

**REVISITING THE IMPACT OF THE CURT FLOOD ACT OF 1998 ON THE
BARGAINING RELATIONSHIP BETWEEN PLAYERS AND MANAGEMENT IN
MAJOR LEAGUE BASEBALL**

*Lacie L. Kaiser**

INTRODUCTION

Since 1922, professional baseball, particularly Major League Baseball¹ ("MLB"), has been placed on a pedestal courtesy of the United States Supreme Court.² Professional baseball has enjoyed immunity from federal antitrust law.³ This immunity has allowed MLB to place restraints on the players' market without having to worry about liability for anticompetitive restraints. However, in 1998 the United States Congress changed professional baseball's status in federal antitrust law by enacting the Curt Flood Act of 1998.⁴ The Curt Flood Act proscribed that professional baseball would no longer be exempt from antitrust law for issues arising out of the relationship between the players and management. The Curt Flood Act had the potential to change the dynamics of the bargaining relationship in Major League Baseball. After passage of the Curt Flood Act, management could no longer rely on immunity from federal antitrust law when unilaterally placing restrictions on the labor market.

Because of the interplay with federal antitrust law and federal labor law, this paper

* J.D. candidate, DePaul University College of Law, 2005; B.A. Sport Management & Communication, University of Michigan, 2002.

¹ Major League Baseball (MLB) is the top professional baseball league in the United States and Canada. MLB consists thirty teams in two leagues, the National League started in 1876 and the American League started in 1901. See Major League Baseball, *History of the Game*, at <http://mlb.mlb.com/NASApp/mlb/mlb/history/index.jsp> (last visited Apr. 28, 2004).

² See Fed. Baseball Club of Balt. v. Nat'l League, 259 U.S. 200 (1922).

³ See *id.*

⁴ Curt Flood Act of 1998, 15 U.S.C. § 26b (2004).

seeks to explore how the bargaining relationship between Major League Baseball players and the league was changed after the Curt Flood Act of 1998. Part II addresses the background information needed to explore the bargaining relationship. It will provide an overview of federal antitrust law, federal labor law, the interaction between federal antitrust law and federal labor law, and professional baseball's judicially-created immunity from antitrust law. Part III will analyze how the Curt Flood Act affected the bargaining relationship. The analysis will explore whether the Curt Flood Act has legally affected the players' and the league's role in the bargaining relationship, and whether the changing political and socio-economic climates since 1922 to the present has affected the bargaining relationship, in particular the culmination point of the Curt Flood Act in 1998. This paper will conclude that the bargaining relationship between players and management in Major League Baseball has not been effectively changed by the language of Curt Flood Act of 1998 itself, but that socio-economic and political concerns surrounding the Curt Flood Act are what impacted the bargaining relationship.

II. HISTORY/BACKGROUND OF THE LAW

In order to understand today's bargaining relationship between MLB players and the league, it is important to explore the legal history of federal antitrust and labor law. The interaction between these two areas of law is essential to understanding how the bargaining relationship is affected by antitrust immunity. Against this backdrop, it will be possible to explore how MLB's special immunity under federal antitrust law since 1922, and the Curt Flood Act's termination of that immunity for player and management relations.

A. Federal Antitrust Law

In 1890, the United States Congress passed the Sherman Act of 1890,⁵ the first in a line of statutory antitrust regulations. Congress “wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . .”⁶ and thus “mandat[ed] for [the United States] a competitive business economy . . .”⁷ Such an economic scheme yields “the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”⁸ The antitrust laws are not meant to regulate the size, growth, or power of a particular business, but only to regulate unreasonable anticompetitive methods that may be used to obtain or maintain market power.⁹ Of all the federal antitrust legislation enacted,¹⁰ two particular provisions have impacted the sports world the most.¹¹

First, Section 1 of the Sherman Act states, “Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or

⁵ Sherman Act of 1890, 15 U.S.C. §§ 1-7 (2004). In passing the Sherman Act, Congress relied on its Constitutional power to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3.

⁶ *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974) (quoting *United States v. South-Eastern Underwriters Ass’n.*, 322 U.S. 533, 558 (1944)).

⁷ *Gough v. Rossmoor Corp.*, 487 F.2d 373, 375 (9th Cir. 1973).

⁸ *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

⁹ *United States v. N.Y. Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626, 642 (E.D. Ill. 1946), *aff’d*, 173 F.2d 79 (7th Cir. 1949).

¹⁰ *See generally* 15 U.S.C. §§ 1-37 (2004) (includes the Sherman Act of 1890 and the Clayton Act of 1914).

¹¹ *Id.* §§ 1-2. The penalties for violating Section 1 or Section 2 can be severe. Violation of Section 1 or Section 2 is a felony punishable by fines up to \$350,000 for a non-corporation entity and up to \$10,000,000 for a corporation, or by imprisonment for up to three years. Sherman Act of 1914, 15 U.S.C. §§ 1-2 (2004). A private person and the United States Government may sue for treble damages and a State Attorney General may bring a civil action on behalf of a natural person for treble damages. Clayton Act of 1914 §§ 4, 4A, 15 U.S.C. §§ 15, 15a, 15c (2004). Private persons can also seek injunctive relief. *Id.* § 26.

with foreign nations, is hereby declared to be illegal.”¹² Section 1 focuses on concerted activity that unreasonably restrains interstate commerce.¹³ Typical activities that raise questions under Section 1 are price fixing,¹⁴ division of markets and territorial restrictions,¹⁵ exclusive dealing,¹⁶ and tying agreements.¹⁷

There are two tools of analysis for Section 1 claims, but only one tool has been used in sport-related cases.¹⁸ Due to the unique nature of the business of sports, courts have rejected application of *per se* violations to the sports world and have consistently applied the “rule of reason.”¹⁹ To understand the “rule of reason,” the theory behind *per se* violations must be explored. A *per se* violation is a business “practice [that] facially appears to be one that would always or almost always tend to restrict competition and decrease output.”²⁰ In other words,

¹² 15 U.S.C. § 1.

¹³ See *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1484 (D. Or. 1987) (“[t]he essence of a Section 1 action is concerted rather than unilateral action”); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (needing a “plurality of actors . . . for a § 1 conspiracy”); *Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 484 (5th Cir. 1966) (“[i]t is fundamental that at least two independent business entities are required for violation of Section 1, while one alone is sufficient under Section 2”).

¹⁴ Price fixing involves any restraint of trade that tends to set a price or maintain a price. *United States v. Frankfort Distilleries, Inc.* 324 U.S. 293 (1945). Price fixing is still illegal even if the seller is the injured party rather than the consumer or purchaser. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).

¹⁵ Division of markets and territorial restrictions are horizontal restraints in which competitors minimize competition by allocating territories at the same market level. *United States v. Topco Associates, Inc.* 405 U.S. 596, 608 (1972).

¹⁶ Exclusive dealing when occurs a party refuses to sell his product except to those who purchase from him exclusively. *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.*, 66 F. 637, 645 (2d Cir. 1895). On its own, exclusive dealing is legal. *Kingray, Inc. v. Nat’l Basketball Ass’n*, 188 F. Supp. 2d 1177, 1197 (S.D. Cal. 2002). The exclusive contract must intend to or actually harm competition of the relevant market. *Id.*

¹⁷ Tying agreements occurs when one party conditions the sale of his product upon the purchase of another product. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 605 (1953).

¹⁸ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85 (1984).

¹⁹ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. at 103-04. The Supreme Court did not apply a *per se* analysis to college football. If not, sport leagues would always be in violation of antitrust by the *per se* violation of horizontal restraints on competition. *Id.* at 100-01. For a criticism of the “rule of reason” test see *Regents of Univ. of California v. Am. Broadcasting Company*, 747 F.2d 511 (9th Cir. 1984) (commenting on the use of the “rule of reason” in price-fixing and group boycotts charges and suggested that the *per se* analysis would be better).

²⁰ *Broad. Music, Inc. v. Columbia Broad. System, Inc.*, 441 U.S. 1, 19-20 (1979).

some restraints are “presumed to have no benefit to competition in the industry [market].”²¹

In contrast, the “rule of reason” gives sport leagues the chance to balance anticompetitive injuries with procompetitive benefits.²² Courts give leagues the opportunity to provide business justifications for what on the surface might appear to be an unreasonable restraint of trade.²³ Under such a test, it must be shown that there exists “(1) an agreement or conspiring among two or more persons . . . ; (2) by which the persons . . . intend to harm or restrain competition; and (3) which actually injures competition.”²⁴ Although sport leagues enjoy some judicial nicety by having the “rule of reason” applied, they are still often found to be in violation of Section 1²⁵ because application of either *per se* rules or the “rule of reason” “does not change the ultimate focus of [the] inquiry”²⁶ which measures the “competitive significance of the restraint.”²⁷

Second, Section 2 of the Sherman Act focuses on monopolies and their power to impact interstate trade.²⁸ Section 2 states, “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed

²¹ Lisa Pike Masteralexis, *Antitrust and Labor Law: Professional Sport Application*, in *LAW FOR RECREATION AND SPORT MANAGERS*, 664 (Doyice J. Cotton et al., eds., 2d ed. 2001). The *per se* test is generally applied in only two situations: 1) the courts seek to avoid a long inquiry into an industry’s business operations, and 2) the courts examine “agreements between traditional business competitors.” *Id.*

²² *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. at 103-04.

²³ *Id.* at 104.

²⁴ *Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988).

²⁵ See e.g. *United States Football League v. Nat’l Football League*, 842 F.2d 1335 (2nd Cir. 1988); *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010 (10th Cir. 1998); *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667 (7th Cir. 1992).

²⁶ *Nat’l Collegiate Athletic Association v. Bd. of Regents*, 468 U.S. at 103.

²⁷ *Id.* (quoting *Nat’l Soc. of Prof’l Engineers v. United States*, 435 U.S. 679, 692 (1978)).

²⁸ See Sherman Act of 1890, 15 U.S.C. § 2 (2004).

guilty”²⁹ The purpose of the monopoly provision is not to prohibit anyone from having monopoly power, but is to prohibit a person from attempting to gain or maintain monopoly power in any part of commerce from the use of illegal trade practices.³⁰ “Hence the existence of power ‘to exclude competition when it is desired to do so’ is itself a violation of [Section 2], provided it is coupled with the purpose or intent to exercise that power.”³¹

In order to prove a violation of Section 2, two elements must be shown. First, the person must have monopoly power in the product and geographic markets.³² Second, the person misused that power by either acquiring the monopoly by illegal means or by maintaining the monopoly by illegal means.³³ Monopolies gained or maintained “from growth or development as a consequence of a superior product, business acumen, or historic accident” are not illegal.³⁴

Although Section 1 and Section 2 may overlap in terms of the objectives of the person involved in antitrust activity, violations of Section 1 and Section 2 are legally distinct offenses.³⁵ In other words, the provisions can be violated independently of each other.³⁶

²⁹ *Id.* For purposes of federal antitrust legislation, “person” is defined “to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.” Sherman Act of 1890, 15 U.S.C. § 7 (2004).

³⁰ *United States v. Griffith*, 334 U.S. 100, 106-07 (1948).

³¹ *Id.* at 107 (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946)).

³² *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States Football League v. Nat’l Football League*, 842 F.2d 1335, 1358 (2d Cir. 1988).

³³ *Id.*

³⁴ *Grinnell Corp.*, 384 U.S. at 571.

³⁵ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946). Section 2 was intended to supplement Section 1. *Standard Oil Co.*, 221 U.S. at 60 (“the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded”).

³⁶ *Id.* ; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940). It is not a violation of the Fifth Amendment’s double jeopardy to be convicted under both Section 1 and Section 2 for the same activity. *See Am. Tobacco Co.*, 328 U.S. at 787-788.

Monopoly power is a “species of restraint of trade;”³⁷ therefore, the “same kind of predatory practices may show violations of [both].”³⁸ One of the main differences between Section 1 and Section 2 violations is the requirement of two or more actors for a Section 1 violation, but this is not required for a Section 2 violation.³⁹

B. Federal Labor Law

In 1935, the United States Congress passed the Wagner Act to govern the relationship between unions, employers, and workers.⁴⁰ The goal of the Wagner Act was to ensure workers the rights to unionize and bargain collectively.⁴¹ The Wagner Act and subsequent amendments, such as the Taft-Hartley amendments and the Landrum-Griffin amendments, are collectively known as the National Labor Relations Act (“NLRA”).⁴²

The heart of the NLRA is Section 7.⁴³ Section 7 guarantees,

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . .⁴⁴

Section 7 rights of union organization, collective bargaining, and concerted activity are

³⁷ *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F.2d 600, 602 (8th Cir. 1942) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)).

³⁸ *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 463 (1960).

³⁹ *Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 484 (5th Cir. 1966); *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1972).

⁴⁰ National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (1994).

⁴¹ *See* § 7, 29 U.S.C. § 157 (1994).

⁴² *See id.* §§ 151 et seq. The Taft-Hartley amendments were enacted in 1947 and added union unfair labor practices. *Id.* The Landrum-Griffin amendments were enacted in 1959, and they regulate the internal affairs of unions. *Id.*

⁴³ *See id.* § 157.

⁴⁴ *Id.*

protected and enforced through various employer and union unfair labor practices.⁴⁵

The National Labor Relations Board (“NLRB”), the governing agency of federal labor law, was also created by the Wagner Act.⁴⁶ The NLRB has exclusive jurisdiction over labor disputes, unfair labor practices, and bargaining representation issues.⁴⁷ However, for interpretation of a collective bargaining agreement, the NLRB’s jurisdiction is limited. The NLRB will not interpret collective bargaining agreements in order to solve disputes arising under the agreement.⁴⁸ If there is a grievance process and arbitration clause, the NLRB will only construe the collective bargaining agreement to determine unfair labor practices.⁴⁹ However, if the underlying contractual dispute is factually parallel to the unfair labor practice, and there has been an arbitration decision on the matter, the NLRB will defer to that decision.⁵⁰ The NLRB will also postpone deciding an unfair labor practice if arbitration under the collective bargaining agreement is pending.⁵¹

State and federal courts can also become involved in the interpretation of collective bargaining agreements.⁵² If there is no binding arbitration clause in the collective bargaining agreement, the court may look at the merits of the case and determine whether there was a

⁴⁵ Unfair labor practices for both employers and union are found in Section 8 of the National Relations Act. *Id.* § 158.

⁴⁶ *Id.* § 153.

⁴⁷ *See id.* §§ 159-60.

⁴⁸ The National Labor Relations Act contains no provision granting the National Labor Relations Board the power to interpret and enforce collective bargaining agreements. *See id.* §§ 151 et seq.

⁴⁹ *NLRB v. C.C. Plywood Corp.*, 385 U.S. 421 (1967).

⁵⁰ *Olin Corp.*, 286 N.L.R.B. 573 (1984).

⁵¹ *United Technologies Corp.*, 268 N.L.R.B. 557 (1984).

⁵² *See* Labor Management Relations Act § 301, 29 U.S.C. § 185 (1994) (Section 301 provides, “Suits for violations of contracts between an employer and a labor organization representing employees . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”). State courts also have jurisdiction to hear breach of contract claims under Section 301. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). State courts still must apply the federal common law of labor law. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

breach of contract.⁵³ If there is a binding arbitration clause, then the court will not look at the merits of the underlying dispute.⁵⁴ Instead, the courts will enforce the bargain the union and the employer made by ordering arbitration.⁵⁵ Most disputes over interpreting collective bargaining agreement are settled through the grievance process set forth in the contract.⁵⁶ And like the NLRB, the courts also give great deference to arbitration decisions.⁵⁷

It should be noted that the NLRB did not recognize jurisdiction over professional sports when the Wagner Act established the NLRB in 1935.⁵⁸ The NLRB first recognized that the NLRA governs professional sport leagues and their players in 1969.⁵⁹ The players have the right to unionize and bargaining collectively under the protection of federal labor law and Section 7 of the NLRA.

C. The Interplay Between Antitrust and Labor Law

Soon after the Sherman Act of 1890 was enacted, federal antitrust and labor law clashed in the courts. State and federal courts became involved in labor disputes when employers sought to enjoin union activity as a “contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce . . .” under Section 1 of the Sherman Act.⁶⁰ Of

⁵³ *Groves v. Ring Screw Works*, 498 U.S. 168 (1990).

⁵⁴ *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

⁵⁵ *Id.* (assuming the parties did not follow the grievance process outlined in the governing collective bargaining agreement). Unions are generally not bound in the collective bargaining agreement to take every grievance to arbitration, unless they agree to do such. In deciding not to take a grievance to arbitration, the union cannot act arbitrarily, discriminatorily, or in bad faith. See *Air Line Pilot Ass’n v. O’Neill*, 499 U.S. 65 (1991).

⁵⁶ Ninety-six percent of collective bargaining agreements have some form of binding grievance arbitration. Stephan F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. Rev. 351, 359 n.55 (2002).

⁵⁷ For an example of case where an arbitration decision is challenged because the arbitrator refused to admit relevant evidence, but the court still upheld the arbitrator’s decision see *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 1015 (2001).

⁵⁸ National Labor Relations Act, § 3, 29 U.S.C. § 153 (1994).

⁵⁹ C. Peter Goplerud III, *Collective Bargaining in the National Football League: A Historical and Comparative Analysis*, 4 VILL. SPORTS & ENT. L.J. 13 (1997).

⁶⁰ Sherman Act of 1890, 15 U.S.C. § 1 (2004).

the first ten cases brought under the Sherman Act, five involved unions.⁶¹ Four of the unions were found to be in violation of federal antitrust laws.⁶²

Following the use of the Sherman Act against organized labor by the courts, the United States Congress enacted the Clayton Act of 1914, which contained two provisions pertaining to labor unions.⁶³ Section 6 states, “That the labor of a human being is not a commodity or article or commerce.”⁶⁴ Section 6 made it clear that, “Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations”⁶⁵ Section 20 states, “That no . . . injunction shall be granted by any court . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment”⁶⁶

However, the United States Supreme Court took a narrow reading of the provisions in the Clayton Act by limiting the anti-injunction statutory provisions.⁶⁷ “It would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute.”⁶⁸ Again, the Congress responded to the Court’s holding by passing more legislation. The Norris-LaGuardia Act of 1932 broadens the anti-injunction language.⁶⁹ It states, “No court

⁶¹ *Highlights from the Rise of American Labor Unions*, available at http://www.felahfd.com/HFD5/ST75b_newsletter.htm#11 (last visited May 1, 2004). Of the other five cases first brought under Section 1, only one case resulted in finding an antitrust violation against the defendant. *Id.*

⁶² *Id.*

⁶³ Clayton Act of 1914, 15 U.S.C. §§ 12 et. seq. (2004).

⁶⁴ *Id.* § 17.

⁶⁵ *Id.*

⁶⁶ Clayton Act of 1914, 29 U.S.C. § 52 (1994).

⁶⁷ Duplex Printing Co. v. Deering, 254 U.S. 443 (1921).

⁶⁸ *Id.* at 472.

⁶⁹ Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101 (1994).

. . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out a labor dispute.”⁷⁰

Along with anti-injunction statutory provisions, federal antitrust and labor law also interact when provisions in the collective bargaining agreement are involved. The implicit, “nonstatutory labor exemption” is needed in order to make the collective-bargaining process work.⁷¹ The nonstatutory labor exemption allows terms agreed upon in the collective bargaining agreements to be exempt from federal antitrust law no matter how uncompetitive the terms are.⁷² However, immunity will only apply the collective bargaining agreement’s provisions that are mandatory subjects of bargaining, the product of bona fide arm’s length bargaining, and part of the employee/employer relationship.⁷³ Mandatory subjects of bargaining arise out of “wages, hours, and other terms and conditions of employment.”⁷⁴ “Other terms and conditions of employment” are those “plainly germane to the ‘working environment’”⁷⁵ and not among the managerial decisions that are at the “core of entrepreneurial control.”⁷⁶

D. Major League Baseball and Antitrust

⁷⁰ *Id.* One exception has been established by the Supreme Court from Norris-LaGuardia’s proscription against injunctions in labor disputes. *See* *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). If the collective bargaining agreement has a binding arbitration clause and the merits of the underlying labor dispute can be resolved in arbitration, then an injunction may be issued. *Id.* at 237-38.

⁷¹ *See* *Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 423 U.S. 884 (1975).

⁷² *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

⁷³ *Flood v. Kuhn*, 407 U.S. 258 (1972).

⁷⁴ National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1994); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348 (1985).

⁷⁵ *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979).

⁷⁶ *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 182 (1989).

Since 1922, professional baseball has enjoyed a special status created by the courts.⁷⁷ In *Federal Baseball Club of Baltimore v. National League*,⁷⁸ the Supreme Court gave baseball complete immunity from federal antitrust laws, including Section 1 and Section 2 of the Sherman Act.⁷⁹ Relying on the need for interstate commerce in order for federal antitrust law to be operative and categorizing the sport of baseball as an exhibition rather than commerce, the Court reasoned,

The business is giving exhibitions of base ball [sic], which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.⁸⁰

These words bound all federal courts to give professional baseball complete immunity from the Sherman Act and all subsequent antitrust acts until 1998, when Congress passed the Curt Flood Act. The immunity greatly affected the bargaining relationship between players and management because, unlike the other professional sport leagues, the players could not challenge any restrictions unilaterally placed upon them by management as a federal antitrust violation.⁸¹ The Supreme Court in 1957 made it clear that other professional sports would not enjoy such immunity by unequivocally stating, “[W]e now specifically limit the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball.”⁸²

⁷⁷ See Roger I. Abrams, *The Curt Flood Act: Before The Flood: The History Of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307 (1999).

⁷⁸ 259 U.S. 200 (1922).

⁷⁹ *Id.*

⁸⁰ *Id.* at 208-09.

⁸¹ See generally *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957) (stating that professional football was not exempt from federal antitrust law); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971) (stating professional basketball “does not enjoy exemption from the antitrust laws”).

⁸² *Radovich v. Nat'l Football League*, 352 U.S. 445, 451 (1957).

And in 1972, the Court again acknowledged that “other professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt.”⁸³

Although it was not until 1998 that baseball’s immunity was narrowed, the scope of the exemption was challenged on several occasions between 1922 and 1998.⁸⁴ In the 1972 case of *Flood v. Kuhn*,⁸⁵ a player challenged MLB’s reserve system that had been in place since 1887.⁸⁶ Flood was traded from the St. Louis Cardinals to the Philadelphia Phillies without his knowledge or consent.⁸⁷ After learning about the trade, Flood petitioned MLB’s Commissioner⁸⁸ to become a free agent, and was denied his request.⁸⁹ Although the United States Supreme Court acknowledged this illogical immunity, it refused to overrule the exemption and stated that it is up to Congress to fix the inconsistency.⁹⁰ In reaffirming the immunity for professional baseball, the Court noted four reasons for keeping the immunity in place:

(a) Congressional awareness for three decades of the Court’s ruling in Federal Baseball, coupled with congressional inaction. (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws. (c) A reluctance to overrule Federal Baseball with consequent retroactive effect. (d) A professed desire that any needed remedy be provided by legislation rather than by court decree.⁹¹

⁸³ *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972).

⁸⁴ See e.g. *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) (challenge to MLB’s rejection of the proposed move of the San Francisco Giants to Tampa, Florida).

⁸⁵ 407 U.S. 258 (1972).

⁸⁶ *Id.* at 260.

⁸⁷ *Id.* at 264-65.

⁸⁸ Bowie Kent Kuhn served as MLB’s Commissioner from 1969-1984. For information about Kuhn see *Major League Baseball, History of the Game*, available at http://mlb.mlb.com/NASApp/mlb/mlb/history/mlb_history_people.jsp (last visited May 1, 2004).

⁸⁹ *Flood*, 407 U.S. at 264-65.

⁹⁰ *Id.* at 279.

⁹¹ *Id.* at 273-274.

Overall, the Court noted that the immunity for baseball was an established aberration acquiesced to by the United States Congress and that *stare decisis* required the immunity to be upheld.⁹²

In 1998, Congress finally confronted and removed baseball's antitrust exemption for issues between players and management.⁹³ After seventy-six years of ignoring *Federal Baseball Club of Baltimore*, Congress finally stated,

[T]he conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.⁹⁴

Professional baseball's antitrust immunity is still in place, but narrowed by the Curt Flood Act.⁹⁵ Under the Curt Flood Act, MLB players could potentially challenge the league's actions pertaining to unilaterally placed restrictions on the labor market.

III. ANALYSIS

Although the Curt Flood Act of 1998 had the potential to change the bargaining relationship between the players and management in MLB, its enactment came too late. This

⁹² *Id.* at 279.

⁹³ Curt Flood Act of 1998, 15 U.S.C. § 26b (2004). See Joshua P. Jones, *A Congressional Swing And Miss: The Curt Flood Act, Player Control, And The National Pastime*, 33 GA. L. REV. 639 (1999); J. Philip Calabrese, *Recent Legislation: Antitrust And Baseball*, 36 HARV. J. ON LEGIS. 531 (1999).

⁹⁴ 15 U.S.C. § 12b (2004).

⁹⁵ For more information on how the Curt Flood Act does not impact other areas of professional baseball see generally Jennifer Dyer, *The Curt Flood Act Of 1998: After 76 Years, Congress Lifts Baseball's Antitrust Exemption On Labor Relations But Leaves Franchise Relocation Up To The Courts*, 3 T.M. COOLEY J. PRAC. & CLINICAL L. 247 (2000); Joshua P. Jones, *A Congressional Swing and Miss: The Curt Flood Act, Player Control, and the National Pastime*, 33 GA. L. REV. 639 (1999).

part will analyze how, if at all, the Curt Flood Act affects the bargaining relationship. Section A will explore the legal climate of federal antitrust and labor law after the Curt Flood Act. Section B will examine the shifting political and socio-economic climates surrounding the Curt Flood Act and whether changes since 1922 affect the bargaining relationship in MLB today. Section C will consider how ethical considerations for both players and management might impact the bargaining relationship after the enactment of the Curt Flood Act. This paper concludes by arguing that although legally the Curt Flood Act of 1998 may have slightly affected the bargaining relationship between the league and the players, the change in the socio-economic and political climates, and the ethical considerations exerts a greater influence on the relationship.

A. The Changing Legal Climate

The legal climate has certainly changed since the enactment of the Sherman Act in 1890, the Wagner Act in 1935, and the Supreme Court's 1922 decision in *Federal Baseball Club of Baltimore*. These legal changes affect the way the Curt Flood Act of 1998 can be applied and the practical considerations surrounding the bargaining relationship between the players and the management. This section will first explore the role of concerted activity permitted by Section 7 of the National Labor Relations Act ("NLRA"). Before the Curt Flood Act, Section 7 was the only tool that could be utilized by the players to force management into making concessions at the bargaining table. The addition of federal antitrust law as a tool for the players after the Curt Flood Act will also be examined. This section will also analyze whether the Curt Flood Act was enacted too late to affect the legal climate of federal labor law and the bargaining relationship between players and the league. Because of the nonstatutory

labor exemption, restrictions on the player market, most of which have been in place for several years, could possibly be placed in the collective bargaining agreement either through incorporation of league rules or actual bargaining. Also, whether a federal antitrust suit could actually be brought by the union, and to what length the players would be willing to go in order to be able to bring such an antitrust suit will be analyzed. All of these legal considerations affect how the Curt Flood Act impacts the bargaining relationship, and whether that impact made any practical difference at the bargaining table.

1. Antitrust Lawsuit as a Bargaining Tool for the Players

Before the Curt Flood Act of 1998, concerted activity was the only weapon that the union and the players had to force the hand of MLB management's hand into concessions at the bargaining table. Unlike the unions in the other professional sport leagues, which could file federal antitrust lawsuits against unilaterally imposed restrictions on the player market, professional baseball players could not gain antitrust verdicts in their favor and return to the bargaining table with the judicial victory as a starting point for negotiations.⁹⁶ Curt Flood and other players like him found out the hard way after lengthy litigation. Even though the courts agree that the exemption was contradictory and nonsensical, they refused to solve the problem and adhered to federal antitrust immunity.⁹⁷ No matter how anti-competitive a league's restriction was on players, such as the reserve clause in *Flood*, the courts would do nothing about it. The courts would merely cite *stare decisis* and instruct the players to lobby the United

⁹⁶ The National Football League, the National Basketball Association, and the National Hockey League have all been found to violate antitrust laws for restraints they unilaterally imposed on their respective player markets. See, e.g., *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971); *Linesman v. World Hockey Ass'n*, 439 F. Supp. 1049 (C.D. Cal. 1971).

⁹⁷ See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993).

States Congress for a remedy.⁹⁸

The Curt Flood Act changed the players' bargaining power by adding another potential tool to their arsenal.⁹⁹ The players can now seek help from the courts if the league unilaterally imposes restrictions on the player market. Those restrictions will be analyzed under the "rule of reason," and can be found to have an anticompetitive effect on the labor market.¹⁰⁰

The Curt Flood Act encourages cooperation between players and the league because unilaterally imposed restrictions can be found to be violations of antitrust laws. The players are no longer faced with a league that does not have to answer for unilaterally imposed anticompetitive rules. The players do not have to call a strike to force management's hand at the bargaining table because management needs the union's agreement in order to place restrictions on the player market. MLB now lacks protection like other professional sport leagues, which have had the federal antitrust laws used against them to force them into concessions during bargaining.¹⁰¹

The nonstatutory labor exemption makes collective bargaining an essential tool for restrictions on labor markets.¹⁰² Since MLB can no longer rely on its antitrust immunity granted by the Supreme Court in *Federal Baseball Club of Baltimore*, the players' union now has to agree to place restrictions on the player market into the collective bargaining agreement's terms and conditions.¹⁰³ Even if the restrictions are placed in the agreement, they

⁹⁸ See *Flood v. Kuhn*, 407 U.S. 258, 279 (1972).

⁹⁹ See Curt Flood Act of 1998, 15 U.S.C. § 26b (2004).

¹⁰⁰ See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984).

¹⁰¹ *Supra* text accompanying note 96.

¹⁰² See *Connell Constr. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 423 U.S. 884 (1975).

¹⁰³ See *Fed. Baseball Club of Balt. v. Nat'l League*, 259 U.S. 200 (1922); *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

still must be found to be a product of bona fide arm's length bargaining, to be mandatory subjects of bargaining, and to primarily affect the parties in the collective bargaining agreement.¹⁰⁴ Bargaining under the National Labor Relations Act is based on the concept of good faith and the mentality of *quid pro quo*.¹⁰⁵ Recently, the nonstatutory labor exemption in the context of professional sport leagues was examined. A college football player challenged the National Football's ("NFL") eligibility requirements for entry into the rookie draft.¹⁰⁶ The NFL's rules regarding the eligibility requirements for the entry draft were merely incorporated by reference to the league rules.¹⁰⁷ The United States Court of Appeals for the Second Circuit found that an incorporation clause of all the league rules and a waiver of the right to challenge such rules were protected by the nonstatutory labor exemption.¹⁰⁸ The court found that there had been arm's length bargaining over the incorporation clause and that the eligibility requirements were a mandatory subject of bargaining.¹⁰⁹ Since MLB is similarly situated to the NFL for management and labor issues, the MLB can only place restrictions on the player market, whether explicitly in the collective bargaining agreement or incorporated by reference, if those terms meet the requirements for the nonstatutory labor exemption. Thus, the players' union can take a more active role in what restrictions are placed on the labor market if they chose to do so.

¹⁰⁴ Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976).

¹⁰⁵ See National Labor Relations Act, § 8(d), 29 U.S.C. § 158(d) (1994). "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." *Id.*

¹⁰⁶ See Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004).

¹⁰⁷ *Id.* at 127.

¹⁰⁸ *Id.* at 139-43.

¹⁰⁹ *Id.* at

Overall, the Curt Flood Act of 1998 has given the players another “weapon,” besides the concerted activity of striking, to use against the league. In effect, it has potentially strengthened the union and weakened the league by making the league rely on the players in order to place restrictions on the players’ market. Despite the apparent rejuvenation of player’s union under the Curt Flood Act, other legal and practical considerations may make the exercise of bargaining power provided by the Curt Flood Act impractical.

2. Practical Impact of the Curt Flood Act on the Antitrust Lawsuit as a Bargaining Tool

Although the league can no longer unilaterally impose restrictions on the player market without fear of an antitrust lawsuit, the Curt Flood Act of 1998 came too late to actually help the players gain more bargaining power. First, although management might have to rely on the union to acquiescence in order to place restrictions on the player market (assuming they are mandatory subjects of bargaining and part of bona fide arm’s length bargaining) the same long-standing restrictions the league has had in place can simply be placed explicitly or by reference in the text of the collective bargaining agreement.¹¹⁰ The nonstatutory labor exemption offers the league a safe haven for the same restrictive rules it placed on the players years before. Although under the National Labor Relations Act, “good faith” bargaining is required, neither party ever has to concede to the other side.¹¹¹ Management can insist on player restrictions in place before the enactment of the Curt Flood Act without ever conceding to the players’ demands.

Second, MLB players now face the same problems as other professional sport leagues when trying to bring an antitrust suit against management. As part of the nonstatutory labor

¹¹⁰ *Connell Constr. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 423 U.S. 884 (1975).

¹¹¹ National Labor Relations Act, § 8(d), 29 U.S.C. § 158(d) (1994).

exemption, after a collective bargaining agreement is in place, an antitrust suit cannot be brought against the league for restrictions on the player market contained within the collective bargaining agreement.¹¹² To make matters worse is that the ban on antitrust lawsuits extends beyond the expiration of a collective bargaining agreement. Under *Powell v. National Football League*,¹¹³ the United States Court of Appeals for the Eighth Circuit found that the nonstatutory labor exemption applied to the collective bargaining agreement's terms after the agreement had expired.¹¹⁴ Therefore, the restrictions in the collective bargaining agreement survive the agreement's life in terms of the availability of an antitrust lawsuit.¹¹⁵ Furthermore, the Eighth Circuit found that the management of the NFL was protected from antitrust suits even after the union and the league had reached a legal impasse in bargaining.¹¹⁶ Moreover, under *National Labor Relations Board v. Katz*,¹¹⁷ management can make unilateral changes after an impasse is reached.¹¹⁸ The Eighth Circuit conceded that a league may only implement changes unilaterally if those terms were "reasonably contemplated during the bargaining process."¹¹⁹ The Eighth Circuit's holding that impasse does not end the exemption, later endorsed by the United States Supreme Court, would seriously restrict the availability of an antitrust lawsuit as a bargaining tool.¹²⁰ Simply stated, as long as restrictions on the players market are placed explicitly or by reference in the collective bargaining agreement, the Curt Flood Act is practically useless.

¹¹² *Id.*

¹¹³ 930 F.2d 1293 (8th Cir. 1989).

¹¹⁴ *Id.* at 1302.

¹¹⁵ *Id.* at 1301.

¹¹⁶ *Id.* at 1303-04.

¹¹⁷ 369 U.S. 736 (1962).

¹¹⁸ *Id.*

¹¹⁹ Goplerud, *supra* note 59; *Powell*, 930 F.2d at 1293.

¹²⁰ *See Brown v Pro Football, Inc.*, 518 U.S. 231, 231-32 (1996).

However, there is one way that the baseball players could avoid the ban on antitrust lawsuits even after impasse, but the solution is not practical. In response to *Powell*, the National Football League Players' Association took the advice of the dissent in *Powell* and ended their bargaining relationship with the league.¹²¹ The players decided to decertify their union as the exclusive bargaining representative of the NFL players, in order to pursue an antitrust suit against the league.¹²² The decision to decertify was drastic and not a practical solution to dealing with an ongoing bargaining relationship.

At first glance the Curt Flood Act of 1998 does allow the players to bring suit for anticompetitive restraints on the players market, and does grant the players the use of an antitrust suit as a tool gain leverage at the bargaining table. However, through the nonstatutory labor exemption, MLB is still heavily protected against antitrust suits. Therefore, the Curt Flood Act's elimination of MLB's antitrust immunity in labor situations hardly, if at all, changes the bargaining relationship or affects the strength of the players' union. However, the changing socio-economic and political climate that caused the United States Congress to finally address baseball's antitrust immunity may have a greater impact on the bargaining relationship.

B. The Changing Socio-Economic and Political Climates

The enactment of the Curt Flood Act of 1998 was the result of a long movement towards trying to extinguish baseball's federal antitrust immunity. A number of socio-economic and political aspects shifted to allow room for the Curt Flood Act to be enacted by the United States Congress. The Supreme Court's view of interstate commerce and federal labor law changed since 1922 and *Federal Baseball Club of Baltimore*. Although the Court

¹²¹ *Powell v. Nat'l Football League*, 930 F.2d 1293 (8th Cir. 1989) (Heaney, dissenting).

¹²² Goplerud, *supra* note 59; *See* National Labor Relations Act, § 9(a), 29 U.S.C. § 159 (1994).

chose not to overturn its 1922 decision, its urging of the use of the political process to change the antitrust immunity and the viewing of baseball as a business rather than entertainment might impact the current bargaining relationship.¹²³

No longer do courts have the easy answer of “complete immunity” when faced with an antitrust suit against MLB. Along with the changing view of the courts, the United States Congress’s ability to finally step up to the plate and take away baseball’s privileged existence impacts the bargaining relationship between players and management.¹²⁴ The players can now enter into the bargaining process with a federal statute addressing their relationship with the league. Congress’s change in position was greatly influenced by the public’s view of the game of baseball. The public’s view was fueled by the labor turmoil prevalent in MLB, especially the 1994-95 strike by MLB players.¹²⁵ Following the 1994-95 strike, professional baseball had to deal with backlash from the general public and lifetime fans of the game. All of these factors affect the bargaining relationship for both the players and the league and will be explored more fully in the following section.

1. The Court’s View—1922 v. Today

In order to understand the bargaining relationship between players and management, the judicial branch’s view of professional baseball and its antitrust status must be explored. In particular, the United States Supreme Court’s view of baseball over the years is important to understand why the bargaining relationship in baseball is changed after the Curt Flood Act of 1998. After its 1922 decision, the Court’s attitude towards professional baseball changed, and

¹²³ Flood v. Kuhn, 407 U.S. 258, 279 (1972).

¹²⁴ Curt Flood Act of 1998, 15 U.S.C. § 26b (2004).

¹²⁵ Curt Flood Act of 1997, S. 118, 105th Cong. § 1 (1997).

this in turn led the Court to urge the United States Congress to change the law.¹²⁶ In addition, the Court's changing view of labor law since establishing professional baseball's antitrust immunity must be considered.

The Supreme Court's changing view of interstate commerce as applied to professional baseball has changed since 1922. In *Federal Baseball Club of Baltimore*, the court viewed baseball as entertainment, not business.¹²⁷ The Court reasoned that traveling across state lines to play the "exhibition of baseball" did not impact interstate commerce.¹²⁸ In 1922, the Court understood baseball to only affect "state affairs."¹²⁹ The Court saw baseball merely as an ancillary activity to the national economy, failing to acknowledge its potential to become a multi-billion dollar industry.¹³⁰

By the time Curt Flood challenged the reserve system in 1972, the Court's view of baseball as entertainment bearing only slightly on interstate commerce changed drastically. In *Flood*, the Court made its feeling about baseball clear. "It seems appropriate now to say that . . . professional baseball is a business and it is engaged in interstate commerce."¹³¹ Also, the Court recognized the movement towards globalization of baseball and viewed it as a business that was involved not only in interstate commerce but global commerce as well.¹³²

In its analysis of baseball's unique antitrust situation, the Court compared baseball to

¹²⁶ *Flood*, 407 U.S. at 279.

¹²⁷ *Fed. Baseball Club of Baltimore v. Nat'l League*, 259 U.S. 200, 208-09 (1922).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *E.g.*, Major League Baseball is able to command billions of dollars for just its national broadcasting rights. It has a \$851 million five-year deal with Entertainment Sports and Programming Network (ESPN) and a \$2.5 billion five-year contract with Fox Broadcasting Company. Recent Television Rights Deals, *STREET & SMITH'S SPORTS BUSINESS JOURNAL: BY THE NUMBERS* 2004, Dec. 29, 2003, at 84. Major League Baseball's (MLB) deal with ESPN runs from 2000 to 2005 and has an average annual value of \$141.8 million for the league. *Id.* MLB's deal with Fox runs from 2001 to 2006 and has an average annual value of \$416.7 million for the league. *Id.*

¹³¹ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

¹³² *Id.* at 279.

the other professional sport leagues and could see no reason why professional baseball should enjoy a special status while all of the other professional sport leagues were dealing with antitrust lawsuits.¹³³

With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball [Club of Baltimore]* and *Toolson* have become an aberration confined to baseball Even though others might regard this as 'unrealistic, inconsistent, or illogical,' the aberration is an established one. (citation omitted)¹³⁴

Although the Court refused to overrule *Federal Baseball Club of Baltimore* in *Flood*, the Court urged the United States Congress to correct its 1922 folly and banish professional baseball from its comfortable existence.¹³⁵ The Court did not want to interfere with *stare decisis* itself. “It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce.”¹³⁶ “And that issue is for Congress to resolve, not this Court.”¹³⁷

It is also worth noting that the Supreme Court chose to ignore its own general rule of statutory interpretation and construction. The Supreme Court has repeatedly stated that exemptions from federal antitrust law should be narrowly construed.¹³⁸ Yet, in cases following and examining the 1922 case of *Federal Baseball Club of Baltimore*, the Court did not mention their own rule regarding federal antitrust law and immunity for it. The Court could have held

¹³³ See, e.g., *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957) (stating that professional football was not exempt from federal antitrust law); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971) (stating professional basketball “does not enjoy exemption from the antitrust laws”).

¹³⁴ *Flood*, 407 U.S. at 282.

¹³⁵ *Radovich*, 352 U.S. at 258.

¹³⁶ *Flood*, 407 U.S. at 282.

¹³⁷ *Id.* at 277 (quoting *United States v. Int'l Boxing Club*, 348 U.S. 236, 243 (1955)).

¹³⁸ See, e.g., *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1991).

that professional baseball's antitrust immunity was limited to the facts in the 1922 case, but it did not. Rather, the Court chose to keep a blanket exemption in place.¹³⁹

Along with the Court's view of baseball's antitrust exemption, its view about federal labor law and unionized labor in general changed as well. When the Sherman Act was passed in 1890, the Court's view of unions was not favorable.¹⁴⁰ With some prodding from Congress with the passage of the Clayton Act of 1914, the Norris-LaGuardia Act of 1932, and the Wagner Act (National Labor Relations Act) in 1935, the Court became more labor friendly. Today, however, the trend has reversed. The nonstatutory labor exemption is a good example of how the courts are more favorable to management. Anticompetitive provisions in the collective bargaining agreement are exempt from antitrust.¹⁴¹ The courts' pro-management view of labor law makes it impossible for players to challenge anticompetitive restrictions unless they end their bargaining relationship with the league altogether.¹⁴²

The courts' views of antitrust immunity for baseball and the pro-management view of labor law now have the opportunity to undermine the bargaining relationship between MLB players and the league. Before the Curt Flood Act of 1998, the courts could only cite *Federal Baseball Club of Baltimore*, no matter how they disagreed with its holding. Now, players and MLB have to be aware of the courts' attitude toward antitrust and labor law issues. The courts' views on how antitrust law should be applied to professional baseball and its views on labor law influenced Congress to enact the Curt Flood Act of 1998.

¹³⁹ *Flood*, 407 U.S. at 284.

¹⁴⁰ *Highlights from the Rise of American Labor Unions*, *supra* note 61.

¹⁴¹ *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

¹⁴² *See Powell v. Nat'l Football League*, 930 F.2d 1293 (8th Cir. 1989).

2. Congress's Involvement—The Making of the Curt Flood Act of 1998

When signing the Curt Flood Act of 1998 into law, President Bill Clinton¹⁴³ remarked, “It is sound policy to treat the employment matters of Major League Baseball players under the antitrust laws in the same way such matters are treated for athletes in other professional sports.”¹⁴⁴ So why did Congress wait seventy-six years after *Federal Baseball Club of Baltimore* and twenty-six years after being told what to do by the Court in *Flood* to enact the Curt Flood Act? As noted by President Clinton, “policy” dictated the result.¹⁴⁵ The “policy” was the change in the political atmosphere surrounding Congress, and it eventually forced Congress to respond to professional baseball’s antitrust immunity.

The Supreme Court left the door open for the political process to work and for Congress to be the one to remove baseball’s antitrust immunity. In *Flood*, the Court cited the need for Congress to overrule the common law that had developed surrounding the world of baseball.¹⁴⁶ The Court did not want to overrule itself so it felt that it was Congress’s job to rework the statutory language, which would impact both federal antitrust and federal labor law. In 1998, Congress finally stepped up and exercised its role as the law-making branch of the federal government.

The political process only began to work after the 1994-95 strike by MLB players. The strike prompted Congress to act.¹⁴⁷ Legislative history shows several attempts to adjust

¹⁴³ William J. Clinton was the forty-second President of the United States. *William J. Clinton*, WhiteHouse.com, available at <http://www.whitehouse.gov/history/presidents/bc42.html> (last visited May 5, 2004).

¹⁴⁴ Statement by President of the United States, 1998 U.S.C.C.A.N. 637 (1998).

¹⁴⁵ *Id.*

¹⁴⁶ *Flood v. Kuhn*, 407 U.S. 258, 277 (1972).

¹⁴⁷ Curt Flood Act of 1997, S. 118, 105th Cong. § 1 (1997).

baseball's antitrust immunity.¹⁴⁸ In a 1997 Senate Report, the purpose of the Curt Flood Act was explored:

As set forth . . . the "Major League Baseball Antitrust Reform Act of 1995," a bill that was reported out of the Judiciary Committee but not enacted during the 104th Congress, the unfortunate baseball strike of 1994-95 reemphasized the need for Congress to clarify its intent to apply to professional baseball the same rules of fair and open competition that are followed by all other unregulated business enterprises in this country, including other sports leagues. In short, other professional athletes and similarly situated employees have alternatives to striking specifically because of the antitrust laws. It is the Committee's belief that the applicability of the antitrust laws to major league baseball player-owner employment relations will significantly reduce the likelihood of future baseball strikes.¹⁴⁹ (footnote omitted)

This history shows that the 1994-95 strike changed the political view of baseball and its labor market. Congress was under pressure to place professional baseball at the same level as other professional sport leagues.

Congress's role in government is to make the laws and to represent the public. Members of Congress sought to represent what they perceived to be the sentiment of outraged fans and to gain political support among their constituents.¹⁵⁰ Along with being a source of political pressure upon the bargaining relationship between players and management, the 1994-95 strike changed the general public's view of professional baseball.

3. The Public's View of Baseball—The Labor Turmoil in MLB

Known as "the national pastime," baseball is watched and played by many Americans. But even before the 1994-95 strike, the general public view of professional baseball had begun

¹⁴⁸ See Major League Baseball Antitrust Reform Act of 1995, S. 231, 104th Cong. (1996).

¹⁴⁹ S. 118.

¹⁵⁰ See Major League Baseball Antitrust Reform Act of 1995, 141 Cong. Rec. S. 4545, 104th Cong. (1995) (statement of Dem. Leahy, Senator); Major League Baseball Antitrust Reform Act of 1995, 141 Cong. Rec. S. 4660, 104th Cong. (1995) (statement of Rep. Hatch, Senator).

to slowly change. As the number of years increased from when *Federal Baseball Club of Baltimore* has been decided, so had the number of other professional sport leagues.¹⁵¹ This trend away from professional baseball as the most popular sport in America is reflected in the television broadcasting contracts that other professional sport leagues were able to make. By 1970, the NFL was already receiving more money for the television rights to its games.¹⁵² MLB was paid eighteen million dollars by the television networks for their games.¹⁵³ The NFL received fifty million dollars.¹⁵⁴ By 1985, the monetary figures rose to \$160 million for baseball and \$450 million for football.¹⁵⁵ Along with dealing with competition from other professional sport leagues, the 1994-95 strike created a wider rift between professional baseball and the general viewing public. Professional baseball had to compete with itself to maintain a positive public view.¹⁵⁶

Between 1972 and the 1994-95 strike, MLB experienced eight separate work stoppages.¹⁵⁷ In August of 1994, MLB faced a big labor dispute. The general public's view of baseball was tarnished because the strike as when the regular season was about to end.¹⁵⁸ As a

¹⁵¹ Compared to the other professional leagues, Major League Baseball, which began play in 1876, was old at the time of *Federal Baseball Club of Baltimore*. The National Football League came into existence in 1922, the National Hockey League was established in 1917, and the National Basketball Association was started in 1946. National Football League, *NFL History*, available at <http://www.nfl.com/history/chronology/1921-1930> (last visited May 1, 2004); National Hockey League, *History*, available at <http://nhl.com/hockeyu/history/evolution.html> (last visited May 1, 2004); National Basketball Association, *NBA Timeline*, available at <http://www.nba.com/history> (last May 1, 2004).

¹⁵² THE MUSEUM OF BROADCAST COMMUNICATIONS, *Sports and Television*, at <http://www.museum.tv/archives/etv/S/htmlS/sportsandte/sportsandte.htm> (last visited May 1, 2004).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Paul D. Staudohar, U.S. Dep't of Labor, *The Baseball Strike of 1994-95*, at <http://stats.bls.gov/opub/mlr/1997/03/art4full.pdf> (last visited May 2, 2004).

¹⁵⁷ *Id.*

¹⁵⁸ *World Series History: Recaps and Results*, WORLDSERIES.COM, available at http://mlb.mlb.com/NASApp/mlb/mlb/history/postseason/mlb_ws.jsp?feature=recaps_index (last visited March 30, 2004).

result of the strike, the playoffs and the World Series, the championship games for MLB, were not held for the first time since 1904.¹⁵⁹ The strike lasted 232 days, and was ended not by the players or management, but because the National Labor Relations Board found an unfair labor practice by the league.¹⁶⁰

Many fans viewed the strike as a dispute between multimillion-dollar athletes and a multibillion-dollar league, and between management and players who enjoyed the game and wished for the game to be played.¹⁶¹ The 1994-95 strike alienated many long-standing, loyal fans, and some argue that baseball has never fully recovered from the strike.¹⁶² When MLB continued its operation in 1995, the fans showed their displeasure with the league and its players by not attending the games.¹⁶³ During the shortened 1995 season, attendance dropped by twenty percent from the year before.¹⁶⁴ On average, over six thousand fewer fans attended every professional baseball game played in 1995.¹⁶⁵ In the ten years since the baseball strike, MLB has yet to achieve a higher average attendance figure per game than before the strike.¹⁶⁶ The 1994-95 strike also affected television viewership. Since the 1995 season, the television ratings for the World Series have also dropped.¹⁶⁷ In only one year later, the 1995 World

¹⁵⁹ *Id.*

¹⁶⁰ Staudohar, *supra* note 156. The NLRB enjoined the league from unilaterally imposing a salary cap on the players because impasse had not been reached, and reinstated terms of the old collective bargaining agreement. *Id.* The court system upheld the injunction, and the players called off the strike after their victory in court. *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* The 1995 season consisted of 144 regular season games. *Id.*

¹⁶⁵ *MLB Attendance*, at http://kenn.com/sports/baseball/mlb/ml_numbers.html (last visited May 2, 2004).

¹⁶⁶ *Id.* Attendance in 1994 averaged 31,256 spectators per game. *Id.* The 2001 season had the highest average attendance since the strike with 29,378 spectators. *Id.*

¹⁶⁷ *Baseball Almanac, World Series: Television Analysis and Ratings Breakdown*, at <http://www.baseball-almanac.com/ws/wstv.shtml> (last visited May 2, 2004).

Series was ironically able to produce better television ratings than the 1993 World Series.¹⁶⁸

The public's reaction to the 1994-95 strike is a classic example of how much the public's view of professional sport greatly affects the bargaining relationship between players and the league. Neither the players nor a league can afford to anger the public, who is the main support of sport leagues.¹⁶⁹ Economically, just like all other professional sport leagues, professional baseball cannot survive without its fans, and both sides of the bargaining table are aware of this important fact.¹⁷⁰

A prime example of how the public's view of baseball affects the bargaining relationship since the 1994-95 strike and the subsequent enactment of the Curt Flood Act of 1998 occurred recently in 2002. Professional baseball found itself again in a labor dispute.¹⁷¹ This time, however, the outcome was different. Both sides knew they could not upset society's view of baseball by having yet another strike or lockout. As one newspaper stated, "[The public is] bewildered that, at a time when people are out of work, when a nation is at war fighting terrorism, baseball can't find a way out of its self-imposed problems."¹⁷² The league even went as far as scheduling online "Town Meetings" with the commissioner to help placate fans during the labor negotiations.¹⁷³ There was justifiable speculation about whether MLB could have survived if a labor dispute had indeed occurred instead of the players and

¹⁶⁸ *Id.*

¹⁶⁹ For some views about work stoppages of other professional sport leagues see Damon Hack, *In the N.F.L., It's Not About Money, But It Is*, N.Y. TIMES, Oct. 31, 2004, §8, at 9; Shannon Fromma, *Hockey's Fans Roll with Hits*, TIMES UNION (Albany, N.Y.), Oct. 8, 2004, at C1.

¹⁷⁰ The absence of fans not only affects a league and its teams, but other businesses depending upon the existence of a league. See, e.g., Thomas J. Ryan, *NHL Fan Gear on Ice*, SPORTING GOODS BUSINESS, Nov. 1, 2004.

¹⁷¹ Ronald Blum, *Baseball Labor Dispute Q & A*, ASSOCIATED PRESS, Aug. 13, 2002, at <http://www.kansas.com/mld/kansas/sports/baseball/3857204.htm> (last visited May 2, 2004).

¹⁷² Don Walker, *Fans Appear Upset with Both Sides in Labor Dispute*, MILWAUKEE JOURNAL SENTINEL, Aug. 20, 2002, at <http://www.dfw.com/mld/belleville/sports/baseball/3904723.htm?1c> (last visited May 2, 2004).

¹⁷³ *Baseball Commish to Go Online to Discuss Labor Dispute*, ASSOCIATED PRESS, July 8, 2002, at <http://www.newschannel8.com/Global/story.asp?S=847734> (last visited May 2, 2004).

management working out their differences.¹⁷⁴ Overall, the public's view creates the socio-economic pressure MLB faces when there is a labor dispute.

4. The Overall Effect on the Bargaining Relationship

The Court's view, Congress's enactment of the Curt Flood Act, and the public's view all affect the bargaining relationship between the players and management in professional baseball. Both the players and the league know that baseball will enjoy no more favoritism in the court system. Unilateral acts by management and rules outside of the collective bargaining agreement can be subject to federal antitrust scrutiny. The bargaining process itself became an important aspect for the league, and the political and socio-economic climates provide a need to stay out of the court system and to avoid strikes and lockouts. For the league, the provisions in the collective bargaining agreement became the most important "weapons" it had to defend itself from antitrust claims.

Most importantly, pressure placed on both players and the league to enjoy labor harmony comes mostly from the fans themselves. Baseball's numerous labor disputes have negatively affected its reputation. By passing the Curt Flood Act of 1998, Congress sent a political message to MLB, on behalf of the general public, not to strike again. The Curt Flood Act did open up another avenue for disputes to be resolved, but that avenue is arguably ineffective.¹⁷⁵ The Curt Flood Act also placed socio-economic pressure on the league to comply with the law or be subject to the treble damages awarded for antitrust violations.¹⁷⁶ Perhaps, both players and management are willing to settle labor disputes without picket lines

¹⁷⁴ See, e.g., Harris Interactive, *Can Baseball Retain Its Fans Amid the Labor Dispute?*, July 9, 2002, at <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=472> (last visited May 2, 2004).

¹⁷⁵ Clayton Act of 1914, 15 U.S.C. §§ 15c, 26 (2004).

¹⁷⁶ *Id.*

because both sides know that MLB will struggle to survive another work stoppage so soon after the 1994-95 strike and the Curt Flood Act of 1998.

Legislative history from 1997 reveals that Congress received political pressure from an unexpected source.¹⁷⁷ The league must have known that the end was near for its complete antitrust immunity, and sought to soften the impact on the bargaining relationship. Following the 1994-95 strike, the MLB players and the league agreed to seek Congress's help to adjust professional baseball's antitrust immunity.¹⁷⁸ The collective bargaining agreement signed by players and management in March of 1997, the parties agree to

jointly request and cooperate in lobbying the Congress to pass a law that will clarify that Major League Baseball players are covered under the antitrust laws (i.e. that Major League Players have the same rights under the antitrust laws as do other professional athletes, e.g. football and basketball players), along with a provision that makes it clear that passage of that bill does not change the application of the antitrust laws in any other context or with respect to any other person or entity.¹⁷⁹

This unique agreement between players and management foreshadowed the end of professional baseball's unlimited antitrust immunity.

The league wanted to ease the pressure that Congress was under after the 1994-95 strike. It also wanted to ease impact the society's view of labor disputes had on the economics of professional baseball. The existence of such a provision in the collective bargaining agreement shows that the bargaining relationship was changed by the 1994-1995 strike and the subsequent Curt Flood Act of 1998. For the first time, the players were able to bargain successfully over an issue that had limited their strength at the bargaining table since 1922.

¹⁷⁷ Curt Flood Act of 1997, S. 118, 105th Cong. § 2 (1997).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

Thanks to the prevailing political and socio-economic climates, the Curt Flood Act fulfilled the players' wishes for their labor market to be treated like the other professional sports labor markets.

IV. CONCLUSION

Professional baseball has seen many changes since the Supreme Court's decision to grant them federal antitrust immunity in 1922. *Federal Baseball Club of Baltimore* placed MLB on a pedestal, but in 1998 their status was changed when Congress enacted the Curt Flood Act.¹⁸⁰ Their new status changed the dynamics of the bargaining relationship in Major League Baseball between players and management. After the Curt Flood Act of 1998, management can no longer rely on immunity from federal antitrust law when unilaterally placing restrictions on the labor market. However, the bargaining relationship between players and management was not as affected as it could have been by the Curt Flood Act because of the nonstatutory labor exemption for terms set forth in collective bargaining agreements. The bargaining relationship was impacted more by the socio-economic climates, political climates, and ethical considerations surrounding the Curt Flood Act.

The Curt Flood Act was a culmination point in political and socio-economic climates that demanded something be done about professional baseball's recurring labor disputes, and the true test of the bargaining relationship between players and the league will come in 2006.¹⁸¹

¹⁸⁰ See *Fed. Baseball Club of Balt. v. Nat'l League*, 259 U.S. 200 (1922); Curt Flood Act of 1998, 15 U.S.C. § 26b (2004).

¹⁸¹ For a copy of the current collective bargaining agreement see Basic Agreement, at http://us.il.yimg.com/us.yimg.com/i/spo/mlbpa/mlbpa_cba.pdf (last visited May 3, 2004).

On December 19, 2006 the current collective bargaining agreement will expire.¹⁸² At the very least, the players and management agreed to delay labor tensions until after the 2006 season is completed; therefore, not having the potential to interrupt play in the middle of the season like the strike in 1994-95. By the time the agreement expires, MLB will be over ten years removed from the last strike. The Curt Flood Act of 1998 will still be there to govern the bargaining relationship, but it will be the socio-economic and political considerations that will affect the outcome at the bargaining table. The players and the league will have to weigh whether a tenth strike or lockout in thirty-four years would be extremely harmful to the game.¹⁸³

¹⁸² *Four-Year Deal Includes Luxury Tax, No Contraction*, ASSOCIATED PRESS, Aug. 30, 2002, at <http://espn.go.com/mlb/news/2002/0830/1425253.html> (last visited May 3, 2004).

¹⁸³ The 1994-95 strike was the ninth labor dispute since 1972.