

157 See Johnson, Minor League Baseball, supra note 136, at 5. Moreover, 74.2 percent of the communities polled in a 1989 survey reported that the stadium lease with their minor league team was for a term of 5 years or less (many were year-to-year). Such short-term leases invite frequent demands for stadium improvements or better lease rental terms. See Arthur T. Johnson, Local Government and Minor League Baseball: A Survey of Issues and Trends 8 (Washington, D.C.: International City Management Association) [hereinafter Johnson, Local Government]. According to the same survey, 40 percent of the communities reported that they were the target of demands for stadium improvements or better rental terms at the time the previous lease had expired; and in every case, the team had threatened to relocate. Id. at 10.

158 See Johnson, Minor League Baseball, supra note 136, at 5.

159 See supra notes 125, 130–131 and accompanying text.

160 See 15 U.S.C. S S 1291 et seq..

161 See Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667 (7th Cir. 1992) (the Chicago Bulls–owned by Jerry Reinsdorf, co-owner of the Chicago White Sox–successfully challenged an NBA rule limiting the number of games “superstation” WGN could carry), cert. denied, 506 U.S. 954, 113 S. Ct. 409 (1992). See also NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984) (NCAA rule restraining member schools in the number of games they could contract to broadcast held unlawful).

162 See, e.g., Senate 1992 Hearings, supra note 99, at 420 (statement of Gene Kimmelman) (“To promote maximum sports viewing options at the lowest price and to infuse competitive market pressures in the structure of Major League Baseball, [the Consumer Federation of America] urges Congress to eliminate Major League Baseball's antitrust immunity and to ensure that the Sports Broadcasting Act's antitrust exemption is limited to national off-air broadcasting contracts.”).

163 Cable Television Basketball Blackout Settlement Agreement between the Attorney General's Office of the State of Connecticut and the National Basketball Association, Apr. 28, 1993. See Commerce Clearinghouse Report, 50,101 (May 18, 1993).

164 Baseball owners contend they are operating the business of baseball, through the commissioner system, in a highly responsible manner–i.e., obviating the need for subjecting the sport to antitrust regulation. See, e.g., 1992 Senate Hearings, supra note 99, at 13–14 (statement of Bud Selig). See also Report of the Restructuring Committee [hereinafter Restructuring Report] (“The role of the Commissioner in protecting the public interest has long distinguished [Major League Baseball] from all other professional sports and has justified the special status of Baseball as the national game.”).

165 See infra note 179 and accompanying text.

166 See, e.g., Ward & Burns, supra note 12, at 133–145. The scandal involved eight members of the 1919 Chicago White Sox, accused of intentionally losing the 1919 World Series for payoffs, and caused the White Sox to be dubbed the “Black Sox.” See Eliot Asinoff, Eight Men Out (1963); David Q. Voigt, 2 American Baseball, at xiii-xviii (1970).

167 Landis, a man who had built a formidable reputation through his activities on the bench–including fining Standard Oil $29 million for antitrust violations and attempting to extradite the Kaiser of Germany because a Chicagoan died when a German submarine sank the Lusitania–demanded and received from the owners control over “whatever and whoever” had to do with the game. See Harold Seymour, 2 Baseball: The Golden Age 322, 369 (1971) [hereinafter Seymour]; Ward & Burns, supra note 12, at 133–145. The day after the eight accused “Black Sox” players were acquitted in a court of law, he barred them from baseball for life. See Will Lingo, “Baseball's Eight Commissioners,” Baseball Am., Nov. 28–Dec. 11, 1994, at 14 [hereinafter Lingo, Commissioners].

168 See Seymour, supra note 167; Ward & Burns, supra note 12, at 133–145; Lingo, Commissioners, supra note 167.

169 See Zimbalist, Billions, supra note 14, at 43.

170 Id. at 44.

171 See Lingo, Commissioners, supra note 167, at 14–15; Kenneth M. Jennings, Balls and Strikes: The Money Game in Professional Baseball 86 (1990). See also Lingo, Commissioners, supra note 167, at 14 (“Baseball historians are almost universal in their disdain for Eckert's work and their assessment that he was completely overmatched in his job. [The retired Air Force general was] so invisible and lacking in strong views that some called him “The Unknown Soldier.”).

172 See Bowie Kuhn, Hard Ball 366–427 (1987); Zimbalist, Billions, supra note 14, at 44. See also Lingo, Commissioners, supra note 167, at 15 (“Like most commissioners who acted at all independently and served long enough, Kuhn eventually drew the scorn of enough owners to become ineffective, and left his post.”).

173 See supra notes 57–62 and accompanying text. See also Lingo, Commissioners, supra note 167, at 15; Helyar, supra note 58.

174 Zimbalist, Billions, supra note 14 at 44.

175 See Lingo, Commissioners, supra note 167, at 15.

176 See Zimbalist, Billions, supra note 14, at 45; Lingo, Commissioners, supra note 167, at 15.

177 Quoted in Bob Nightengale, “Herzog Turned Off by Baseball's Greed,” Baseball Am., Aug. 10, 1990, at 14.

178 Quoted in David Greising, “Baseball's Bases Are Still Loaded With Problems,” Bus. Wk., Sept. 21, 1993, at 37.

179 See, e.g., Joe Gergen, “Baseball Still in No Hurry to Choose a Commissioner,” L.A. Times, Jan. 21, 1994, at 1; Roger Angell, Shades of Blue, The New Yorker, Dec. 7, 1992, at 124, 127 [hereinafter Angell]. See also Will Lingo, “Baseball Seeks Strong Leaders,” Baseball Am., Nov. 28–Dec. 11, 1994, at 14 [hereinafter Lingo, Leaders] (“Brewers owner Bud Selig is the de facto commissioner. But Selig is nothing more than an extension of the owners.”).

180 See, e.g., Angell, supra note 179.

181 See Restructuring Report, supra note 164.

182 See id. at 6. See also Jack McCallum, “The Toothless Commissioner,” Sports Illustrated, Feb. 24, 1994, at 14; “Owners Plan Limits Commissioner's Power: ‘Best Interests' Ruling Revised,” Chi. Trib., Feb. 12, 1994, at C1.

183 See Restructuring Report, supra note 164.

184 Quoted in Ronald Blum, “Restructuring,” AP, Feb. 12, 1994, available in LEXIS, Nexis Library, AP File. Chicago White Sox co-owner Jerry Reinsdorf candidly summarized his view of the position when he stated that the job of the next commissioner will be to “run the business for the owners, not the players or the umpires or fans.” Quoted in Angell, supra note 179, at 127.

185 See, e.g., Athelia Knight and Richard Justice, “Work Stoppages a Part of Baseball,” Wash. Post, Aug. 11, 1994, at D1.

186 See BNA Plus Work Stoppage Statistics.

187 See, e.g., Richard Sandomir, “Field of Dreams Turns into Nightmare in New Jersey,” N.Y. Times, Aug. 23, 1994, at B9; Ira Berkow, “Yesterday Was Just Perfect for a Ball Game,” N.Y. Times, Aug. 29, 1994, at C9; Murray Chass, “Game's Ultimate Strikeout Is Hanging in the Balance,” N.Y. Times, Sept. 6, 1994, at B11; Thomas Boswell, “Baseball Season Ends Now,” Wash. Post, Sept. 15, 1994, at B1; Shirely Povich, “For Years, the Game Changed; Now, It Has Stopped,” Wash. Post, Sept. 15, 1994, at B4; Claire Smith, “What Strike Needs Is a Designated Hero,” N.Y. Times, Sept. 5, 1994, at 26. See also September 1994 “House Hearings,” supra note 63 (tr. at 57) (statement of Adam Kolton) (stating that he harbors “no doubt that many fans have been so alienated by the strike” that they will stay away and boycott future baseball games); id. at 55–56 (explaining the view of his group, Sports Fans United, that “[t]he antitrust exemption as we see it is really a giant permission slip issued by the courts for baseball owners to treat fans any way they want without any consequences,” and reporting that his group had joined the Consumer Federation of America, Fans First, and more than a dozen other fan groups across the country on a national petition drive to end professional baseball's antitrust exemption and that the petition had well over 15,000 signatures even though the campaign had just begun).

188 See, e.g., Jim Bunning, “Repeal that Anti-trust Exemption,” N.Y. Times, Oct. 3, 1994, at A15; Kathleen Madigan, “Foul Ball: Major League Baseball's Monopoly,” Bus. Wk., Nov. 1992, at 42; Connie Mack & Richard M. Blau, “The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption,” 45 Fla. L. Rev. 201 (1993); Robert G. Berger, “After the Strikes: A Reexamination of Professional Baseball's Exemption From the Antitrust Laws,” 45 U. Pitt. L. Rev. 209 (1983); Claire Smith, “Antitrust Exemption is Also in Question,” N.Y. Times, Aug. 19, 1994, at B9; Charles Rembar, “When Justice Holmes Swung and Missed,” N.Y. Times, Aug. 20, 1994, at A23; Thomas Boswell, “Step up to the Plate, Mr. President,” Wash. Post, Sept. 14, 1994, at B6; “Kiss it Goodbye,” Wash. Post, Sept. 16, 1994, at A26.

189 See Powell I, 678 F. Supp. 777, 781 (D. Minn. 1988), rev'd, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991). A “Right of First Refusal/Compensation System” restricts the ability of a player to sign with another team as a “free agent.” Under this system, a team could retain a veteran free agent by exercising a right of first refusal and by matching a club's offer. Even if the old team decided not to match the offer, it would receive compensation from the new team in the form of additional draft choices. Id. at 779.

190 See Powell I, 678 F. Supp. 777 (D. Minn. 1988); “McNeil,” 764 F. Supp. 1351 (D. Minn. 1991). But see supra notes 95–98 and accompanying text (regarding criticism of Powell II for having the effect of forcing the union to decertify, thereby delaying the availability of antitrust remedies to the harmed players).

191 See White v. National Football League, 836 F. Supp. 1508 (D. Minn. 1993). See also Letter From Gene Upshaw, Executive Director, National Football League Players Association, to Representative Jack Brooks, Chairman of the House Judiciary Committee (Sept. 22, 1994):

Only when [NFL] players prevailed in a series of antitrust actions, and gained significant damages, did the owners finally agree in the labor context to a drastic amelioration of [owner-imposed player restrictions].\*\*\*

In my view, giving any group of sports owners an exemption from the antitrust laws gives them a huge additional and unneeded advantage in labor negotiations. With the exemption in hand, the owners know they can jointly impose severe labor negotiations. When this is coupled with the owners' already overwhelming economic advantage, the result is that the collective bargaining rights guaranteed by the labor laws become a meaningless sham.

The NFL's 1977 collective bargaining agreement was also incorporated in a court-approved class action settlement that ended 5 years of labor discord. See Alexander v. National Football League, 1977–2 Trade Cas. (CCH) 61,730, 1977 WL 1497 (D. Minn. 1977), aff'd sub nom. Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978).

192 In 1970, NBA players commenced a class action antitrust suit against the NBA, challenging certain league-imposed player restrictions. See Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 884–889 (S.D.N.Y. 1975). By 1976, the parties in Robertson were able to enter into, and the district court approved, an antitrust settlement agreement, which gave rise to collective bargaining agreements between the NBA and NBA players. Moreover, after a collective bargaining agreement between the players and the NBA expired in 1982, when the NBA sought for the first time to impose a salary cap on the players, the players were able to successfully challenge this unilateral action by the NBA in court as violative of the terms of the parties' settlement agreement in Robertson. The players and the NBA were then able to negotiate a mutually agreeable Memorandum of Understanding modifying their settlement agreement, and likewise entered into a new multi-year collective bargaining agreement that included a salary cap. When the collective bargaining agreement expired in 1987, the players and the NBA entered into a Moratorium Agreement, whereby certain NBA practices would remain in effect but no new contracts would be signed.

When the Moratorium Agreement expired on October 1, 1987 without a mutually agreeable resolution, the players brought another antitrust suit, which culminated a year later in a new collective bargaining agreement. Although this collective bargaining agreement expired on June 23, 1994, the parties have been able to reach a no strike/no lock out agreement, so that the 1994–1995 season has been able to proceed without interruption, despite the parties' ongoing legal battle. See National Basketball Ass'n v. Williams, 857 F. Supp. 1069 (S.D.N.Y. 1994), appeal docketed, 94–7709 (2d Cir. Jul. 19, 1994); Richard Justice, “NBA Strikes a Labor Deal: Owners, Players Agree to Play Uninterrupted Season”, Wash. Post, Oct. 28, 1994, at C1; Sam Smith, “NBA Keeps Eye on Ball, Avoids Strike 3: Players, Owners Announce They'll Play Full Season”, Chi. Trib., Oct. 28, 1994, at .

193 See September 28, 1994 Markup of H.R. 4994, Subcomm. on Econ. and Commercial Law of the House Judiciary Comm. (tr. at 21) [hereinafter 1994 Markup] (statement of Representative Hamilton Fish).

194 See September 1994 House Hearings, supra note 63, at 47 (statement of Stanley Brand).

195 See supra notes 128, 157–159 and accompanying text.

196 See 1994 Markup, supra note 193 (tr. at 21) (statement of Representative Fish).

197 In 1953, in Toolson, the Court wrote: “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.” Toolson v. New York Yankees, 346 U.S. at 357. And in 1972, in Flood, Justice Blackmun wrote that “what [the Court] said in Toolson in 1953, we say again here in 1972: the remedy, if any is indicated is for congressional, and not judicial action.” Flood v. Kuhn, 407 U.S. at 289.

198 See supra note 2.

199 See supra notes 74–76 and accompanying text.

200 See, e.g., Jackson v. National Football League, 802 F. Supp. 226, 234–235 (D. Minn. 1992) (granting a temporary restraining order to four NFL players, effectively making them free agents, in response to players' antitrust challenge to owners' application of player restraints after termination of the collective bargaining relationship between the parties).

201 See supra notes 77–98 and accompanying text.

202 See supra note 86 and accompanying text.

Brown v. Pro Football, Inc. appears to represent the only antitrust challenge to a sports league's alleged imposition of new employment terms not previously included in a collective bargaining agreement. See Brown v. Pro Football, Inc., 782 F. Supp. 125, 137–139 (D.D.C. 1991), appeals docketed, Nos. 93–7165, 94–7071 (D.C. Cir. Sept. 27, 1993, Mar. 31, 1994). In that case, which involved the NFL's unilateral imposition of a term providing that developmental squad players would be paid a fixed salary rather than being permitted to negotiate their own salaries, the district court held that because the salary restraint was never included in a collective bargaining agreement, the nonstatutory labor exemption did not apply. Id. at 139. (The court also held, in the alternative, that the non-statutory labor exemption had ended with the expiration of the collective bargaining agreement. See supra text accompanying note 92.) See also Bridgeman v. National Basketball Association, 675 F. Supp 960, 965 (D.N.J. 1987).

Although some commentators have read Powell II very broadly, as authority for immunizing even some new employment terms imposed after “impasse” (see, e.g., Note, “When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports,” 94 Colum. L. Rev 1045, 1064 (1994)), the case did not involve the imposition of a new term or condition, but rather, the maintenance of a term contained in the most recent collective bargaining agreement. See Supreme Court Brief for the United States as Amicus Curiae, Powell v. National Football League, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (No. 89–1421), cert. denied, 498 U.S. 1040 (1991) at 13 n.5. In the Committee's view, the broad construction of Powell II suggested by these commentators would go far beyond the limited purpose of the nonstatutory labor exemption. See supra notes 95–98 and accompanying text.

1 The only exception to antitrust coverage for the NFL, NBA and NHL is contained in the Sports Broadcasting Act, 15 U.S.C. S S 1291–94. Under this law, the professional sports leagues (baseball included) are protected from antitrust suits when they enter into league-wide contracts with television networks.

H.R. REP. 103-871, H.R. Rep. No. 871, 103RD Cong., 2ND Sess. 1994, 1994 WL 685623 (Leg.Hist.)

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