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PROFESSIONAL SPORTS AND THE ANTI-TRUST LAWS

By John F. O'Dea

If, of late, you have observed that the sport pages are being read by persons who apparently are unaware of the difference between a split T and a split bat, you may credit the United States Supreme Court with the broadened interest in this section of the newspaper. Decisions affecting professional operation in the realm of sports have aroused the interest of legal scholars. Congress likewise has been piqued to inquiry by diverse rulings in an area long considered to be beyond the bourn of the anti-trust statutes.

The status of commercialized sport in relation to the Clayton and Sherman Acts was first seriously considered in 1922 in the case of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs. The action, instituted in the Supreme Court of the District of Columbia, was the outgrowth of an aborted attempt to establish a third major league of baseball teams. The plaintiff was the Baltimore Club of the short-lived Federal Baseball League. The parties defendant were both major leagues, the National League and the American League, the various member clubs of such leagues and several individual league and club officials. The complaint alleged a monopoly of the business of baseball effected by a National Agreement and a National Commission which dominated and controlled the whole structure of baseball, minor leagues as well as major leagues. The term "Organized Baseball" was employed to indicate all who were subject to the National Agreement. The complaint recited the formation and attempted operation of the Federal League, the combination and conspiracy of "Organized Baseball" to destroy such competition and the ultimate elimination of the Federal League.

The trial court was so impressed by the evidence in support of the complaint that Judge Stafford held as a matter of law that the defendants had attempted to monopolize the business of baseball and a part of interstate commerce, leaving to the jury the question of fact as to whether the Federal League was destroyed by the conduct of "Organized Baseball." The jury found in favor of the plaintiff in the sum of $80,000, which was trebled in accordance with the provisions of the Sherman Anti-Trust Act.

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1 259 U.S. 200 (1922).

An appeal was taken to the Court of Appeals of the District of Columbia. The reviewing court raised the query:

"Did the giving of exhibitions of baseball under the circumstances disclosed in the record constitute trade or commerce within the meaning of the Sherman Act?"

In answer to the question raised the court quoted from various cases, definitions of "trade" and "commerce," and concluded:

"Through these definitions runs the idea that trade and commerce require the transfer of something, whether it be persons, commodities, or intelligence from one place or person to another. The con-comitant of this concept is the principle approved by the Supreme Court of the United States that 'importation into one State from another is the indispensable element, the test, of interstate commerce.' International Textbook Co. v. Pigg, 217 U.S., 91.

"The business in which the appellants were engaged as we have seen, was the giving of exhibitions of baseball. A game of baseball is not susceptible of being transferred. The players, it is true, travel from place to place in interstate commerce, but they are not the game. Not until they come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it. The exertions of skill and agility which they witness may excite in them pleasurable emotions just as might a view of a beautiful picture or a masterly performance of some drama, but the game effects no exchange of things according to the meaning of 'trade and commerce' as defined above.

"The transportation in interstate commerce of the players and the paraphernalia used by them was but an incident to the main purpose of the appellants, namely, the production of the game. It was for it they were in business—not for the purpose of transferring players, balls and uniforms. The production of the game was the Dominant thing in their activities. In Hooper v. California, 155 U.S., 648, the Supreme Court of the United States was asked to hold that because an insurance corporation in effecting a marine insurance policy used some of the instrumentalities of commerce, it was engaged in that commerce, but the court refused to yield to the argument, and said: 'It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or the instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other;' and the court held that the business of marine insurance was not commerce, irrespective of the fact that some of its incidents were. Consult also Paul v. Virginia, 75 U.S., 168; New York Life Insurance Co. v. Cravens, 178 U.S., 389. So here, baseball is not commerce, though some of its incidents may be.

"Suppose a law firm in the City of Washington sends its members to

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3 269 Fed. 681 (D.C. Cir. 1920).
4 Id. at 684.
points in different States to try lawsuits; they would travel, and probably carry briefs and records, in interstate commerce. Could it be correctly said that the firm in the trial of the lawsuits was engaged in trade and commerce? Or take the case of a lecture bureau, which employs persons to deliver lectures before Chautauqua gatherings at points in different states. It would be necessary for the lecturers to travel in interstate commerce in order that they might fulfill their engagements, but would it not be an unreasonable stretch of the ordinary meaning of the words to say that the bureau was engaged in trade or commerce? If a game of baseball before a concourse of people who pay for the privilege of witnessing it is trade or commerce, then the college teams who play football where an admission fee is charged engage in an act of trade or commerce. But the act is not trade or commerce—it is sport. The fact that the appellants produce baseball games as a source of profit, large or small, can not change the character of the games. They are still sport, not trade. 

The opinion of the Court of Appeals did not conclude upon resolving this basic query. The court proceeded with a further consideration of the problem in the following language:

"This brings us to consider whether or not the restrictions which appellee says resulted in the monopolization denounced by the statute affected illegally the interstate features of appellee's business, that is, the movement of its players and those of the other clubs of the Federal League and their paraphernalia from place to place in the league's circuit; for it is well settled that persons not engaged in interstate commerce may be guilty of violating the statute by illegally interfering with those who are so engaged. Loewe v. Lawlor, 208 U.S., 274, 297; United States v. Trans-Missouri Freight Association, 166 U.S. 290; Northern Securities Company v. United States, 193 U.S. 197. The statute does not apply 'where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect.' United States v. Patten, 226 U.S. 525, 542. If the necessary effect is but incidentally or indirectly to restrict the commerce, 'while its chief result is to foster the trade and increase the business of those who make and operate it, it is not violative of the law.' United States v. Standard Oil Co., 173 Fed., 177, 188; Hopkins v. United States, 171 U.S., 578, 592; Anderson v. United States, 171 U.S., 604, 618; United States v. Joint Traffic Association, 171 U.S., 505, 568; and Addyston Pipe and Steel Co. v. United States, 175 U.S. 211, 244.

"Generally speaking, every player was required to contract with his club that he would serve it for one year and would enter into a new contract 'for the succeeding season at a salary to be determined by the parties to such contract.' The quoted part is spoken of as the 'reserve clause,' and it is found, in effect, in the contracts of the minor league players as well as in those of the major league players. For his services each player was given a certain consideration, and for consenting to the reserve clause, another consideration, both of which were set forth in his contract. It is provided in the rules adopted by the leagues and in the National Agree-

6 Id. at 684–85.
ment that if a player violates the reserve clause—is guilty of 'contractjumping,'—he shall be punished by being treated as ineligible to serve in any club of the leagues until he has been formally reinstated, and a list of such ineligible players is kept by the leagues.

"The number of players which each club was permitted to employ was limited to twenty-two. It is admitted that this was a reasonable number and that none of the clubs retained more players than it needed. The number of skilled players available did not equal the demand, and clubs within the appellant leagues were competing among themselves for first-class players. One of the directors of the appellee admitted that if his club had to compete for public favor with the appellants it undoubtedly would have been driven to the ranks of the latter for many of its players. If the reserve clause did not exist, the highly skilful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior an inferior clubs would be uninteresting and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain. The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz., of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players—rests the gravamen of appellee's case. It must be obvious that the restrictions thus imposed relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee in interstate commerce. Whatever effect, if any, they had was incidental, and therefore did not offend against the statute."

Upon writ of error the matter came before the Supreme Court of the United States.

The Court of Appeals was sustained. Mr. Justice Holmes delivered the opinion of the Court, stating in part:

"The decision of the court of appeals went to the root of the case, and, if correct, makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery. A summary statement of the nature of the business involved will be enough to present the point. The clubs composing the Leagues are in different cities, and, for the most part, in different states. The end of the elaborate organizations and suborganizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club

\[6\] Id. at 686-88.
crossing a state line in order to make the meeting possible. When, as the result of these contests, one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition for the world's championship between these two. Of course, the scheme requires constantly repeated traveling on the part of the clubs, which is provided for, controlled, and disciplined by the organizations, and this, it is said, means commerce among the states. But we are of the opinion that the court of appeals was right.

"The business is giving exhibitions of baseball, 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. According to the distinction insisted upon in Hooper v. California, 155 U.S. 648, 655, 39 L.ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which, in its consumption, is not commerce, does not become commerce among the states because the transportation that we have mentioned takes place. To repeat the illustrations given by the court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another state.

"If we are right, the plaintiff's business is to be described in the same way; and the restrictions by contract that prevented the plaintiff from getting players to break their bargains, and the other conduct charged against the defendants, were not an interference with commerce among the states.

"Judgment affirmed."

For a period of 27 years the Federal Baseball decision stood unchallenged and generally regarded as authority for the immunity of all professional sports from the impact of the anti-trust laws. Apparently the nature of the immunity was given little analysis. Sports were spoken of as being "exempt" from the Sherman and Clayton Acts. The precise position which sports occupied was immaterial as long as no attempt was made to invoke the acts with respect to sports operations.

In 1949 the United States Court of Appeals for the Second Circuit rendered opinions in Gardella v. Chandler, which precipitated a multiplicity of law suits. Gardella, a baseball player, had violated the renewal option

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7 Supra note 1.
8 172 F.2d 402 (2d Cir. 1949).
afforded by the "reserve clause" of his contract with the New York Giants, a member of the National League, by contracting with and playing for a team in the Mexican League. For such conduct the Commissioner of Baseball placed Gardella on the ineligible list and he was unable to obtain employment as a player in the United States when his Mexican venture paled. He brought suit against the Commissioner and others challenging the use of the reserve clause as a violation of the anti-trust statutes. The United States District Court granted a motion to dismiss the action, relying upon the federal baseball decision. The Court of Appeals by vote of two judges to one remanded the case for trial upon the merits, each of the three judges (Chase, Frank and Hand) rendering separate opinions, no one of which agreed with the other.

Justice Chase expressed his belief that Federal Baseball was still controlling law and that the sale of radio and television rights, despite developments in those fields of communication did not constitute a material difference from the sale of the exclusive right to send "play by play" descriptions of the games interstate over telegraph wires, a feature which was present in the Federal Baseball case. Justice Hand considered the difference between the telegraphing of that time (1922) and present day radio or television to be so great as for practical purposes to make a difference in kind. He believed it to be necessary to remand the case to determine whether all of the interstate activities of the defendants—those, which were thought insufficient before, in conjunction with broadcasting and television—together form a large enough part of the business to impress upon it an interstate character.

Justice Frank was not as temperate as his benchmates. In his view recent decisions of the Supreme Court had completely destroyed the vitality of Federal Baseball and had left that case but an "impotent zombie." The "reserve clause" was likened to "peonage."

An out of court settlement of the Gardella case deprived the United States Supreme Court of the opportunity of being heard upon the matter. To many, however, it was a foregone conclusion as to what that Court would do when baseball next came before it. With anticipatory hope, sired by Gardella, several baseball players rushed their grievances into the courtrooms. In the United States District Court in the Southern District of California, George Earl Toolson, dissatisfied with the assignment of his contract from Newark to Binghamton, complained against the New York Yankees and their farm system which embraced both the assignor and assignee clubs. Jack Corbett and the El Paso Club filed suit in the United

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9 Supra note 1.
10 Supra note 8 at 409.
11 Toolson v. New York Yankees, 200 F.2d 198 (9th Cir. 1952).
States District Court for the Southern District of Ohio against the Commissioner of Baseball, the National League, the Cincinnati team and others protesting the action of the defendants in respecting the "reserve clause" of a contract which bound Corbett to a team in the Mexican League. In the Southern District of Ohio, Walter J. Kowalski filed an action against the Commissioner of Baseball and others complaining that through the use of players' contracts and agreements he was deprived of the reasonable value of his services and the opportunities for professional promotion. The complaints were all dismissed by the district courts. Each dismissal was upheld upon appeal by the United States Courts of Appeal.

Certiorari was granted by the United States Supreme Court in each case. The cases were consolidated for hearing and decided by common opinion rendered in Toolson v. New York Yankees. The opinion states:

"Without re-examination of the underlying issues, the judgments below are affirmed on the authority of the Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws."

The opinion states:

"Without re-examination of the underlying issues, the judgments below are affirmed on the authority of the Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws." The sports world found great relief in the Toolson decision. Although the action had involved only the "business of baseball" the holding did not indicate that there was any particular facet of that sport which had saved baseball or which made it unique. It was determined that Congress in enacting anti-trust legislation had not intended to include the business of baseball within the scope of the Acts. Predicated upon congressional intent the decision could reasonably be expected to apply to any sports enterprise organized and operated upon a basis similar to baseball. An intent could not be imputed to Congress to exclude baseball and include hockey or football. The United States District Courts so interpreted the decision and dismissed complaints which had been filed involving boxing and football. The boxing question was the first to find its way into the Supreme Court, coming up under the Expediting Act. The case, United States v. International Boxing Club of New York, was a civil anti-trust action brought by the government in the United States District Court for the Southern District of New York. The complaint charged the defendant fight promoters with monopolization of professional championship boxing contests. Substantiat-

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13 Corbett v. Chandler, 202 F.2d 428 (6th Cir. 1953).
14 Kowalski v. Chandler, 202 F.2d 413 (6th Cir. 1953).
16 Id. at 357.
ing allegations recited leasehold rights upon the principal arenas where championship contests might be held, and the employment of "return match" and "exclusive service" contracts to control the athletes. The interstate features of the business were stressed by enumeration of the activities which impinged upon recognized interstate functions such as radio, television, travel and motion picture distribution. It was contended that receipts from sale of radio, television and motion picture rights represented on the average 25 per cent of total revenue and in some instances exceeded revenue derived from the sale of admission tickets. The Supreme Court framed the issues thusly:

"The question thus presented is whether the defendants' business as described in the complaint—the promotion of professional championship boxing contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission—constitutes 'trade and commerce among the several states' within the meaning of the Sherman Act."10

The Court answered its interrogatory in the affirmative, Chief Justice Warren stating in the opinion of the Court:

"Apart from Federal Baseball and Toolson, it would be sufficient, we believe, to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television, and motion picture rights." (citing cases)

"Notwithstanding these decisions, the defendants contend that they are exempt from the Sherman Act under the rule of stare decisis. They, like the defendants in the Shubert case, base this contention on Federal Baseball and Toolson. But they would be content with a more restrictive interpretation of Federal Baseball and Toolson than the defendants in the Shubert case. The Shubert defendants argue that Federal Baseball and Toolson immunized all businesses built around the live presentation of local exhibitions. The defendants in the instant case argue that Federal Baseball and Toolson immunized only such businesses that involve exhibitions of an athletic nature. We cannot accept either argument.

"For the reasons stated in the Toolson opinion and restated in United States v. Shubert, 75 S. Ct. 277, Toolson neither overruled Federal Baseball nor necessarily reaffirmed all that was said in Federal Baseball. Instead, 'without re-examination of the underlying issues,' (346 U.S. 356, 74 S. Ct. 79) the court adhered to Federal Baseball 'so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the Federal anti-trust laws.' We have held today in the Shubert case that Toolson is not authority for exempting other businesses merely because of the circumstance that they are also based on the performance of local exhibitions. That ruling is fully applicable here.

Moreover, none of the factors underlying the Toolson decision are present in the instant case. At the time the Government's complaint was filed, no court had ever held that the boxing business is not subject to the antitrust laws. Indeed, this Court's decision in the Hart case, less than a year after the Federal Baseball decision, clearly established that Federal Baseball could not be relied upon as a basis for exemption for other segments of the entertainment business, athletic or otherwise. Surely there is nothing in the Holmes opinion in the Hart case to suggest, even remotely, that the Court was drawing a line between athletic and nonathletic entertainment. Nor do we see the relevance of such a distinction for the purpose of determining what constitutes 'trade or commerce among the several States.' The controlling consideration in Federal Baseball and Hart was instead a very practical one—the degree of interstate activity involved in the particular business under review. It follows that stare decisis cannot help the defendants here; for, contrary to their argument, Federal Baseball did not hold that all businesses based on professional sports are outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court. See United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561, 64 S. Ct. 1162, 1178, 88 L. Ed. 1440.20

Football had been brought into the legal arena by an action instituted by William Radovich against the National Football League and its various member teams, in the United States District Court for the Northern District of California, Southern Division.21 The complaint was filed shortly after the Gardella opinions.20 It recites that Radovich, a professional football player who was under contract to the Detroit team of the National Football Club, "jumped" his contract and played for two years with the Los Angeles Dons, a member team of the rival All America Conference. Allegation is made that the National Football League attempted to monopolize the business of professional football and to eliminate the All America Conference. In order to effect such purpose a uniform players' contract was adopted which incorporated a "reserve clause" binding the player to the club with which he originally signed. Sanctions against the violation of the "reserve clause" were imposed in the form of "black-listing." It is alleged that Radovich was "black-listed" by the National Football League for playing in the All America Conference and that by reason of such interdiction he was denied employment as a player-coach in the Pacific Coast League, alleged to be an affiliate of the National Football League. Damages at the statutory trebled amount aggregated $105,000.00.

20 Id. at 241-43.
21 Radovich v. National Football League, 231 F.2d 620 (9th Cir. 1956).
22 Supra note 8.
A motion to dismiss the complaint was held under submission when certiorari was granted by the United States Supreme Court in the Toolson case. Upon the decision in Toolson that Federal Baseball was still the law insofar as it determined that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws, the district court drew the obvious inference that Congress must also have had no intention of including the comparable business of football. The Radovich case was dismissed upon citation of Federal Baseball and Toolson.

Appeal was taken to the United States Court of Appeals for the Ninth Circuit. While the matter was under review the boxing case was decided by the United States Supreme Court. The general positions adopted by the contesting parties and the resolution of such contentions are expressed in the opinion of the Court of Appeals in sustaining the dismissal. (Radovich v. National Football League.)

"The League relies on Toolson and its parent, Federal Baseball Club v. National League, 259 U.S. 200. Radovich says the International Boxing case governs and his complaint should not have been dismissed. Which of the two tides catches professional football? We confess that the strength of the pull of both cases is about equal.

"Federal Baseball v. National League survived in Toolson, we believe, only because of the historical indulgence of the Congress in not specifically bringing the sport under the anti-trust acts for 30 years after the former decision was announced. Radovich says United States v. International Boxing means that only the professional sport of baseball is left with an immunity from the application of The Sherman and Clayton Acts and that the immunity of baseball is really a historical accident. It is a good argument.

* * * * *

"If our first step is correct: that we have the right to compare, then the second one is obvious. Football is a team sport. Its operation has just about the same aspects as baseball. Boxing is an individual sport. In professional football, very good arguments do exist for the indulgence of restraints on individual players. Of course, such indulgence could not stand against the positive commands of the Congress. In boxing, arguments for restraints on the individual's right to contract seem rather hollow.

"Further, it appears reasonable to us to assume that if Congressional indulgence extended to and saved baseball from regulation, then the indulgence extended to other team sports."

The distinction between Boxing and team sports which the Court recognized, had been urged by counsel for the National Football League as a differentiating note between the Boxing and Baseball cases. It was con-

23 Supra note 14.
24 Supra note 21.
25 Id. at 622.
tended that team sports such as baseball and football are dependent upon close competition on the field of play for popular acceptance and survival. Such competition can only be provided by contests between teams of equal strength. League organization and inter-play designed to foster rivalry constitutes the lure for sports fans. Player control was essential to assure an even distribution of talent in order to supply the team balance which would provide competitive exhibitions. Unevenly balanced teams during the early days of baseball had discouraged patronage and resulted in financial loss. To overcome such a disastrous condition the "reserve clause" and other player controls were adopted. These devices were peculiar to team sports enterprises and found no place in the staging of boxing exhibitions. Placing all championship fighters under the aegis of one group of promoters could find no justification. It was monopoly for monopoly's sake.

A petition to the United States Supreme Court for a Writ of Certiorari was filed on behalf of Radovich. The Department of Justice of the United States Government offered a supporting memorandum as Amicus Curiae. The Writ issued.

The interjection of the government into the case brought about an amusing circumstance. The attorneys for the government, intent upon denying to Boxing the benefits of the Baseball decisions, had made some positive observations in their brief filed in International Boxing, which observations were most consonant with the position which football was urging. In the boxing brief the government had argued:

"The gravamen of the complaint in the Federal Baseball case was the alleged illegality of the so-called 'reserve clause' in the players' contracts, under which a player, once he signs his first contract with organized baseball, is precluded from ever playing for another club unless he is sold or released . . . . The holding in Federal Baseball that baseball was not interstate commerce had the practical effect of insulating the reserve clause from attack under the Sherman Act. . . .

"In determining whether there are practical reasons for applying the doctrine of stare decisis here, so that the exemption from the anti-trust laws which baseball now has (as a result of the reaffirmance of Federal Baseball in Toolson) should be extended to boxing, the inherently different economic characteristics of the two sports should also be borne in mind. Organized baseball is a tightly integrated organization of 382 clubs (grouped into two major and forty-nine minor leagues) . . . which play many games each season. But, unlike most businesses, successful baseball operation requires that the competing teams cooperate with each other to insure that no one team attains too great superiority over its competitors. . . . For, unless all teams in the league are of relatively equal playing ability, public interest soon wanes. ' . . . Single exhibitions, however closely contested, do not maintain public interest unless they are a part of a larger drama—the quest of a championship.' . . . The reserve clause which has
been described as the ‘keystone of the entire structure of professional baseball’ . . . is designed to achieve this equality among clubs, for by tying players to particular teams it prevents the wealthier clubs from buying up all the leading players.’

The plain import of the government’s brief in Boxing was that the “reserve clause,” grounded in the peculiar feature of the baseball business, was a reasonable restraint and did not offend against the anti-trust laws. Specifically it was stated that “Federal Baseball . . . had the practical effect of insulating the reserve clause from attack under the Sherman Act.” This was also the argument of professional football. The status of baseball before the anti-trust courts had not been attained by judicial fiat but had evolved from a long trial which had educed testimony as to the entire operation of baseball, and in particular the reasons and surrounding circumstances leading to the adoption of the “reserve clause” and the functions of the clause. The Court of Appeals in Federal Baseball must have considered the propriety of the “reserve clause” in order to make the observation:

“If the reserve clause did not exist the highly skillful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far out-strip others in playing ability that the contests between the superior and inferior clubs would be uninteresting and the public would refuse to patronize them.”

This statement was a part of the decision which in the opinion of the Supreme Court:

“Went to the root of the case.”

When Federal Baseball was challenged in the Toolson deliberations, the Supreme Court affirmed Federal Baseball “without reexamination of the underlying issues.” In the opinion of Justice Frankfurter the “underlying issues” to which the Court had reference were “the constituents of baseball in relation to the Sherman Law.” The most celebrated “constituent of baseball” was the “reserve clause.” Obviously it had been before the courts and had not been found to be offensive.

Had not Chief Justice Warren made the same observation in United States v. Shubert, where referring to Federal Baseball, he commented:

“For over 30 years there had stood a decision of this court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called ‘reserve clause.’”

26 Supra note 3.
27 Supra note 1.
28 Supra note 17.
30 Id. at 229.
The Radovich case brought professional football before the Supreme Court under legal circumstances which paralleled the courses of Toolson, Corbett and Kowalski. The complaint in each instance had charged an attempt to monopolize a professional sport through the instrumentalities of league organization, the employment of a uniform players contract embodying a "reserve clause" which wedded the player to the club which first took him under contract, and the sanction of suspension for a violation of the "reserve clause." Each complaint had been dismissed in the District Court and each dismissal had been sustained by a Court of Appeals.

Football urged the position that it presented a pattern of organization and operation identical with that which baseball had offered for judicial scrutiny. It felt that it could justly claim the benefits of the Baseball decisions under the doctrine of stare decisis since in the lexicon of Justice Frankfurter it "differed not one legal jot or tittle" from such sport in its constituents. The dissenting opinion of Justice Frankfurter in the Boxing case was cited as being here truly opposite.

Realistically, football harbored no illusion of "exemption" from the acts and declaimed the confusing employment of the term "exemption" as applied to baseball or anyone else. Football had already been informed by the United States District Court for the Eastern District of Pennsylvania in United States v. National Football League,\(^3\) that it was immaterial whether football itself was engaged in interstate commerce, it could violate the anti-trust laws by unreasonable restraints affecting radio, an obvious instrumentality of interstate commerce. It felt that baseball was in the same position and could be charged with any acts which resulted in the unreasonable restraint of an admitted field of interstate activity such as radio or television. It contended merely that certain restrictive aspects of the sports of baseball and football which concerned the internal operation of such sports were not within the orbit of the acts. Congress had referred to such aspects as those "solely related to the promotion of competition on the playing field."\(^3\)

The representatives of the Department of Justice who had in the Boxing case construed Federal Baseball as having "the practical effect of insulating the reserve clause from attack under the Sherman Act" could now only construe Federal Baseball and Toolson as being applicable solely to "the business of baseball," a form of endeavor unrelated to any other type of activity. The position taken was so extreme as to invite an interrogatory

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\(^{31}\) Supra note 17 at 248-51.


of Justice Brennan as to whether “soft-ball” might be entitled to the benefit of the decisions. Counsel for the Government was compelled to admit that he could not answer the question from the position which he occupied, apparently unaware that the composition of the ball in use today in professional baseball differs materially from that which had been employed when the game was legally dissected in 1922.

The Supreme Court reversed the dismissal of the Radovich complaint by the district court. Mr. Justice Clark delivered the opinion of the Court, stating in part:

"Respondents' contention, boiled down, is that agreements similar to those complained of here, which have for many years been used in organized baseball, have been held by this Court to be outside the scope of the anti-trust laws. They point to Federal Baseball and Toolson, supra, both involving the business of professional baseball, asserting that professional football has embraced the same techniques which existed in baseball at the time of the former decision. They contend that stare decisis compels the same result here. True, the umbrella under which respondents hope to stand is not so large as that contended for in United States v. International Boxing Club, supra, nor in United States v. Shubert, 348 U.S. 222 (1955). There they would have had us extend Federal Baseball to boxing and the theater. Here respondents say that the contracts and sanctions which baseball and football find it necessary to impose have no counterpart in other businesses and that, therefore, they alone are outside the ambit of the Sherman Act. In Toolson we continued to hold the umbrella over baseball that was placed there some 31 years earlier by Federal Baseball. The Court did this because it was concluded that more harm would be done in overruling Federal Baseball than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the court to the practical result that it should sustain the unequivocal line of authority reaching over many years.

"The Court was careful to restrict Toolson's coverage to baseball, following the judgment of Federal Baseball only so far as it 'determines that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws.' Supra, at 357. The Court reiterated this in United States v. Shubert, supra, at 230, where it said, 'In short, Toolson was a narrow application of the rule of stare decisis.' And again, in International Boxing Club, it added, 'Toolson neither over-ruled Federal Baseball nor necessarily reaffirmed all that was said in Federal Baseball . . . . Toolson is not authority for exempting other businesses merely because of the circumstance that they are also based on the performance of local exhibitions.' Supra, at 242. Furthermore, in discussing the impact of

the Federal Baseball decision, the Court made the observation that that
decision 'could not be relied upon as a basis of exemption for other seg-
ments of the entertainment business, athletic or otherwise... The con-
trolling consideration in Federal Baseball... was... the degree of inter-
state activity involved in the particular business under review.' Id., at 242-
243. It seems that this language would have made it clear that the Court
intended to isolate these cases by limiting them to baseball, but since Tool-
son and Federal Baseball are still cited as controlling authority in antitrust
actions involving other fields of business, we now specifically limit the rule
there established to the facts there involved, i.e., the business of organized
professional baseball. As long as the Congress continues to acquiesce we
should adhere to—but not extend—the interpretation of the Act made in
those cases. We did not extend them in boxing or the theater because we
believed that the volume of interstate business in each—the rationale of
Federal Baseball—was such that both activities were within the Act. Like-
wise, the volume of interstate business involved in organized football places
it within the provisions of the Act.

"If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to
answer, aside from the distinctions between the businesses, that were we
considering the question of baseball for the first time upon a clean slate we
would have no doubts. But Federal Baseball held the business of baseball
outside the scope of the Act. No other business claiming the coverage of
those cases has such an adjudication. We, therefore, conclude that the or-
derly way to eliminate error or discrimination, if any there be, is by legis-
lation and not by court decision. Congressional processes are more accom-
modative, affording the whole industry hearings and an opportunity to assist
in the formulation of new legislation. The resulting product is therefore
more likely to protect the industry and the public alike. The whole scope of
congressional action would be known long in advance and effective dates
for the legislation could be set in the future without the injustices of retro-
activity and surprise which might follow court action. Of course, the doc-
trine of Toolson and Federal Baseball must yield to any congressional
action and continues only at its sufferance. This is not a new approach. See
Davis v. Department of Labor, 317 U.S. 249, 255 (1942); compare United
States v. Rutkin, 343 U.S. 130 (1952)."

* * * * *

"We think that Radovich is entitled to an opportunity to prove his charges.
Of course; we express no opinion as to whether or not respondents have,
in fact, violated the antitrust laws, leaving that determination to the trial
court after all the facts are in."\(^{35}\)

Editorial comment and congressional activity would indicate that the
rationale of Radovich is not fully apparent. The consternation is not ill-
foundered. It would seem that when the Supreme Court in deciding Toolson
construed Federal Baseball as a case determining legislative intent it pre-
cluded itself from rendering a decision such as Radovich. Surely the Court
could not impute to Congress the intent to discriminate in favor of baseball

\(^{35}\) 352 U.S. at 449–54.
by passing legislation which was inapplicable to the business of baseball but applicable to all other sports regardless of their similarity to baseball in format and operation. From the expressions of today's Congress it is apparent that no such intent could ever have been imputed to it and it is extremely questionable that a predecessor legislature could be so read.

Legislative intent is forgotten in Radovich and the criterion substituted is rather one of extent—the degree of interstate activity involved in the staging of professional football exhibitions.

In the Radovich decision the Court quotes from itself in Shubert "The controlling consideration in Federal Baseball—was ... the degree of interstate activity involved in the particular business under review." It refers to "the volume of interstate business" as "the rationale of Federal Baseball." In vain do we scan the Toolson opinion for any like construction of Federal Baseball.

In Radovich is found the conclusion that "the volume of interstate business involved in organized football places it within the provisions of the Act." In view of the circumstance that the question of the propriety of the dismissal of a complaint was the matter under review, the only basis for determining "the volume of interstate business involved in organized football" would be the allegations of the complaint. The Radovich complaint contains some very general and indefinite allegations of "lucrative" radio and television contracts. From such allegations the Court is able to determine that "the volume of interstate business involved in organized football places it within the provisions of the Act." Yet in reviewing Toolson the same Court had before it allegations of interstate activity far more definite and substantial, but apparently did not even consider whether such allegations would support a conclusion that the volume of interstate business involved in organized baseball was sufficient to bring that activity within the embrace of the anti-trust statutes. The pertinent Toolson allegation is the following:

"That the aforesaid production of games and narration by radio and transmittal by television to the outside public in the various states of the United States is a substantial part of the business of professional baseball in that the receipts from such activities exceed $1,000,000.00 each year and exceeds the sum of 20% of the net profits of professional baseball each year."86

The opinion of Justice Clark in Radovich points out that concern as to the effect of an adverse ruling upon baseball was one of the controlling considerations in the Toolson decision. Consistency would invoke the same concern when dealing with a related business. Undoubtedly the same flood

86 Toolson Complaint Par. IX.
of litigation, the same harassment and the same retroactive effect feared in Toolson would ensue upon the repudiation of football’s “reserve clause.”

The illogic of the majority opinion is further accentuated by the converse position of Mr. Justice Harlan upon the preservation of the status quo. In suggesting that the undoing of what was started by Federal Baseball should be left to Congress, Mr. Justice Clark takes no heed of the fact that his opinion is itself a departure from Federal Baseball. Stare decisis would compel that Federal Baseball be followed to its logical result until the Congress should determine otherwise, if the resolution of the problem is to be in fact left to Congress. How much more cogent is the reasoning of Mr. Justice Harlan, with whom Mr. Justice Brennan joins:

“If the situation resulting from the baseball decisions is to be changed, I think it far better to leave it to be dealt with by Congress than for this court to becloud the situation further, either by making untenable distinctions between baseball and other professional sports, or by discriminatory fiat in favor of baseball.”37

Several sports writers and a former great baseball player have arrogated the mantle of exigetes to inform us that the Supreme Court has indicted football by reason of its player “draft.” It is true that the player selection system was mentioned by the Honorable Chief Justice during the oral argument of the Radovich case and the fact was publicized in the newspapers. However, it was promptly pointed out by counsel for defendants that the propriety of the draft was not in issue. No mention of the draft was made in the complaint nor any charge that Radovich was in any manner affected by the draft; the fact being that Radovich had never been drafted. The Chief Justice conceded that his knowledge of the existence of a draft had been derived from the newspapers. The Court carefully evidenced the absence of any influence by such feature in a footnote to the principal opinion:

“Consideration of basic differences, if any, between the baseball and football businesses, such as the football draft system, use of league affiliations, training facilities and techniques, etc., is not necessary to this decision.”

Since the ruling of the Supreme Court in International Boxing, a decision respecting the business of professional basketball has been rendered in which Boxing was followed. The action was commenced in the United States District Court for the Southern District of New York by the Washington Professional Basketball Corporation against the National Basketball Association.38 The complaint contended that a conspiracy foreclosed

37 Supra note 34 at 456.
the plaintiff from participation in the business of basketball. A motion to
dismiss was denied, with the citation of *International Boxing*.

With the *Boxing* decision supplemented by *Radovich*, legal prognosis
in the field of sports becomes relatively simple. It is a safe prediction that
the courts will deny to all sports other than baseball the benefits of *Federal
Baseball* and *Toolson*. The Supreme Court is apparently insistent that
Congress assume the task of unraveling the snarl. It is also not improbable
that the sports-minded Department of Justice will do its utmost to give all
sporting activities a day in court. At the Supreme Court hearing on foot-
ball, government counsel renewed acquaintance with the sports writers
covering the proceedings by reminding them that he had met them the
previous year at the Boxing hearing and took his leave with the comment
that he would see them next year at the hockey hearing.\(^9\)

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\(^9\) The National Hockey League Players' Association filed a $3,000,000 anti-trust suit
against the six National Hockey League clubs in New York in October, 1957. The association
is asking to void the standard player contract.