

The Rule of Unreason: the Reserve Clause before the Law, 1879-1953

By
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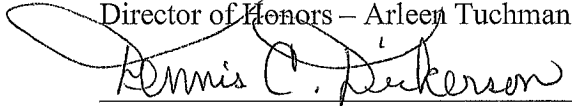
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For Jillian, my best friend in the world.

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Introduction: The Long Debate

“The truth of an idea is not a stagnant property inherent in it. Truth *happens* to an idea. It *becomes* true, is *made* true by events. Its verity *is* in face an event, a process, the process namely of its *verification*.” – William James, “The Meaning of Truth,” 1909¹

“Veritably baseball is something more than the great American game – it is an American institution having a significant place in the life of the people, and consequently worthy of close and careful analysis.” – H. Addington Bruce, “Baseball and the National Life,” *Outlook*, May 1913²

On November 18, 1953, readers of *The Sporting News*, long considered “baseball’s Bible,” found portraits of a starting nine on the second page. For once, however, these nine men were not ballplayers but the justices of the United States Supreme Court.³ The headline above three full pages of coverage declared, “O[rganized]. B[aseball]. Wins the ‘Big One’ in Court, 7 to 2: Anti-Trust Suits Called Out in High Tribunal.”⁴ The US Supreme Court had just handed down their ruling in *Toolson v. New York Yankees*, a lawsuit brought against major league baseball by two dissatisfied minor leaguers and the owner of a small Texas ball club. The Court found in favor of the defendants. A cartoon, reprinted from the *St. Louis Post Dispatch*, depicted an umpire clad in judicial robes giving the “safe” signal to a sliding baseball player whose jersey said “Reserve Clause” (See Appendix, Figure 1).⁵ The jersey referred to the system of labor restraints which bound a player to his team for life. Sportswriter Shirley Povich, in his nationally syndicated column, wrote:

A few years back, Umpire Bill McGowan was confronted at first base by an outraged ball player he had called out...Calmly folding his arms across his chest, [McGowan] addressed himself to the disputant and said; “If you don’t think you’re out, read tomorrow morning’s papers.” That’s sound advice now for that considerable number of persons who were thinking, perhaps, that Organized Ball was transgressing the Federal anti-trust laws.⁶

¹ William James, “The Meaning of Truth,” *Writings 1902-1910* (New York: The Library of America, 1987), 823.

² H. Addington Bruce, “Baseball and the National Life,” *Outlook* 104, (May 1913), pp. 104-7 from Steven A Riess (Ed.), *Major Problems in American Sport History* (Boston: Houghton Mifflin Company, 1997), 218.

³The case was decided under the first term of Chief Justice Earl Warren. The Associate Justices were Felix Frankfurter, Tom Clark, Sherman Minton, Hugo Black, Robert Jackson, William O. Douglas, Stanley Reed, and Harold Burton.

⁴ Both Major League Circuits, the National and American Leagues, alongside a cartel of Minor Leagues known as the National Association comprised Organized Baseball since 1903. *The Sporting News*, Nov. 18, 1953, “Sporting News Clippings 1950-1953,” Box 1, The Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

⁵ Referring to baseball’s system of self-governing labor rules.

⁶ Reprinted in *The Sporting News*, Nov. 18, 1953, “Sporting News Clippings 1950-1953,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

As the Court of final appeal, only a future act of the Supreme Court or an act of Congress could strike down the decision. Neither body seemed eager to do so. One prominent congressman remarked, “I always have felt that baseball is primarily a sport and not a business. I think that is the way the fans feel.”⁷ The plaintiffs along with other opponents of baseball’s monopoly need only to read the papers to know that they had lost. The hated reserve system was safe by a hair.

This thesis examines the arguments over baseball’s infamous reserve clause in the context of antitrust law, the body of laws dealing with competition and combination in industry.⁸ The clause gave the owner of a baseball club a perpetual right to renew a players’ contract; however, owners found the contracts largely unenforceable in court. The National League (f. 1876) had to use extralegal mechanisms, like boycotting and blacklisting, in order to sustain the system. Furthermore, the reserve could only persist if “Organized Baseball” gained control of all, or nearly all, baseball exhibitions. The combination wrought in 1903 by the American League, the National League, and the National Association of Professional Baseball Clubs accomplished this task.⁹ In this way, the existence of the reserve clause hinged on the preservation of the market monopoly. Thus, antitrust law, supplanted contract law as the dominant legal arena. The time period under study extends from the adoption of the contract clause in 1879 to the US Supreme Court’s retrenchment of the system in the 1953 *Toolson* decision. In particular this thesis engages with the events of the years 1949 to 1953: a period beginning with the 2nd Circuit Appellate Court’s decision in *Gardella v. Chandler* (1949) and ending with the US Supreme Court’s decision. This period also includes the House Judiciary Committee hearings that investigated monopoly

⁷ Quoted in Jack Walsh, “Historic Holmes Ruling of ’22 Upheld: Game Still Sport, Not Interstate Business,” “Sporting News Clippings 1950-1953,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

⁸ Perhaps a better description: “The antitrust laws of the United States were enacted beginning in 1890. These laws prohibit agreements that restrict competition, monopolization, attempted monopolization, and mergers and acquisitions that tend to substantially lessen competition or tend to create a monopoly.” Spencer Weber Waller, Neil Cohen, and Paul Finkelman (Eds.), *Baseball and the American Legal Mind* (New York: Garland Publishing, 1995), 75.

⁹The National Association of Professional Baseball Clubs was a cartel of Minor League baseball leagues formed in September 1901. Neil Sullivan, *The Minors: The Struggles and the Triumph of Baseball’s Poor Relation from 1876 to the Present* (New York: St. Martin’s Press, 1990), 37-41.

practices in baseball. Mainly, this thesis employs these various “texts” in order to understand the unexpected actions of the Warren Court – a puzzle which has vexed legal historians for some time.

To borrow Larry Gerlach’s turn of phrase, “despite an abundance of baseball histories, the history of baseball remains remarkably obscure.”¹⁰ The origins of the game itself remain beclouded by myth, and of the hundreds of books published on baseball each year few can be considered authoritative, critical, or academic studies. Part of the problem has been the marginalization of sport as a historical subject. Historian Pierre Bourdieu wrote, “The history of sports is a relatively autonomous history which, even when marked by major events of economic and social history, has its own tempo, its own evolutionary laws, its crises, in short, its specific chronology.”¹¹ Often this attitude has manifested itself in insular narrative histories of the game – the first of which began appearing as early as 1911.¹² From these narratives we know the chronology of baseball’s development and the major points of tension and change in that history. Historian Robert Burk’s *Much More than a Game: Players, Owners, and American Baseball since 1921* (2001), the second of two volumes, represents the modern iteration of the narrative baseball histories – though Burk is undoubtedly more critical.¹³ He argues that baseball has always been a “labor-intensive industry” characterized by “the struggle between on-field employees and management.”¹⁴

¹⁰ Larry Gerlach, “Not Quite Ready for Prime Time: Baseball History, 1983-1993,” *Journal of Sports History* 21.2 (1994), 103.

¹¹ Quoted in Charles P. Korr, *The End of Baseball as We Knew it: The Players Union, 1960-81* (Chicago: University of Illinois Press, 2002), 13.

¹² From Larry Gerlach, “Not Quite Ready for Prime Time,” 104. Albert G. Spalding’s *America’s National Game* (1911) was “the first true history of the game.” Harold Seymour’s *Baseball: The Early Years* (1960) represented “the first scholarly baseball book...Seymour, a traditional narrative historian, wrote an institutional history of the game’s organization and administration based upon a close and literal reading of texts.” In a similar vein, sociologist David Q. Voigt’s three-volume *American Baseball* (1960-1983) “elevated the study of baseball history to new qualitative levels.” Academics began to write about baseball during the 1980s.

¹³ Robert Burk, *Much More than a Game: Players, Owners, & American Baseball since 1921* (Chapel Hill: UNC Press, 2001).

¹⁴ I would also like to give credit to Professor Burk for many of the colorful narratives in the pages to follow. His work represents a wonderful melding of popular nonfiction and serious academic work. The lack of a thesis or analytic frame, however, keeps me from being “in conversation” with the work. Robert Burk, *Much More than a Game*, vii. Other baseball histories, of varying degrees of scholarship, which impacted this work include: Neil Sullivan, *The Minors: The Struggles and the Triumph of Baseball’s Poor Relations from 1876 to the Present* (New York: St. Martin’s Press, 1990); Stephen Korr, *The End of Baseball as we Knew It: The Players’ Union, 1960-81* (Chicago: University of Illinois Press, 2002); Brad Snyder, *A Well-Paid Slave: Curt Flood’s Fight for Free Agency in Professional Sports* (London: Plume Books, 2006); Jon Swanson, *The Rise of the MLBPA: One Craft Guild’s Safe Path Home* (Santa Barbara: University of California Dissertation, 2008).

The struggles of the players, major and minor, and umpires all belie the popular grand narrative of baseball as *The National Game*. His is a great business history of baseball that artfully ties together the many threads of baseball's labor problems through time. In particular, Burk's exploration of paternalistic attitudes and practices during the period 1921-1965 fit comfortably with the thrust of this thesis.

The academic study of baseball history began with Stephen Riess' seminal book *Touching Base: Professional Baseball and American Culture in the Progressive Era* (1980).¹⁵ Riess created a methodological framework for analyzing baseball culture and values in a historical context. He argued that baseball achieved success during the progressive era by articulating a narrative which accorded well with dominant values and ideas.¹⁶ "I hope to demonstrate that also crucial [to baseball's prominence] was the ideology developed by cooperative writers which made the sport appear directly relevant to the needs and aspirations of Middle America," Riess wrote.¹⁷ "That the fundamental assumptions of baseball's ideology were false did not matter since Americans thought they were true and acted accordingly."¹⁸ In a sense Riess established, to use William James' phrase, the "cash value" of these widely held beliefs about baseball; among them, the idea that baseball had positive health effects, that it could Americanize recent immigrant children, that it represented an egalitarian game, that it was a moral exercise, and so on.¹⁹ The propagation of these stories had direct and robust economic consequences for the baseball industry. In this way, his work lent me a way of thinking about culture and how it operates in an economic and legal context.

Scholarship in the field of sports economics has also been increasingly robust, and historically relevant. The seminal work in the field was published in 1956 and challenged the legitimacy of the reserve system as a mechanism of keeping team playing strengths equal – a common defense of the

¹⁵ Stephen Riess, *Touching Base: Professional Baseball and American Culture in the Progressive Era* (Westport: Greenwood Press, 1980)

¹⁶ Stephen Riess, *Touching Base*, 5-6. Additionally, Riess' edited volume *Major Problems in American Sport History* provided a number of the primary texts for the first chapter and I would be remiss not to mention their importance here.

¹⁷ *Ibid*, 5

¹⁸ *Ibid*, 223

¹⁹ William James, "The Meaning of Truth," *Writings 1902-1910*, 823; *Ibid*.

system.²⁰ Subsequent studies have confirmed the results intuited in this initial paper; namely that baseball players are systematically exploited by ownership.²¹ The economic underpinnings of this work are decidedly numerous, so I will reserve my comments for the most important of these works: Andrew Zimbalist's *Baseball and Billions* (1992). Zimbalist's wide-ranging study undergirded many of the economic ideas presented in the following work.²²

The apparently aberrant exemption of baseball from Federal antitrust law represents the one exception to the generally tepid interest in baseball as an academic subject. Particularly in recent years a number of book length works as well as innumerable law reviews have ventured to answer: *Why is baseball unique before the law?* "Most commentators thought [the exemption] was wrong at the time and now consider it ludicrous," wrote one legal group of legal historians.²³ A short essay by law professor Larry Bumgardner provides an example of one common explanation. "This special treatment of baseball," he wrote, "has been difficult to explain from a purely legal analysis. Rather, it may reflect baseball's truly unique status in American culture."²⁴ "From a fan's biased viewpoint, baseball does have a special place in American culture – and thus does deserve this special treatment."²⁵ As intuitive as this line of reasoning may be, Bumgardner does not provide a mechanism through which culture may have played a role.

The first book length work on the baseball and antitrust problem was written by Jerold Duquette, a political scientist. In *Regulating the national Pastime: Baseball and Antitrust* (1999), Duquette employed an "institutionalist" perspective in order to examine the position of baseball in the context of

²⁰ Simon Rottenberg, "The Baseball Players' Labor Market," *The Journal of Political Economy* 64.3 (Jun. 1956), 242-258.

²¹ See George G. Daly, "The Baseball Player's Labor Market Revisited," Andrew Zimbalist, "Salaries and Performance: Beyond the Scully Model," Rodney Fort, "Pay and Performance: Is the Field of Dreams Barren?" from Paul Sommers (Ed.), *Diamonds are Forever: The Business of Baseball* (Washington D. C.: The Brookings Institution, 1992), 11-28, 109-133, 134-161; Andrew Zimbalist, *Baseball and Billions: A Probing Look Inside the Big Business of Our National Pastime* (New York: Basic Books, 1992).

²² Ibid.

²³ Spencer Weber Waller, Neil Cohen, and Paul Finkelman (Eds.), *Baseball and the American Legal Mind*, 75.

²⁴ From Larry Bumgardner, "Baseball's Antitrust Exemption," in Paul Staudohar (Ed.), *Diamond Mines: Baseball and Labor* (Syracuse: Syracuse University Press, 2000), 83.

²⁵ Ibid, 95.

successive regulatory paradigms.²⁶ He argues that the historical development of baseball law can be explained by the dominant competition policy “regime” in place at the time. He divided his inquiry into four historical phases – the “market regime” (1880-1920), the “associationalist regime” (1920-1960), the “societal regime” (1960-1980), and the “efficiency regime” (1980-2000) – by employing the work of another political scientist.²⁷ While most of his observations possessed explanatory value they left vague the refined portions of the argument.²⁸ The main problem was that Duquette used context to explain a decision, *Toolson*, almost wholly *out* of context with the dominant antitrust paradigm.²⁹

A recent book by legal historian Stuart Banner went much further in illuminating the history of baseball and antitrust. Banner’s impeccably researched volume, entitled *The Baseball Trust: A History of Baseball’s Antitrust Exemption* (2014), concluded that baseball’s antitrust exemption derived principally from the sophistication of organized baseball in “working the levers of the legal system,” and secondarily from the historical contingency inherent in the legal system.³⁰ Banner counterpoised this thesis against the notion that baseball’s unique cultural status *must* account for the discrepancy – ostensibly a popularly held view.³¹ This is not entirely a straw man as we saw above in Bumgardner’s essay. While Banner’s discussion of the *Federal Baseball* case surpassed any other I have read, his discussion of *Toolson* – the keystone of the antitrust cases against baseball – possessed several trapdoors and suffered from a narrow viewpoint. One reviewer wrote, “It’s a compelling argument so long as one considers *Toolson* in a vacuum. However, Banner does not explain why the Court would have such concerns with regard to

²⁶ Jerold Duquette, *Regulating the National Pastime: Baseball and Antitrust* (Westport: Praeger, 1999).

²⁷ From Marc Allen Eisner, *Regulatory Politics in Transition* (Baltimore: The Johns Hopkins University Press, 1993), p. 1-9 as cited in Jerold Duquette, *Regulating the National Pastime*, xv-xvii.

²⁸ More than one review criticized this view as important and helpful but overly simplistic. For an example, see Harmon Gallant, “Book Review,” *Journal of Sports Economics* 1 (3), 2000, 311-314. Historian Stuart Banner wrote, “[T]his method is not helpful in explaining either the exemption’s origin or its persistence, because the ‘regimes’ are so stylized that one could use them to account for just about anything that took place during the period.” Stuart Banner, *The Baseball Trust: A History of Baseball’s Antitrust Exemption* (Oxford: Oxford University Press, 2014), N.2, p 251.

²⁹ He also spends a mere two paragraphs on the subject.

³⁰ Stuart Banner, *The Baseball Trust*, xiv-xv.

³¹ “Baseball’s cultural meaning has given rise to considerable sentimentality over the years, especially among older men, some of whom have been judges and legislators... The argument of this book, however, is that baseball’s cultural status is neither the primary reason it originally gained its exemption nor the primary reason the exemption has persisted for nearly a century.” *Ibid*, xiii-xiv.

baseball but not similar concerns with regard to myriad other industries (such as the insurance industry)...”³² Insofar as Banner dealt with the 1951 Hearings, he largely dismissed them as an extended publicity stunt by Congress designed to help baseball. Both of these books represent steps forward, but neither completely unties the baseball knot during the period under study in this work.

My own effort in solving the riddle differs principally in methodology. Uniquely, the heart of this work is the rhetoric created by the 1949 Gardella Case and the 1951 Hearings of the Subcommittee for the Study of Monopoly Power. For the former, the decisions issued by the justices, law reviews, and newspaper accounts constitute the fabric of the discussion. For the latter, the papers of Emanuel Celler, the Chairman of the subcommittee, alongside the transcript of the hearings and the report (a robust 2,000 pages of narrative) as well as press accounts illuminate the wide ranging and intense debate over baseball’s antitrust status during this period. The narratives surrounding the reserve clause, and there were many, converged during this period. Most notably, these events revealed a broad consensus among players, owners, and fans that the reserve clause protected baseball’s cultural status from the scourge of gambling and dishonesty while simultaneously upholding the economic fabric of the game. When viewed critically, the “authoritative” narrative created by these events, by which I mean the Gardella case and the Celler Hearings, sufficiently explains the persistence of the reserve clause in an increasingly unfriendly antitrust context, and the outlier status of Organized Baseball.³³ The overall result, underscored by the Supreme Court in *Toolson* (1953), was one of profound ambiguity. Legal actors had a difficult time reconciling the manifest illegality of the reserve clause with the story woven by its supporters.

³² Mitchell Nathanson, “The Baseball Trust: A History of Baseball’s Antitrust Exemption by Stuart Banner (review),” *NINE: A Journal of Baseball History and Culture* 22(1), 2013, 169-171. He continued, “which had likewise been free of Congressional regulation for years but no longer. As a consequence of the Court’s expanded interpretation of the Commerce Clause, all of those industries were now seemingly subject to retroactive liability as well—a reality that did not seem to concern the Court much at all. Why the Court should issue a ruling that was flatly incorrect merely to protect baseball, as opposed to all these other industries, from retroactive liability is a topic that demands clarification.” Mitchell Nathanson, “The Baseball Trust: A History of Baseball’s Antitrust Exemption by Stuart Banner (review),” *NINE: A Journal of Baseball History and Culture* 22(1), 2013, 169-171.

³³George Galloway’s classic *The Legislative Process in Congress* (New York: Crowell, 1964) defined the framework for understanding the 1951 Hearings. See also, Stephen Lowe, *The Kid on the Sandlot: Congress and Professional Sports: 1910-1992* (Bowling Green: Bowling Green University Popular Press, 1995)

As for the structural, procedural, and doctrinal aspects of antitrust, a work published by the American Bar Association entitled *The Rule of Reason* (1999) proved the most informative.³⁴ This monograph laid out the history, procedures, and legal reasoning of the “rule of reason” standard – the test used by the Federal Courts in antitrust cases beginning in 1911.³⁵ The test, which seeks to discern reasonable and unreasonable restraints of trade, had some common law antecedents including some cases which were centuries old by the time Congress passed the Sherman Act.³⁶ Though some forms of restraint of trade (e.g. boycotting or price fixing) are illegal *per se*, most cases fall under the rule of reason criteria: 1. “Anticompetitive effects” 2. “Market power” 3. “Intent” 4. “Procompetitive effects” 5. Less restrictive alternatives 6. Degree of economic integration.³⁷ In this way, litigants must be able to craft a coherent economic and historical narrative regarding a particular business practice. While many cases appear straightforward, antitrust law becomes complicated very quickly. Ellis Hawley’s classic *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (1966) illustrated this point well.³⁸ Hawley argues that many schools of credible thought vied for dominance during the New Deal years as policy makers attempted to reconcile the logics of centralization and decentralization. The most important work which influenced this paper, however, is Rudolph Peritz’s *Competition Policy in America: History, Rhetoric, Law* (1996).³⁹

The theoretical framework of this thesis largely derives from the work of two men: Stephen Riess and Rudolph Peritz. Stephen Riess’ book was discussed above. Peritz viewed antitrust jurisprudence as the outcome of rhetorics “in tension.”⁴⁰ “[T]his book is a history of rhetorical encounters, of debate,

³⁴ James E. Hartley et al. *The Rule of Reason* (Chicago: ABA Antitrust Section, 1999).

³⁵ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

³⁶ See James E. Hartley et al. *The Rule of Reason*, 22-33.

³⁷ *Ibid*, 102-126.

³⁸ Ellis Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton: Princeton University Press, 1966).

³⁹ Rudolph J. R. Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford: Oxford University Press, 1996). Additionally, Theodore Kovaleff’s *Business and Government During the Eisenhower Administration: A Study of the Antitrust Policy of the Antitrust Division of the Justice Department* (Athens: Ohio University Press, 1980) helped immensely in situating *Toolson* within the emergent Eisenhower antitrust policies.

⁴⁰ Rudolph Peritz, *Competition Policy in America*, 5.

disagreement, and struggle,” he wrote.⁴¹ More than that, however, Peritz illustrated the importance of the values, cultural assumptions, and rhetorical strategies which undergirded these narratives. Peritz described the work as postmodern: “Perhaps all that amounts to is a postmodernist restatement of Justice Holmes’s maxim about legal formalism – that general principles do not decide concrete cases. The same can be said for general structures.”⁴² This is not to say that trends do not emerge or that the history of competition policy is indeterminate, rather this view suggests that the debates are incredibly complex. This is not a progressive history. The texts that I read in my work on this thesis have convinced me of the rightness of this view. I agree that “[i]deas have a complex relationship with facts” and “[t]heory and practice seem to be more interdependent, dialogical, and historical than objectively correct or necessary.”⁴³ Consequently, *Competition Policy in America* had a major impact on the theoretical and methodological contours of this study.

The problem of baseball’s monopoly came into acute focus during the period from 1949 to 1953. Debate raged in Court, in Congress, in law journals, and in the sporting press. The debate concerned the “reasonableness” of baseball’s self-governing laws, in particular the reserve clause. The baseball business had been exempt from antitrust law since 1922 on the grounds that the Federal government did not have jurisdiction over the business. Baseball’s ownership, in alliance with the games’ brightest stars and largely supported by the press, argued that baseball was economically *sui generis*, unique, due to the need for competitive balance, fair competition, and clean play. As such, baseball’s rules *promoted* competition rather than *restricted* it, and *any* application of the antitrust laws would destroy the National Game. Yet on a deeper level the argument concerned questions of culture, values, and history which conflated baseball’s economic uniqueness with its cultural uniqueness. The 1949 Gardella lawsuit and the 1951 Hearings of the Subcommittee for the Study of Monopoly Power constituted the central acts of these

⁴¹ Rudolph Peritz, *Competition Policy in America*, 6.

⁴² *Ibid.*, 5.

⁴³ *Ibid.*

debates. As Associate Justice Brandies wrote in 1918, legality rested on “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”⁴⁴ The judges and Congressmen tasked with determining the answer to the reserve clause puzzle produced many different answers. This thesis argues that the Subcommittee hearings verified one particular rhetorical thread, established during the Gardella case, made it true, and, intentionally or not, established the “reasonableness” of baseball’s practices. The confusing *Toolson* decision, the final act in this long debate, can be understood best as a response to this rhetoric by the Court. The Supreme Court, unable or unwilling to refute the dominant narrative, deflected the issue through legal sleight of hand. The exemption now rested not on a question of jurisdiction, but on the stronger ground of reason. In this way, I argue that baseball’s exemption primarily rested on a verified set of economic ideas embedded with cultural assumptions rather than on the skills of baseball’s owners, the antitrust paradigm, or culture alone.

I forcefully depart from Banner here. He writes, “The argument of this book...is that baseball’s cultural status is neither the primary reason it originally gained its exemption nor the primary reason the exemption has persisted for nearly a century.”⁴⁵ Quibbling over degrees of effect is not the purpose of this paper, rather, I argue that the complicated, often maddening, arguments surrounding the reserve clause incorporated cultural and moral elements alongside economic arguments and all these considerations got rolled up in legal decision making. Further, the quiet assumptions and pieces of evidence which prefigured, restrained, and defined these various narratives – for example, the notion that players were “dishonest” or the historical construction that the reserve clause was “necessary” – played a large role. More than any other factor, this cacophony led to the Supreme Court’s odd decision in the *Toolson* case. My methodology and theoretical frame, with innumerable thanks to Peritz, privileges rhetoric and puts the

⁴⁴ *Chicago Board of Trade v. United States* 246 US 231, 238 (1918), Opinion of the Court.

⁴⁵ Stuart Banner, *The Baseball Trust*, xiv.

many reserve clause narratives at the center of this story thereby providing the key to untying the baseball antitrust knot.⁴⁶

Chapter one of this thesis covers the emergence of the reserve clause in 1879 and tracks the tumultuous debate over the “The Reserve Clause: The Greatest Problem in the World Today”, as one contemporary author hyperbolically stated, through the first decades of the 20th century until Oliver Wendell Holmes Jr.’s landmark decision in *Federal Baseball v. National League* (1922).⁴⁷ The early contours of the debate are flushed out, as are the earliest histories of the game. Chapter one examines the emergence of the lexicon and language embedded in these rhetorics, especially in regards to honesty and gambling. Finally, the chapter examines the ways in which these debates played out in different legal settings, namely, under contract law and antitrust law, as well as the development of the latter. Chapters 2 and 3 cover the period of immediate interest to this study: 1949-1953. Chapter 2 encompasses the *Gardella v. Chandler* (1949) decision and the 1951 Hearings. In particular, the chapter focuses on the narratives created by these tumultuous events as they bore on the impending Supreme Court Case in *Toolson*. Chapter 3 connects these threads to the peculiar actions of the Supreme Court in 1953 and after in creating the baseball outlier. It is the central contention of this piece that the Nine did so because of the basic ambiguity of the reserve clause and the controversy surrounding it. In the end, unreason reigned supreme.

⁴⁶ I hope the reader will agree.

⁴⁷ David Fultz, “The Reserve Clause: The Greatest Problem in the World Today,” *Baseball Magazine*, March 1913, 31 cited in Stuart Banner, *The Baseball Trust*, 11. *Federal Baseball Club of Baltimore Inc. V. National League Of Professional Baseball Clubs*. 259 U. S. 200 (1922), Opinion of the Court.

Chapter 1: “The Greatest Problem in the World Today”: Baseball, Rhetoric, and the Law 1879-1922

The trouble started in 1879. Before the opening of that season, professional baseball was a mess, an unprofitable mess. Beset by gambling, “revolving”, team failure, and single team domination many leagues failed to finish a single season in the black.¹ Owners regularly offered huge contracts to players on competing teams and the players broke with their contracts to sign the bigger offers. Iterated several times this practice of contract-breaking and resigning was termed “revolving.” Many teams failed. For example, the Cleveland Forrest Citys went into receivership halfway through the 1872 season.² The big market clubs like the Boston Red Sox had the habit of buying the best players off of weaker clubs only to find they had no one to play towards the end of the season. “It may be noted that the Chicago club played four games in Philadelphia on its present trip,” the *Chicago Tribune* wrote in 1875, “And that their hotel bill in the city during their stay were more by \$60 than their receipts from all the five games [sic].”³ Alfred Spink described the state of baseball in 1875: “Bribery, contract breaking, dishonest playing, poolroom manipulation, and desertion of the players became so commonplace that the respectable element of patrons began to drop out of attendance.”⁴ Underwater, uncertain, and besmirched by gambling, the eight biggest association clubs met in the Grand Central Hotel on February 2nd to form a new league – the National League. Out of this crucible came the business of Major League Baseball. Yet the new league was beset by the same problems which had plagued the National Association. By 1879 the owners of the newly organized National League had had enough of this money-losing enterprise, and set out to fix what they viewed as the problem: the exorbitant salaries paid to ballplayers.

¹ Harold Seymour, *Baseball: The Early Years* (New York: Oxford University Press, 1960), 75-6, from Steven Riess, (ed.). *Major Problems in American Sport History*, (Boston: Houghton Mifflin Co., 1997), 223-225.

² How great of a name is the Forrest Citys? Ibid.

³ “Sporting – The Professional Baseball Association – What it Must do to be Saved,” *Chicago Tribune*, Oct 24, 1875, from U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, pp. 1509.

⁴ Quoted in *Organized Baseball: Report of the Subcommittee on Study of Monopoly Power*, Emanuel Celler, chairman (Washington D.C.: Government Printing Office, 1952), 214.

This chapter examines the emergence of the reserve clause debate and the major contours of the various arguments – in favor, opposed, indifferent, etc. – concerning the system through the period 1879-1922. Section I examines the reasoning behind the reserve clause and the owners initial justifications for the system. Section II explores the history and rhetoric of the Players’ League, a breakaway effort by the Brotherhood of Professional Baseball Players to establish their own league. The failure of John Montgomery Ward’s proletarian circuit combined with his admission that his league could not survive without a reserve clause constituted strong evidence in favor of the *necessity* of the clause. This section is couched in the larger development of baseball history and baseball writing. Section III, spanning the first two decades of the 20th century, examines two threads which converge around the person of Hal Chase: the legality of the reserve clause under contract law and the problem of gambling in baseball. Chase, one of the dirtiest game-fixers to ever play the game, was the plaintiff in one of the biggest baseball cases of the early 20th century: *American League v. Chase* (1914). The simmering problem of dishonest play, variously attributed to the low moral character of “well-paid” players and to the cheapness and power of the owners, became incorporated into the reserve clause debate after the explosive 1919 World Series. Finally, section IV takes apart the Supreme Court decision in *Federal Baseball v. National League* (1922), which established baseball’s judicial antitrust exemption. This last section will also examine the major contours of antitrust law as they weighed on the baseball debates, and thereby establish the proper context for considering the period 1949-1953 in the succeeding chapters.

The Birth of the Reserve Clause

William Hulbert, the president of the Chicago White Stockings, along with Aruther Soden, the owner of the Boston club, came up with an ingenious solution to the money problem. What if the teams ceased the “unhealthy competition” for one another’s players?⁵ On September 30, 1879, in Buffalo, the owners agreed secretly to not bid for a designated five players on each club. Thus the “reserve clause” was born. The contract clause itself alongside a system of intricate enforcements effectively gave owners

⁵ Stuart Banner, *The Baseball Trust*, 4-5.

the perpetual right to renew a players' contract. The players were bound to their teams for life. The reserve rule initially extended to only the five best players on a club, but the scope of the clause expanded and eventually covered the whole roster.⁶ One of the first forms of the reserve clause, from 1890, read,

Eighteenth. It is further understood and agreed that the said party of the first part shall have the right "to reserve" said party of the second part for the next season ensuing...and said right or privilege is hereby accorded the said party of the first upon the following conditions...First, that the said party of the second part shall not be reserved at a salary less than that mentioned...except by consent of the party of the second part. Second, that the said party of the second part, if he be reserved by the said party of the first part...shall be one of not more than fourteen players then under contract.⁷

On its face, the reserve clause contained only a right to renew for the following year based on the mutual accord of the contracting parties. In other words it was an agreement to work out a new contract.

However, the owners contended that the reserve clause contained a perpetual right to renew. Moreover, the clause had both a positive and negative hold on the player. The club reserved him but also restrained him from playing with other clubs – this second agreement found purchase in various forms, usually in an agreement to "observe all league rules" which included the rule that no reserved player could play for another team. A "tampering" rule also barred players and managers from negotiating with clubs that did not reserve them.⁸

In order to enforce this double mechanism, the League devised two tactics: the blacklist and the boycott. The blacklist was used to keep players from "jumping" their contracts. If a player signed with a team that did not reserve him he would find himself on the blacklist.⁹ Once on the blacklist he could not play baseball for any National League club. The boycott was used to keep owners from offering contracts

⁶ The number of reserved players reached eleven in 1883, twelve in 1885, expanded to fourteen in 1887, and finally covered the whole roster by the early 1890s. Andrew Zimbalist, *Baseball and Billions*, 4.

⁷ Reproduced as evidence in the lawsuit *Metropolitan Exhibition Co. v. Ward* (1890) from Spencer Weber Waller et al. (eds), *Baseball and the American Legal Mind*, 204.

⁸ *Constitution of the National League of Professional Base Ball Clubs*, adopted Feb 2, 1876, from U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, pp. 1095-1110.

⁹ "Sec 39. Any manager or player, while under contract with, or reservation by, a League club, who shall, without the consent of such club, enter the service of any other club in any capacity, shall be liable to expulsion by said League club. Whenever a club suspends or expels a manager or player, that club shall at once notify the Secretary of this League." *Ibid*, 1104.

"Sec 40. No manager or player who has been suspended or expelled, shall at any time thereafter be allowed to play with, or serve in any capacity, or appear on the playing field or bench of any League club..." *Ibid*.

to reserved players. Any team employing a “blacklisted” player would be expelled from the league, could not compete against teams in the league, or play in those same teams’ ballparks.¹⁰ These extralegal mechanisms succeeded in giving the reserve clause teeth. A player who jumped a contract would bring about the end of his career in the National League. “Any manager or player,” the National League Constitution read, “while under contract with, or reservation by, a League club, who shall, without the consent of such club, enter the service of any other club in any capacity, shall be liable to expulsion by said League club.”¹¹

As the decade progressed the owners introduced a standard form contract and expanded the use of the reserve list to include all the players’ in a given club. Before each season, the league secretary circulated the lists of reserve players amongst the various clubs.¹² The secret deal, designed for the sole purpose of reducing salaries, predictably sparked animosity amongst the players. Their most obvious recourse was to play in a different league. The fates of many competing leagues rose and fell throughout this tumultuous period; among them were the American Association (1883-1891), the Players’ League (1890), the Western League/ American League (1894-1899, 1901-present) and innumerable smaller circuits like the Eastern League (1892-1911) or the New England League (1891-1899).¹³ These clubs, not party to the reserve clause agreement, could in theory sign whomever they pleased subject only to their own financial restraints – and they did so. Many National League players signed with other leagues at higher salaries.¹⁴ Two early historians of the game, John Evers and Hugh Fullerton, described this process as follows: “The players revolted against this reduction in salaries, organized a rival league, and salaries

¹⁰ *Constitution of the National League of Professional Base Ball Clubs*, Feb 2, 1876, from U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, pp. 1095-1110.

¹¹ *Ibid*, 1107.

¹² *Ibid*, 1102.

¹³ Lloyd Johnson and Miles Wolff, *The Encyclopedia of Minor League Baseball* (Durham: Baseball America, Inc., 1997), 91-94.

¹⁴ Stuart Banner, *The Baseball Trust*, 35-40.

leaped to five times that figure bringing disaster upon everyone concerned.”¹⁵ After both the American Association and Players’ League folded after the 1890 season, salaries fell by an average of 40 by 1893.¹⁶

The Irony of the Players’ League

The newly organized National League behemoth did not go unchallenged for long. Fueled by an intense dislike for the reserve clause, a new league, run by the Brotherhood of Professional Baseball Players (f. 1885), the industries’ first union, and other financial backers, began operating in 1890. John Montgomery Ward, the star shortstop for the New York Giants and a graduate of Columbia Law School, wrote the manifesto of the union and the new league and published it in *Lippincott’s Magazine* under the title, “Is the Base-ball Player a Chattel?”¹⁷ The owners had already positioned themselves on the rhetorical battlefield. When he introduced the reserve clause, William Hulbert declared, “The Expenses of many of the clubs have far exceeded their receipts, attributable wholly to high salaries.”¹⁸ The reserve clause prevented *unhealthy* competition, he said a few days later. “Professional baseball is on the wane,” Albert Spalding, a former player and baseball executive, wrote in 1881, “Salaries must come down or the interest of the public must be increased in some way. If one or the other does not happen, bankruptcy stares every team in the face.”¹⁹ The reason for baseball’s commercial failure could not have been clearer: the avarice of disloyal, greedy players.

Thus, Ward stepped into the breach. The brotherhood had a laundry list of grievances. Ward’s men wanted an end to the reserve system as well as the \$2,500 salary cap.²⁰ In order to win back lost ground, the players organized in the Brotherhood needed an alternative narrative for baseball’s commercial failure. The owner’s claimed that extortionate player salaries had made the game unprofitable

¹⁵ John Evers and Hugh Fullerton, *Touching Second: The Science of Baseball* (Chicago: The Reilly & Britton Co., 1910), 28.

¹⁶ E. C. Alft Jr, “The Development of Baseball as a Business: 1876-1900” from U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 1432.

¹⁷ John Montgomery Ward, “Is the Base-Ball Player a Chattel?” *Lippincott Magazine* 40 (May 1887), pp. 310-319 from Steven Riess (ed.), *Major Problems in American Sport History*, pp. 216-218.

¹⁸ *Buffalo Commercial Advertiser*, September 30 and October 3, 1879, quoted in Stuart Banner, *The Baseball Trust*, 5.

¹⁹ Quoted in Andrew Zimbalist, *Baseball and Billions*, 47.

²⁰ They also wanted an end to the additional duties demanded of them like collecting tickets and sweeping up the ballpark. From *Ibid*, 5.

and the reserve clause necessary. Ward countered that the real problem lay with the unscrupulous practices of the owners.²¹ “In order to justify this extraordinary measure and distract public attention from the real causes making it necessary, the clubs tried to shift the blame to the players,” Ward wrote. “They attempted to conceal entirely that the real trouble lay in the extravagant and unbusiness-like methods of certain managers...”²² The story crafted by ownership, he continued, beclouded the real intent of the owners which was to obtain an illegal monopoly of the baseball business.²³ The reserve clause had little to do with buoying competitive balance and limiting “unfair” salaries. In fact, the former problem had hardly been helped at all – in 1889 Boston bought fifteen players for a total of \$73,000 paid, of course, to the teams rather than the players.²⁴

Ward did not stop after refuting the narrative laid down by ownership. He looked to reframe the issue as a moral crusade of victims oppressed by industry. “The reserve clause is like a fugitive slave law,” the article read, “which denied him a harbor or a livelihood and carried him back, bound and shackled, to the club from which he attempted to escape. Once a player’s name is attached to a contract, his professional liberty is gone forever.”²⁵ *Liberty and slavery rather than expenses and balance sheets.* The moral tones of the piece framed the issue as one of rights rather than one of economics. The clubs, Ward argued, made “money *rightfully* belonging to the players [emphasis mine].”²⁶ The Chicago Cubs had recently sold future Hall-of-Famer King Kelly to the Boston Beaneaters for \$10,000, Ward pointed out.²⁷ Ward had not been the first to criticize the reserve clause on moral grounds, nor would he be the last. The coercive labor practices of the Major Leagues did not go unnoticed in the popular press. *Life* magazine wrote in 1887: “A baseball player may double and treble in professional skill and value, and the

²¹ John Montgomery Ward, “Is the Base-ball Player a Chattel?” *Lippincott Magazine* 40 (May 1887): 310-319 from Steven Riess (Ed). *Major Problems in American Sports History*, 216.

²² *Ibid*, 217.

²³ *Ibid*, 217.

²⁴ Andrew Zimbalist, *Baseball and Billions*, 5.

²⁵ John Montgomery Ward, “Is the Base-ball Player a Chattel?” *Lippincott Magazine* 40 (May 1887): 310-319 from Steven Riess (Ed). *Major Problems in American Sports History*, 217

²⁶ “The whole [reserve system] is a conspiracy, pure and simple, on the part of the clubs by which they are making money rightfully belonging to the players.” *Ibid*.

²⁷ *Ibid*, 218.

principal profit will accrue, not to the player himself, but to the club...Such a system is rotten.”²⁸ Charles Lichtman, a labor leader, was quoted in a 1902 article saying, “it is possible practically to condemn a man to perpetual slavery under baseball law.”²⁹ On March 27, 1892 the Salt Lake Herald previewed the upcoming season by noting that the National League and American Association had joined forces in “one monster combination.”³⁰ The reporter continued, “It is sort of a baseball trust for no player can be employed who does not knuckle down to the rules imposed. There has been a general cutting down of salaries as the first thing, and \$5,000 pitchers last year now receive but \$4,000.”³¹ Elements of the popular press rankled at the perceived abuses of baseball’s magnates, but the sympathy only extended so far.

In this way the reserve clause question encompassed a wide range of questions and considerations. Was the system economically justified? Morally defensible? A protection of the fans? A money grab by the owners? A defensive action against greedy players? The dishonest player and the avaricious owner became almost stock characters. The choice to compare baseball to slavery established both the fundamentally moral nature of the debate and also the economic underpinnings of the reserve clause. (The reserve clause created an *economic* system akin to peonage, and therefore the system was immoral by analogy.) This first round of debate left untouched purely legal questions: Was the reserve clause an unenforceable contract? Did the system constitute an illegal restraint of trade? Did the courts have jurisdiction on the issue? But these questions would be answered in short order, albeit differently depending on the institutional setting. How well these stories would hold up in the court of law remained to be seen.

The baseball historian Bill James described the lawsuits that plagued the early game of baseball colorfully: “Players sued owners, owners sued players, players sued players, teams sued teams, leagues sued teams, Curly sued Moe, Moe Sued Larry, Larry sued Curly and they all got together and sued the

²⁸ *Life*, July 28, 1887, quoted in Stuart Banner, *The Baseball Trust*, 6.

²⁹ James R. Burnet, “Critical Opinions Upon Recent Employers’ Liability Legislation in the United States,” *Journal of Social Science* 40 (1902), 80, quoted in Stuart Banner, *The Baseball Trust*, 6.

³⁰ “The World of Sport: The Outlook this Season from the Diamond”, *Salt Lake Herald*, Mar 27, 1892.

³¹ *Ibid.*

cameraman; Lord, it was an awful time, and then the war started.”³² These suits fell into two bodies of law: contract law and antitrust law. The earliest suits dealt with the former, older branch of common law. The National League attempted to enjoin (restrain) players from playing with other teams for breach of contract, but most courts declined to issue injunctions. As a principle of the common law, if a players’ services were “irreplaceable” an injunction was generally granted. If a player was average and easily replaceable the injunction was generally not granted.³³

Leading up to the opening of the first Players’ League season in 1890, the National League sought to keep their best players from jumping to the new ball clubs. The suit against Ward made it to the New York Supreme Court. In *Metropolitan Exhibition Co. v. Ward* (1890) Justice O’Brien refused a preliminary injunction to restrain Ward from playing for the Players’ League during the upcoming season.³⁴ “We have the spectacle presented of a contract which binds one party for a series of years and the other party for ten days, and of the party who is itself bound for ten days coming into a court of equity to enforce its claims against the party bound for years,” Justice O’Brien wrote.³⁵ Baseball lost *Metropolitan Exhibition Co v. Ward* (1890) and a similar suit against Buck Ewing shortly thereafter. The headline in the *Sporting Life* on April 2nd, 1890 read: “BASEBALL. BEATEN AGAIN: THE LEAGUE LOSES THE EWING SUIT.”³⁶ The most prominent exception was in *Philadelphia Ball Club, LTD. v Lajoie* (1901) wherein the Pennsylvania Supreme Court granted an injunction against Napoleon Lajoie after he broke his contract with the Phillies in order to play for the American League club in Philadelphia, the Athletics.³⁷ This proved the exception rather than the rule. Most courts found that the Uniform Players’ Contract, in particular the reserve clause, lacked mutuality and basic equity – the player was

³² Bill James, *The Bill James Historical Baseball Abstract* (New York: Villard Books, 1986), 110.

³³ This legal doctrine at common law had been recently reinforced in 1850 in England. In *Lumley v. Wagner*, the opera singer Johanna Wagner was enjoined from breaking her contract on the grounds that her services were unique and irreplaceable. A similar case involving the actress Fanny Morent Smith was decided in 1870 in New York. See Stuart Banner, *The Baseball Trust*, 13-15.

³⁴ *Metropolitan Exhibition Co. v. Ward* (Jan. 1890) from Spencer Waller, Neil Cohen, and Paul Finkelman (Eds), *Baseball and the American Legal Mind* (New York: Garland Publishing, Inc., 1995), 199-211.

³⁵ *Ibid.*

³⁶ “Baseball Beaten Again: The League Loses the Ewing Suit”, *Sporting Life*, April 2, 1890.

³⁷ Ban Johnson, the commissioner of the American League, had Lajoie traded to Cleveland where Pennsylvania jurisdiction would not be in force. Stuart Banner, *The Baseball Trust*, 20-23.

bound to a club for life and the club was bound to the player not at all. The reserve clause was illegal and unenforceable as a contract.

Unable to keep players from fleeing to the new league, the National League declared economic war and attempted to drive the fledgling circuit out of business. The National League scheduled games in order to conflict with the Players' games; however, by May of 1890, things did not look good for the National League. They seemed to be taking more punishment than they were dishing out. More to the point, the Players' League strategy of foregoing a reserve system in favor of three-year contracts seemed to be paying dividends as more and more stars left for Ward's league. "The new League is doing well in the aggregate," *The Sporting News* reported on May, 24, 1890, "receiving the larger share of the patronage...there is no financial trouble...all the players, without a single exception, are behaving admirably; there is no larking or dissipation of any kind."³⁸ The upstart Players' League outdrew the Senior Circuit at the ballpark and played a more exciting brand of ball. Despite unseasonably bad weather, John Montgomery Ward's league had not folded within a month, but thrived. One Umpire, quoted in the *Sporting News*, said simply, "The Brotherhood boys mean business."³⁹ There are no dull games played in the Players' League," the *Sporting News* reported, "Too much credit cannot be given Ward for the way he has handled his men so far."⁴⁰ Through July the outlook for the Players' League remained sunny. With the exception of Cleveland and Buffalo all clubs had made money, League spokesman claimed in the press.⁴¹ Despite the sunny predictions, by August the buzzards had begun to circle. The pressure put on the fledgling circuit by the National League seemed to be driving the Players' League out of business. Adrian Constantine "Cap" Anson, a player who chose to stay in the National League, gave an interview in which he said,

There are some men that don't know a good thing when they see it...That's just what's the matter with these ball players. They had soft snaps, soft beds to sleep in, first-class grub to eat and sure money at the end of the month. They were not satisfied and they bolted. They know that they

³⁸ "Players' League: A model Campaign in the New Organization. The Teams Are Playing Good Ball – Players in Accord – The League Solid Financially At All Points," *The Sporting News*, May 24, 1890.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ "Views of Base Ball Leaders as to the Situation," *The Sporting News*, July 5, 1890.

made a big mistake and no doubt they're sorry for it, but it is too late... Their League can't last because it is not founded on right principles.⁴² Other National League players piled on the ailing Brotherhood. John Clarkson, a pitcher for the National League club in Cleveland said briefly that the National League better protected the interests of "all those concerned."⁴³ The specter of the greedy player thus raised by fellow players, these comments must have seemed quite a boon to the beleaguered National League owners. Here again, "*the right principles*" conflated business practice with morality, and tied together inexorably the cultural and economic aspects of the reserve clause.

By the end of the season the Boston Reds (PL) had outdrawn the Boston Beaneaters (NL) by almost 50,000 fans; the Pittsburgh Burghers (PL) over the Pittsburgh Innocents by over 100,000; the Chicago Pirates (PL) topped the White Stockings (NL) by nearly 50,000; the New York Giants (PL) took in 90,000 more fans than their NL rivals – also the New York Giants. The only market which split was Cleveland with the Infants and the Spiders both drawing some 50,000 fans.⁴⁴ Somehow, this had not been enough. The Players' League folded after only one season. A defeated John Montgomery Ward wrote, "In order to get men to invest capital in baseball, it is necessary to have a reserve rule... The reserve rule, on the whole, is a bad one; but it cannot be rectified save by injuring the interests of the men who invest their money, and that is not the object of the brotherhood."⁴⁵ At the close of 1890, only one Major League remained standing, and that was the National League.

The 1890s did not go well for the players. Salaries soared when the Western League, sometimes called the "beer and whiskey circuit" because they served alcohol at ballparks unlike the NL, declared itself the American League and began to compete directly with the NL for players and fans. As long as competing leagues arose, the reserve clause did not operate as intended. But what would happen when no league was willing to offer a contract to a reserved player? History did not wait long to provide the

⁴² "League Views: No Notion of Compromise Entertained," *The Sporting News*, August 2, 1890. Bonus fact: Cap Anson was the first Major Leaguer to record 3,000 career hits.

⁴³ Ibid

⁴⁴ Lloyd Johnson and Miles Wolff, *The Encyclopedia of Minor League Baseball*, 115.

⁴⁵ Quoted in *Organized Baseball: Report of the Subcommittee on Study of Monopoly Power*, Emanuel Celler, chairman, 215

answer. The 1903 National Agreement brought together three separate entities: the National League, the American League, and the National Association of Professional Baseball Leagues.⁴⁶ The grand union came at the end of a tumultuous period “trade war” during which player salaries skyrocketed. Each party agreed to respect the reserve lists of the others as well as exclusive territory rights. Although the reserve clause was found unenforceable at common law, the 1903 National Agreement made this point mute. In this way, antitrust law supplanted contract law as the most crucial regulatory area for baseball’s labor structure. The reserve system could only work alongside a perfect, or near-perfect, monopoly of baseball playing, and consequently striking at this edifice became the object of players and owners disillusioned by the status quo.

Despite various legal reverses, Baseball’s barons managed to articulate a narrative which fit the evidence. In choosing to argue in favor of the reserve clause in order to obtain competitive balance, the owners made it an issue for the fans. Sportswriter Hugh Fullerton wrote in *American Magazine* in 1912, “The reserve clause was placed in contracts to prevent the wrecking of leagues by competitive bidding whereby the richest club could always win.”⁴⁷ Given the prominence of New York teams at the top of the table, this assertion seemed intuitive. If teams could retain their own talent at cost and did not have to bid competitively with bigger rivals then small cities would not lose their best players. During one of the earliest antitrust cases against baseball, August Herrmann, then president of the Cincinnati Reds, testified that the reserve clause existed to allow smaller teams to retain talent.⁴⁸ Without relative parity between teams the outcome of games would be largely predetermined and therefore a rather dull affair which would attract few spectators.⁴⁹

The basic ambiguity of the reserve clause, and the inability of legal actors to reconcile seemingly mutually exclusive narratives each backed by evidence did not emerge during the postwar period, but

⁴⁶ “The National Agreement of September 11, 1903,” from *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, pp. 521-544.

⁴⁷ Hugh S. Fullerton, “The Baseball Primer,” *American Magazine* 74 (1912), 204 from Stuart Banner, *The Baseball Trust*, 9.

⁴⁸ “Affidavit of August Herrmann” from Stuart Banner, *The Baseball Trust*, 9.

⁴⁹ Steven Riess, *Touching Base*, 154.

rather had been part of the business from the very start. John Evers, a second basemen for the Chicago Cubs and the famous pivot man in the poem “Baseball’s Sad Lexicon” (commonly “Tinker to Evers to Chance”), wrote a book with the sportswriter Hugh Fullerton in 1910 entitled *Touching Second: The Science of Baseball*. Evers summed up the ambiguity of baseball law with the following:

Understand in the first place that baseball “law” is illegal, contrary to civil law, in direct violation of the Federal laws regulating combines and the blacklist, and in principle, directly in defiance of the Constitution and of the Rights of Man. Yet, because of the nature of the peculiar business, the greater part of baseball law is necessary.⁵⁰

The fundamental inequity of the reserve clause proved difficult to reconcile with its manifest necessity.

The history of baseball, the first volumes of which began to reach publication alongside *Touching Second*, demonstrated the necessity of *some* mechanism of restraining player revolving and the support of roughly equal competition among clubs. The necessity of so-called “Baseball Law” derived from the peculiar aspects of the business itself.⁵¹ Yet the various rules governing baseball ultimately resided in the dishonesty of the players themselves. “Many of the most iniquitous laws in force,” Evers wrote, “resulted from defensive action by the owners to prevent the repetition of disgraceful acts by players.”⁵² These acts included game fixing, gambling, breaking a contract, and just about anything else the owners could think of.

David Fultz, a former Major Leaguer, wrote an article for *Baseball Magazine* in 1913, hyperbolically titled, “The Reserve Clause: The Greatest Problem in the World Today.” Fultz reflected the general consensus when he wrote, “We have given this situation a great deal of thought for a number of years, and although realizing the individual hardships brought about by the reserve rule, we have never

⁵⁰ John Evers and Hugh Fullerton, *Touching Second*, 42.

⁵¹ John Evers and Hugh Fullerton, *Touching Second*, 27, 43-46. “In that respect, baseball is one of the oddest of all business ventures. Eight club owners in the league are partners in business, sharing receipts, sharing prosperity and adversity. Yet all the time these business partners must strive to beat each other on the field and to take each others’ players away from them... Without the reserve, and the illegal agreements between owners, some players would receive high salaries for a few years, possibly bankrupt some clubs without much improving their playing strength, destroy the power of owners and managers to discipline players, and, for a time at least, weak clubs would be weakened and strong ones strengthened.”

⁵² *Ibid.*

yet been able to formulate any substitute for it.”⁵³ The great sportswriter Grantland Rice wrote, “As long as a city of 400,000 is forced to compete with a city of 3,000,000 or 5,000,000 and keen competition is the basis of the sport, what is to be done about it?”⁵⁴ This broad accord had two constituent parts: I. The reserve clause was immoral and illegal II. The reserve clause was necessary because of the economics of baseball as illustrated by history. The debate was about to take a turn however. The problem of gambling in baseball laid about like dry kindling, and the match was about to be lit. Soon, the owners would have a much stronger case for the reserve clause.

The Benedict Arnolds of Baseball?

Since the inception of professional baseball after the close of the War Between the States, baseball was a sport for gamblers. In at least one incident a gambler rushed onto the field to tackle an outfielder attempting to catch a fly ball.⁵⁵ A still more fantastic story concerned a sharpshooter who sent bullets cracking at the feet of a fielder chasing down a batted ball. In 1877, four players on the Louisville Club threw games in exchange for \$100 apiece in retaliation for not being paid their salaries.⁵⁶ The *Spirit of the Times*, a St. Louis paper, wrote in 1878, “Baseball, as a professional pastime has seen its best days in St. Louis. The amount of crooked work is indeed startling, and the game will undoubtedly face the same fate elsewhere unless some extra strong means are taken to prevent it.”⁵⁷ In describing a typical baseball crowd the *New York Sun* reported that “the Irish” seemed principally interested in betting money, and didn’t much care about the result as long as they won their bets.⁵⁸ You could bet on anything in baseball – from the call on the next pitch to the total number of hits in the game. “The police noticed the betting began as soon as the umpire announced the pitchers,” one newspaper wrote in 1920,

The men would spring up with bills in their hands and bet. Others would bet on balls and strikes, others on foul balls, errors, wild throws and outs. Some even bet the pitcher would use a certain

⁵³ David Fultz, “The Reserve Clause: The Greatest Problem in the World Today,” *Baseball Magazine*, March 1913, 31 cited in Stuart Banner, *The Baseball Trust*, 11.

⁵⁴ *Evening Public Ledger* (Philadelphia), January 13, 1915, from Stuart Banner, *The Baseball Trust*, 58.

⁵⁵ Eliot Asinof, *Eight Men Out: The Black Sox and the 1919 World Series* (New York: Henry Hold and Co., 1963), 11.

⁵⁶ *Ibid*, 11-12; Steven A. Riess, *Touching Base*, 62..

⁵⁷ Eliot Asinof, *Eight Men Out*, 11.

⁵⁸ *New York Sun*, June 16, 1884 from Steven Riess (ed.) *Major Problems in American Sport History*, 216.

windup on his next ball, or that Whatisname would try to steal second and be caught. They bet on anything, and bet any amount from a dime to a hundred dollars.⁵⁹

Baseball pools, one of the more popular types of betting systems, grouped together players or teams into a “stake” and the combination that scored the most runs won the pool.⁶⁰ People of all walks of life bet on the games in almost any place from the pool hall to the barber shop to the workplace. Even women got in on the game. In the great baseball novel, *The Celebrant*, the Polo Grounds is depicted as a hotbed of gambling; “Every inning, sometimes every pitch, was worth a wager.”⁶¹

The reality of the gambling interest in baseball belied the rhetoric of baseball’s ownership and their allies in the sporting press whose livelihood depended just as much on the success of the enterprise. In order to distinguish baseball from boxing and horseracing, the two other big-time commercial sports of the early 20th century, the owners emphasized the morality of the game. In fact, this was enshrined in the very founding of the National League: “The objects of this League are...to surround it with such safeguards as to warrant absolute public confidence in its integrity and methods.”⁶² Far from unconnected with the business aspects of the sport, these paeans to morality and virtue principally served to line the pocket books of baseball’s barons and the writers who covered the sport. Various, baseball provided a “safety valve” for urban passions, contributed to the health of the fan and the player, contributed to the “Americanization” of the hordes of immigrants, and upheld rural values in a society increasingly populated by urban automatons.⁶³ The social appeal of baseball included the view of the game as “clean” and “vigorous” competition safe from organized crime and gambling interests. After all, the sport could hardly teach American youth the value of sportsmanship and physical fitness if players routinely threw games. The efforts to craft an image of the game, in order to attract middle-class, white audiences,

⁵⁹ “Detectives Swoop Down in Cubs-Phillies Game,” *New York Times*, May 24, 1920.

⁶⁰ Similar to fantasy baseball and its various iterations today. Steven A. Riess, *Touching Base*, 62.

⁶¹ Eric Greenberg, *The Celebrant* (New York: Bison Books, 1993).

⁶² *Constitution of the National League of Professional Base Ball Clubs*, adopted Feb 2, 1876, from U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 1095.

⁶³ From Steven A. Riess, *Touching Base*, 17-26; Addington Bruce wrote, “Baseball, then, from the spectator’s standpoint, is to be regarded as a means of catharsis, or perhaps better, as safety-valve.”

succeeded despite the widespread and pervasive gambling influence. In 1913 *American Magazine* editors remarked, “Baseball has given our public a fine lesson in commercial morals. It is a well paying business...for it must be above suspicion. Nobody dreams of crookedness or shadiness in baseball.”⁶⁴

The gambling “problem” only increased with the profitability of the National Game. As Bill James wrote, “In fact, of course, the Black Sox scandal was merely the largest and ugliest wart of a disease that had infested baseball at least a dozen years earlier and grown, unchecked, to ravage the features of a generation.”⁶⁵ And it did not seem as if a concerted effort was being made to root out the crookedness. In the ballparks, the only gambling site over which they had control, most owners posted signs declaring gambling illegal, but only enforced the measure in an arbitrary and capricious way. When fans began to make noise about the more “undesirable elements” at the ballpark, clubs sent in private detectives and police. One such raid sent four spectators at the Polo Grounds to jail and a much more robust forty-seven were rounded up by plain clothes policemen at Wrigley Field.⁶⁶ Yet even this extreme effort only brought with it a fine of one dollar.

Baseball’s ownership not only ignored pervasive gambling, but contributed to it. Riess wrote, “Professional baseball was a nexus between politics and organized crime.”⁶⁷ Julius Feishmann, president of the Cincinnati Reds, and Frank Farrell, owner of the New York Highlanders, belonged to New York’s gambling syndicate and ran racing stables.⁶⁸ Charles Stoneham of the Giants operated a horse racing track in Cuba, and Jacob Ruppert of the Yankees owned one stateside. Charles Weeghman had close ties with Mont Tennes, the boss of Chicago’s gambling syndicate.⁶⁹ The profitability of the game did not depend on actually rooting out the gamblers, but only in appearing to do so.

⁶⁴ “In the interpreter’s House,” *American Magazine* 76 (September 1913): 96, quoted in Steven A. Riess, *Touching Base*, 21.

⁶⁵ Bill James, *Historical Baseball Abstract*, 134.

⁶⁶ “Launch Drive on Baseball gamblers,” *New York Times*, May 25, 1920.

⁶⁷ Steven Riess, *Touching Base*, 61.

⁶⁸ The following from Steven A. Riess, *Touching Base*, 60.

⁶⁹ *Ibid*, 61.

In cities without a large racing culture, like Boston and Pittsburgh, baseball betting proved particularly pervasive. The owners contributed in still other ways to the problem. Steven Riess wrote, “Many of Pittsburgh’s professional gamblers actually attended games free on passes obtained from councilmen and other municipal authorities.”⁷⁰ Owners also chronically underpaid players, a consequence of the lopsided bargaining position afforded by the reserve clause. Concerning the infamous Black Sox scandal, Stephen Jay Gould wrote, “Sox owner Charles Comiskey was not only the meanest skinflint in baseball, but a man who could cruelly flaunt his wealth, while treating those who brought it to him as peons.”⁷¹ The owners did take seriously one aspect of the gambling problem, however, and that was throwing games. Fan betting could be tolerated without harming the image of the game, and so could ownership’s intimacy with organized gambling. It was not so with game fixing. The press and the public took notice, and felt personally affronted when games themselves were not on level.

Harold Homer Chase, considered by many to be the best first baseman in the game, developed a reputation as a player who could be bought. In 1910, George Stallings charged him with throwing a game.⁷² In 1917, during a tie game in the ninth inning, Cincinnati manager Christy Mathewson, called “The Christian Gentleman” for his uprightness, called in Jimmy Ring to close the game. Chase walked to the mound and said, “I’ve got some money bet on this game, kid. There’s something in it for you if you lose.”⁷³ After he unintentionally lost, Chase slipped him \$50 the next day. Mathewson, fed up with Chase, shipped him off to the Giants where he was suspended for throwing games in 1919.⁷⁴ After migrating to the Pacific Coast League in 1920, he was banned from the league for bribing an umpire. Bill James wrote that Chase, “presumably holds the all-time record for games fixed.”⁷⁵ Other players, of course, fixed games including Ty Cobb and Tris Speaker. In 1914 a new league emerged: The Federal League. Chase jumped his contract with the White Sox to play for the Buffalo Buffeds of the new league.

⁷⁰ Steven A. Riess, *Touching Base*, 63.

⁷¹ Stephen Jay Gould, “Introduction,” in Eliot Asinof, *Eight Men Out*, xvi.

⁷² Bill James, *The Bill James Historical Baseball Abstract*, 135.

⁷³ Eliot Asinof, *Eight Men Out*, 14-15.

⁷⁴ Bill James, *The Bill James Historical Baseball Abstract*, 135.

⁷⁵ *Ibid.*

The resulting action in *American League Baseball Club v. Chase* (1914) placed the reserve clause in the spotlight once again.⁷⁶ The dual moral logics of the reserve clause thus emerged into full view. Would the court decide in favor of baseball's dirties cheat or the monopolistic monolith of Organized Baseball? Was Chase a peon to be pitied or a gambler to be despised?

Though the antitrust status of Major League baseball was not at issue in the case of *American League Baseball Club v. Chase* (1914), the case was another of the injunction cases, Judge Bissell used the industrial organization of baseball in order to illustrate the basic inequalities which underlay the Uniform Player Contract. Keene Addington, Chase's lawyer, wanted to broaden the case, and concluded his argument by saying, "There is more at stake here than Chase's individual case."⁷⁷ In the strictly legal aspects of the case, J. Bissell refused an injunction. He wrote that the American league did not come into the court of equity "with clean hands" and therefore the court would not issue an injunction on their behalf.⁷⁸ The scope of the facts presented did not restrain Bissell's pen however. He continued, "The quasi peonage of baseball players under the operations of this plan and agreement is contrary to the spirit of American institutions, and is contrary to the spirit of the Constitution of the United States."⁷⁹ "While the question of the dissolution of this combination on the ground of its illegality is not before this court for decision," Judge Bissell wrote, "The court will not assist in enforcing an agreement which is a part of a general plan having for its object the maintenance of a monopoly."⁸⁰ For Bissell, no economic justification could uphold a system of bondage so repugnant to American values. The immorality of monopoly outweighed the charges that the reserve clause only served to protect fans and owners from the players. Addington's attempt to broaden the case beyond the questions presented evidently appealed to Bissell. In this way, the rhetoric undergirding the Players' League outlasted the Players' League itself.

⁷⁶ *The American League Baseball Club of Chicago v. Chase* 149 N.Y.S. 6 (1914).

⁷⁷ Not to be confused with Addington Bruce, the baseball writer. Memorandum for Plaintiff in Reply, August Herman Papers, Box 108, File 24, from Stuart Banner, *The Baseball Trust*, 52.

⁷⁸ *The American League Baseball Club of Chicago v. Harold H. Chase* (July 1914) from Spencer Waller, Neil Cohen, and Paul Finkelman (Eds), *Baseball and the American Legal Mind*, 163-189.

⁷⁹ *Ibid*, 187.

⁸⁰ *The American League Baseball Club of Chicago v. Harold H. Chase* (July 1914) from Spencer Waller, Neil Cohen, and Paul Finkelman (Eds), *Baseball and the American Legal Mind*, 188.

Whatever solace this provided to opponents of the reserve clause, the celebration was short-lived. Two years after the *Chase* case, the Baltimore Terrapins, a Federal League ball club, brought suit against the National League on antitrust grounds which I will return to in the next section. First, however, we must examine an event which permanently changed the character of the reserve clause debate: the 1919 World Series.

The 1919 World Series has reached the status of myth in American history. From *The Natural* to *Field of Dreams* to *The Great Gatsby*, the tragic tale of the men who threw the World Series has retained the ability to enthrall. “As [Shoeless Joe] Jackson departed from the Grand Jury room,” the Chicago *Herald and Examiner* reported, “a small boy clutched at his sleeve and tagged along after him. ‘Say it ain’t so, Joe,’ he pleaded. ‘Say it ain’t so.’ ‘Yes, kid, I’m afraid it is,’ Jackson replied. ‘Well, I never would’ve thought it,’ the boy said.”⁸¹ The whole nation would not have thought it. The shock of the nation seemed proportional to the audacity of the fix – this was not some two-bit regular season game, but the World Series. Yet the reality of baseball gambling lay beneath a thin veneer of rhetoric. “To me, baseball is as honorable as any other business. It has to be, or it would not last out a season,” Charles Comiskey, the skinflint owner of the White Sox told his biographer in 1919, “Crookedness and baseball do not mix.”⁸²

But crookedness and baseball did mix, and the resulting cocktail proved explosive. At the outset, the 1919 World Series had looked to be a coronation rather than a contest. “It was said that Chicago fans did not come to see them win: they came to see *how*,” Eliot Asinof wrote.⁸³ The White Sox boasted the legendary second baseman Eddie Collins, the natural “Shoeless” Joe Jackson, defensive genius Buck Weaver, and ace Eddie Cicotte. The Cincinnati Reds, known as the “Miracle Men” for their unlikely capture of the National League Pennant, looked puny before “the all-powerful colossus from the West.”⁸⁴ The Series, however, would not be decided by talent: eight White Sox players had conspired with

⁸¹ Chicago *Herald and Examiner*, September 30, 1920 from Eliot Asinof, *Eight Men Out*, 121.

⁸² Eliot Asinof, *Eight Men Out*, 39

⁸³ *Ibid*, 5.

⁸⁴ *Ibid*.

gamblers to fix the World Series. To the shock of the nation, the Reds managed to win the title, and while charges of crookedness flew around in the subsequent winter, nothing specific landed. When Hugh Fullerton, the great sportswriter and personal friend of Charles Comiskey, attempted to blow the lid off of the gambling “secret” on December 15, the sporting press exploded in anger. The hornets’ nest, however, had been kicked. The next year, on September 29, 1920, the following headline found purchase in every major American newspaper: “Eight White Sox Players are Indicted on Charge of Fixing 1919 World Series; Cicotte got \$10,000 and Jackson \$5,000.”⁸⁵ The narrative surrounding the necessity of baseball’s reserve would be indelibly marked by the Black Sox, for here was *prima facie* evidence of the players’ avarice and willingness to deceive not only the games’ owners but the public. The players had to meet charges of fraud in a 1921 trial. In part because of the theft of a number of confessions, the jury found the players innocent. Yet they still had to face “baseball law” or rather the stern justice of the first Commissioner of Baseball Kenesaw Mountain Landis. He suspended the players for life.⁸⁶

Without plunging too far into the counterfactuals, how would baseball history have differed without the exposure of the fixed series? “We could focus on many themes,” Stephen Jay Gould wrote, “from the persistence of the Reserve Clause and the failure of players’ organization...to the continuing power of the Commissioner of Baseball.”⁸⁷ The extent to which the great tempest of the Black Sox Scandal scarred baseball history is difficult to discern. However, the events of 1920 very clearly changed the balance of power in the moral arena of the reserve clause debate. No longer did the players hold the moral high ground. The events cast a shadow in both directions, not only changing the debate but demanding a reassessment of baseball’s past.

These various stories only mattered insofar as they provided justification for Organized Baseball’s peculiar system of peonage. Back in the courtroom, the cogency of this narrative would serve organized baseball well. These moral positions became tied together with economic considerations in the

⁸⁵ Eliot Asinof, *Eight Men Out*, 146.

⁸⁶ Steven Riess, *Touching Base*, 65-66.

⁸⁷ Stephen Jay Gould, introduction to Eliot Asinof, *Eight Men Out*, xvi.

defense of the reserve clause. The players needed to be restrained from dishonesty in order to make money, thus the reserve clause regulated the business of baseball, to the benefit of the public, rather than restraining competition. The legal problem, obviously, involved more than one question. The jurisdiction of Federal Courts over baseball did not seem at all clear, nor was it clear how the antitrust statutes should deal with personal service and labor.

Rounding Third and Heading for Holmes

Competition policy constitutes the branch of business regulation which deals with monopoly.⁸⁸ The preponderance of enormous business combinations called “trusts” during the last decades of the 19th century precipitated the passage of the Sherman Act (1890), which made criminal monopolization and attempts at monopolization in federal jurisdiction. “Modern” antitrust began after the watershed *Standard Oil* case of 1911, when the judicial standard for deciding cases under the Sherman Antitrust Act, and later under the Clayton Act of 1914, became the so-called “rule of reason” standard.⁸⁹ A certain subset of business activities would be declared illegal *per se*, but most would be judged on their merits. Under this standard the judiciary decided the reasonableness of a restraint by balancing a number of considerations: the anticompetitive effects, the procompetitive effects, the intent, and the alternatives.⁹⁰ Though the reserve system possessed elements, such as boycotting, which were illegal *per se*, the Court had a colorful relationship with labor issues to put it mildly. Moreover, the standard in fact had *two* hurdles: the first question in any antitrust case came down to jurisdiction. Did the business in question constitute interstate

⁸⁸ In classical economic thought, competition represented the natural tendency of a free market economy. The advantages of competition were manifest and accrued to the consumer. On the other end of the spectrum lay monopoly, which could only be created by dishonesty or government intervention. Though trusts and holding companies largely faded, the name stuck. The book on antitrust most useful to this project has been Rudolph Peritz's *Competition Policy in America: History, Rhetoric, Law* (Oxford: Oxford University Press, 1996). For an account of the passage of the Sherman Act see pages 9-58

⁸⁹ Common law cases against restraint of trade date all the way back to 1415 with the *Dyer's Case*. The rule of reason standard itself can be traced to English law of the early 19th century. A law review article from 1888 stated, “the well-settled doctrine of both this country and of England, that a contract in partial restraint of trade must be reasonable.” In this way the period from 1890 to 1911 may be considered something of an aberration in that the Supreme Court pursued a literalist take on the Sherman Act. From James Hartley et al., *The Rule of Reason* (Chicago: American Bar Association Section of Antitrust Law, 1999), 16-45; see also Rudolph Peritz, “Rule of Reason,” *Hastings Law Journal* 40, 1988, 285-342

⁹⁰ For more on the application of these “Tests” see James Hartley et al. *The Rule of Reason* (Chicago: American Bar Association Monograph, 1999)

commerce? The second, if the petitioners established jurisdiction, then the court decided “on the merits” of the case or rather decided on the reasonableness of the restraint in question. Throughout the 1910s, commonly known as the *Lochner* era, when baseball first encountered antitrust litigation, the Supreme Court had been using a narrow construction of interstate commerce like a scythe to cut down litigation.⁹¹ In 1922 baseball did not escape this razor, expertly wielded by Oliver Wendell Holmes Jr.⁹² In order to understand the antitrust laws governing baseball, some recap of the major movements in antitrust seems necessary.

Congress passed the Sherman Act amidst a furious tumult of populist anger. President Benjamin Harrison signed the bill into law the same year, 1890, during which the Players’ League rose and fell. The general feeling preceding the act can be summed up in Joseph Keppler’s famous “The Bosses of the Senate” (See Appendix, Figure 2). The cartoon is of the Senate Chamber but is dominated by rotund and grotesque giants with enormous top hats. Each man, if we should call him such, looks like a bag of money fitted in fine, ruffled clothing. “Copper Trust”, “Nail Trust”, and “Steel Beam Trust” push into the room from the right under the “Monopolists’ Entrance.” In comparison the Senators at their desks look puny and powerless. Above the chamber a sign reads “This is a Senate of the Monopolists, by the Monopolists, and for the Monopolists.” In contrast, the peoples’ entrance is locked tight.⁹³ It would not remain locked for long. Into this maelstrom strode Senator John Sherman, Republican from Ohio, on the crest of a populist wave. In an early debate about the Sherman Antitrust Act, Sherman warned of the influence of “the socialist, the communist, and the nihilist” if no action was taken to blunt the power of combined industry.⁹⁴ Though slightly hyperbolic, the fears expressed by Sherman were not unfounded. The proliferation of trusts had begun to put a strain on the entire framework of political and economic thought.

⁹¹ Article I, Section 8 of the US Constitution, “The Congress shall have Power to...regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Rudolph Peritz, *Competition Policy in America*, 59-62.

⁹² *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, Et Al.* 259 U.S. 200 (1922), Opinion of the Court.

⁹³ Robert Caro, *The Master of the Senate* (New York: Vintage Books, 2002), 47, image on 200.

⁹⁴ Rudolph Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford: Oxford University Press, 1996), 9.

Classical economic thought asserted that markets were “self-regulating” insofar as monopolies could only arise out of undue government privilege. These theories held that monopolies were transitory entities that would revert to the “natural” state of competition. Seeking to explain this phenomenon in 1889, classical economist David Ames Wells argued that the efficiency gains produced by the introduction of steam power had led to “over-production” and therefore “excessive competition” which created an incentive to combine against the natural incentive to compete.⁹⁵ The undermining of economic laws, viewed in the 19th quite literally as almost natural laws in the same vein as biology or physics, proved still more distressing as the political concept of equality began to come apart. James Bryce, the British Ambassador to the United States, wrote, “The power of groups of men organized by incorporation as joint-stock companies...has developed with unexpected strength in unexpected ways, overshadowing individuals and even communities, and showing that...[industrial combinations] may, under the shelter of law, ripen into a new form of tyranny.”⁹⁶ Nineteenth century political-economy in America did not recognize or account for persistent or prolific combinatory practices, and the emergence of such enormous industrial power in a relatively short window naturally challenged the standing order. The Sherman Act was largely a response to this.

After years of legislative wrangling, Congress passed the Sherman Antitrust Act in 1890, the final form of which looked little like the original. In this way, the act presented a compromise. On the one hand, the Sherman Act’s clear evocation of well understood common law categories like “conspiracy,” “restraint of trade,” and “monopolization” made it a fairly staid legislative remedy. Yet on the other hand the Sherman Act revolutionized antitrust law in the United States. First, the new act represented a powerful positive law.⁹⁷ Rather than protecting business from government the Sherman Act used the government to protect the public *from* business. Second, antitrust law became federalized, thus

⁹⁵ David Ames Wells, *Recent Economic Changes and their Effect on the Production and Distribution of Wealth and Well-Being of Society* (1889), 74, quoted in Rudolph Peritz, *Competition Policy in America: History, Rhetoric, Law*, 24.

⁹⁶ James Bryce, *The American Commonwealth*, (1889), 407-8, quoted in Rudolph Peritz, *Competition Policy in America: History, Rhetoric, Law*, 24.

⁹⁷ Rudolph Peritz Jr. *Competition Policy in America*, 9-26.

eliminating the myriad problems of uneven jurisprudence and jurisdiction. Third, the act expanded standing to include individuals not party to but harmed by a contract. Fourth, the act gave the Attorney General the power to bring cases against trusts and combinations. Fifth, the act prescribed radically new civil and criminal punishments to monopolists.⁹⁸ Where before the punishment for restraint of trade had been to find the contract unenforceable or to revoke a corporate charter, the Sherman act created new remedies. The act provided for damages to the amount of “threefold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.”⁹⁹ More strikingly, harsh criminal charges as well as governmental seizure were incorporated as potential remedies.

Peritz argued that the final iteration of the act represented a compromise between two competing rhetorics: freedom of competition and freedom of contract. Champions of the former idea, a group containing Senator Sherman, believed that any restraint of trade represented a challenge to the “industrial liberty of citizens” and should thus be countered by government action. Contrary to classical economic thought, champions of the latter ideal saw *both* competition and combination as “natural forces” and viewed “ruinous competition” as a problem of equal, if not greater, peril than trusts.¹⁰⁰ Only by preserving freedom of contract could the effects of competition be blunted. “It is just as necessary to restrict competition as it is to restrict combination,” Congressman John D. Steward (D. Ga.) remarked during an 1890 debate.¹⁰¹

During the first two decades of federal antitrust, a group known as “the literalists” held sway in the Federal Courts. The literalists strictly applied the standards laid out in the Sherman Act. However, in 1911 the architecture of antitrust underwent a deep and far reaching change.¹⁰² The case was *The Standard Oil Company of New Jersey Et Al. v. United States* (1911) and it was the culmination of five

⁹⁸ Rudolph Peritz, *Competition Policy in America: History, Rhetoric, Law*, 25-26.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, 16-17.

¹⁰¹ *Ibid.*, 16.

¹⁰² For a more detailed discussion of the Rule of Reason standard see Rudolph Peritz, “The ‘Rule of Reason’ in Antitrust Law: Property Logic in Restraint of Competition”, *Hastings Law Review* 40 (1988-89), 285-342; Stephen A. Siegel, “Understanding the *Lochner* Era: Lessons from the Controversy over Railroad and Utility Rate Regulation”, *Virginia Law Review* 70 (1984), 187-263; James May, “Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918,” *Ohio St. Law Journal* 50 (1989), 257-395.

years of legal maneuver which produced twelve thousand pages of printed matter.¹⁰³ Although Justice White's landmark decision split the great Standard Oil octopus apart, the victory proved pyrrhic for regulators. The Rule of Reason standard established by the White Court established the distinction between "reasonable" and "unreasonable" combinations and trusts, thereby undercutting a substantial part of the Sherman Act's power. Justice Brandeis's iteration of the rule of reason standard, in *Board of Trade of Chicago v. United States* (1918), is generally cited as the best representation of the test:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.¹⁰⁴

In an area as complicated as business regulation the law cannot function well categorically, yet the view of law envisioned here commits the government, with the primacy of the judicial branch, to review of each restraint questioned. Though not *ad hoc*, the fabric of law under this view must respect the complications of the real world. The *Lochner* court saw the ascendance of those, like Congressman Steward, who viewed regulation as a careful calibration of competition and combination. It became increasingly clear that the judicial branch would be called on to do the calibrating.

After the ascendance of rule of reason jurisprudence and the birth of "modern" antitrust policy the stories told about businesses and the control of business history took on a new importance. Justice Brandies' questions from *Board of Trade of Chicago* (1918) illustrated this shift. What was the history of the restraint and its effects? Why was it imposed? What was the nature of the industry? Baseball owners had positioned themselves to answer all of these questions by creating a cogent narrative about the history of baseball and the rules which restricted its organization. However, this was not all. The question of jurisdiction preempted these questions. The interpretation of the Commerce Clause of the constitution

¹⁰³ *Standard Oil Company of New Jersey Et al. v. United States* 221 U.S. 1 (1911), Opinion of the Court.

¹⁰⁴ *Board of Trade of Chicago v. United States* 246 U.S. 231 (1918), Opinion of the Court.

presented another prominent aspect of Progressive Era Jurisprudence. These jurisdictional questions operated in two parts 1. What constituted “inter-state”? 2. What constituted “commerce”? The common definitions during the time, based partly on the 1895 case *Hooper v. California*, distinguished between inter-state and intra-state commerce depending on whether interstate transport was “essential” or “incidental” to the business.¹⁰⁵

The Lochner Court ruled that several analogous types of industry, especially in entertainment, were not subject to the jurisdiction of the Federal Antitrust statutes. Part of this restriction dealt with the contemporary definition of commerce. In a 1914 New York Supreme Court case involving the Metropolitan Opera Co. the Court went on a lengthy harangue as to the lunacy of classifying individual performance as commerce.¹⁰⁶ In 1914, in response to the jurists who increasingly used the Sherman Act to destroy labor unions, Congress passed the Clayton Antitrust act, which exempted personal effort, or labor, from the antitrust statutes. Thus another wrinkle. In the movie industry, the courts found that interstate distribution of film *did* violate the Sherman Act the distinction lay in the moving of the literal film and not the exhibition.¹⁰⁷ Also in 1923, the court ruled that a combination of Vaudeville contractors in constituted interstate commerce.¹⁰⁸ In working around the distinction between essential and non-essential transport the court wrote, “It may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently.”¹⁰⁹ The case that would eventually become *Federal Baseball v. National League* antedated the vaudeville and film distribution cases. The suit began its torturous path to the US Supreme Court in 1916. An excellent account of this case can be found in Stuart Banner’s book, but much is worth recounting here as it bears on this thesis.¹¹⁰

As with the Chase case, *Federal League of Professional Baseball Clubs. v. National League of Professional Ball Clubs Et Al.* emerged from the tensions created by the Federal League war.

¹⁰⁵ *Hooper v. California*. 155 U.S. 648 (1895).

¹⁰⁶ *Metropolitan Opera Co. v. Hammerstein* 147 N. Y. Suppl. 532 (1914).

¹⁰⁷ *Binderup v. Path Exchange, Inc.*, 263 US 291 (1923), Opinion of the Court.

¹⁰⁸ *Hart v. B. F. Keith Vaudeville Exchange Et Al.* 262 U.S. 271 (1923), Opinion of the Court.

¹⁰⁹ *Ibid.*

¹¹⁰ Stuart Banner, “The Supreme Court Steps In,” *The Baseball Trust*, pp. 63-90.

Economically pressed to the wall, the desperate Federal League chose to play their trump card in 1915: an antitrust suit. Predictably, the first day of the trial brought a flood of fans into the courtroom. The *New Republic* wryly noted that rarely had an antitrust issue drawn such interest.¹¹¹ “Most men would rather be brought to poverty by costly kerosene than be deprived of the best baseball that can be provided,” the article continued.¹¹² The Federal League hired Keene Addington, the lawyer who successfully represented Hal Chase, to argue their claim. In the district court of Chicago the litigants argued before Judge Kenesaw “Mountain” Landis. (As a clue to where this is going, Landis was made the first Commissioner of Major League baseball in 1921.) The transcripts of the trial indicate that Addington tapped into the same vein which had wrought success in the Chase case. “The most important point,” Addington argued, was that the reserve “reduce the player to a chattel.”¹¹³ The plaintiffs apparently hoped that Judge Landis, a noted trustbuster, would find this reductionist, moral argument, which stripped away all the many complexities of baseball law, as appealing as had Bissell of the New York Supreme Court.

The Federal League owners quickly discovered that they did not hold a monopoly on the moral high ground. When George Warton Pepper, the lawyer for the National League, closed his arguments by waxing on about the fine qualities of the national game of baseball Landis said, “Well, we will have to keep affection, love and affection, out of this lawsuit.”¹¹⁴ Yet immediately after this denial, Landis proceeded to reintroduce affection into the record. “I think you gentlemen here all understand that a blow to this thing called baseball – both sides understand this perfectly – will be regarded by this court as a blow at a national institution...therefore *you need not spend any time on that phase of this subject* [emphasis mine].”¹¹⁵ The cultural importance of baseball thus filtered upwards into this legal process in ways which were intuitive but not obvious. Each court, in essence, had to decide on one particular

¹¹¹ *The New Republic*, January 30, 1915 cited in Stuart Banner, *The Baseball Trust*, 56.

¹¹² *Ibid.*

¹¹³ Transcript, vol. 1, *Federal League of Professional Ball Clubs v. national League of Professional Ball Clubs Et Al.* (January 20-23, 1915), August Herman Papers, box 105, folder 5 from Stuart Banner, *The Baseball Trust*, 56.

¹¹⁴ Transcript, vol. 1, 247, 248, August Herrmann Papers, box 105, folder 5, cited in Stuart Banner, *The Baseball Trust*, 58.

¹¹⁵ *Ibid.*

narrative over another – that of course is the nature of an adversarial system. But the court, perhaps unwittingly, also privileged the assumptions, values, and ideas which preconfigured these narratives. And more to the point, what if neither side presented a coherent policy? Landis suggested that the importance of baseball's cultural position was so obvious that it need not be mentioned. In this way, culture weighed on the debate both explicitly and implicitly.

Over a year elapsed with no action by Landis, and none seemed forthcoming. “Judge Landis, for reasons best known to himself, has elected to delay,” *Baseball Magazine* reported.¹¹⁶ The delay forced a settlement between the warring leagues, which effectively destroyed the Federal League. The reasons for the delay eventually became known. Landis spoke in the dismissal on his choice to sit on the case – thereby strangling it. Landis feared that a ruling in favor of *Federal Baseball* would be “vitally injurious” to the game, yet he felt the preponderance of evidence favored the plaintiffs.¹¹⁷ Baseball rewarded this show of loyalty by offering Judge Landis the Commissionership of baseball in 1920.

A resurrected version of the case began the tortured path through the legal system after Organized Baseball settled out of court with the most powerful Federal League clubs in 1916. The Baltimore Terrapins were not invited to the party and brought suit against Organized Baseball. As Stuart Banner recounts, the first trial of the new case started in the summer of 1917.¹¹⁸ Discontinued because of outside negotiations between the parties, the trial ended ignominiously. Nothing came of these renewed talks and the Terrapins filed suit again in the fall of the same year. The second trial began in March 1919 – the Federal League had thus existed as litigants to antitrust suits for longer than they had actually been a league. Under the watchful eye of Judge Wendell Phillips Stafford, the jury found against the National League. “Much of the defense case had rested on the asserted benefits of the reserve clause for the stability and profitability of the game,” Banner writes, “but Stafford told the jury to ignore that aspect of

¹¹⁶ *Baseball Magazine*, January 1916 from Stuart Banner, *The Baseball Trust*, 60.

¹¹⁷ Transcript of dismissal proceedings, February 7, 1916, August Herrmann papers, box 104, folder 1, from Stuart Banner, *The Baseball Trust*, 61.

¹¹⁸ Stuart Banner, *The Baseball Trust*, 65.

the case.”¹¹⁹ A few of the literalists had stuck around after all. The transcript of the case recorded Stafford’s words to the jury: “[it is not germane] that players are generously treated...or that their salaries are high, or that they are well-disciplined...or that better games are played.”¹²⁰ The only question then was the existence of a monopoly.

The Court of Appeals reversed this decision on jurisdictional grounds. Thus, in 1922 the case, known as *Federal Baseball Club of Baltimore Inc. v. National League of Professional Ball Clubs Et Al.*, made it to the US Supreme Court. In a perfunctory decision Justice Oliver Wendell Holmes Jr. wrote for a unanimous court:

The business is giving exhibitions of base ball, 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, the transport is a mere incident, not the essential thing.¹²¹

In this way, the Supreme Court affirmed the logic of the appellate court. The baseball business was simply not interstate in nature and therefore beyond the scope of the Federal Antitrust laws. Nor was baseball “commerce” in the contemporary, legal definition of the term. Notwithstanding Stafford’s holding, which was now void, the Supreme Court did not rule on the merits of the case, and left the reasonableness of the reserve system indeterminate.

From 1922 onward baseball possessed an exemption from antitrust litigation on jurisdictional grounds. This was not at all odd. Similarly constructed industries like theater, insurance, law firms, etc. also possessed “exemptions.” *Federal Baseball* passed relatively unnoticed in the academic press.¹²² An attempt to unionize baseball in 1924 failed, and the labor situation only declined for the players.

¹¹⁹ Stuart Banner, *The Baseball Trust*, 69.

¹²⁰ Trial Transcript, *Federal Base Ball Club of Baltimore v. National League of Professional Base Ball Clubs* (D.C. Sup. Ct., April 2, 1919), 495-497, cited in Stuart Banner, *The Baseball Trust*, 69.

¹²¹ *Federal Baseball Club of Baltimore Inc. v. National League of Professional Ball Clubs Et Al* 259 U.S. 200 (1922).

¹²² “Recent Cases,” *Harvard Law Review* 34 (5), 1921, 559. “Action for damages under the Sherman Anti-Trust Act against the professional baseball leagues on the ground that they were, through their contracts with players, acting in

This chapter explored the narratives surrounding the reserve clause, and the way in which these stories played out in different institutional and legal settings from 1890-1922. The authors of these narratives as well as their content and framework changed over the early decades of the 20th century but also stayed the same in many respects. In this way, the examination of the history of the language and symbols employed during this formative period of debate provides ample groundwork for the forthcoming chapters. The most prominent arguments against the reserve clause rested on moral grounds – the reserve clause, like slavery and peonage, was wrong. Those in favor argued that the reserve clause was a necessary function of baseball’s unique business structure – in almost no other industry did teams have to cooperate for profits but compete for the choice employees. Moreover, fans would be more likely to pay for a competitive game than a lopsided contest, and in the absence of a reserve clause, the richest teams would buy up all the best talent. The rationale for the reserve clause also differed between narratives: to some the players did not show sufficient loyalty and demanded extortionate salaries, to others the owners sought to obtain an illegal monopoly of the game. A particular view of the player undergirded and framed these stories. The players were slaves or superstars, victims or villains, heroes or hustlers. Though these narratives were presented here as equal, they were asymmetric in their appeal during the Progressive era – the anti-labor, economic story in support of the reserve clause accorded well with the dominant cultural mores of the time and fit comfortably within the dominant antitrust paradigm as we have seen. These narratives played out differently in different legal settings as well. Under contract law, Judges often refused to enforce the contracts or issue injunctions because of the manifest inequality in the contracts. Stafford’s trial court had delivered a similarly straightforward ruling. The Supreme Court, however, took a different tack and essentially created a *new* narrative: the game of baseball did not constitute interstate commerce and therefore was not a subject for federal regulation.

restraint of interstate trade. *Held*, that professional baseball is not trade within the meaning of the Act... In baseball, the game’s the thing, not the transportation incidental thereto.”

Furthermore, the earliest histories of baseball, penned by sportswriters, players, and owners alike, attributed the success of the game after 1890 to stabilizing effects of the reserve clause. In this way, the justification of the reserve clause can be best understood as a product of historical narrative creation. I would be remiss to suggest that these interpretations were entirely static. On the contrary, these arguments had to be made again and again in dramatically different contexts – the context for the 1890 debate was far from that of 1950. Proponents of the reserve clause successfully incorporated arguments concerning gambling after the 1919 World Series, and thereby created a moral position of their own. The language established during this formative period bore heavily on the debates to follow. After the doldrums of depression and war, new competing leagues emerged in California and south of the border. The litigation stirred up by these trade wars spurred to action the Courts as well as Congress. The newly constituted Subcommittee for the Study of Monopoly Power, under the Committee of the Judiciary, looked to reconfigure the relationship between business and government. For all that had changed, the debate had largely not moved, how new legal actors would attempt to reconcile the paradoxical reserve clause is the subject of the next two chapters.

Chapter 2: Baseball on the Operating Table, 1949-1952

“The public buys Lucky Strikes without concern as to whether the employees of American Tobacco Co. are doing their best for that company or are trying to get jobs with Liggett & Myers or Reynolds Tobacco Co. But the public demands that each ballplayer have full loyalty to and extend his best efforts for his club.” – Ford Frick, testifying before the House Subcommittee on the Study of Monopoly Power, July 31, 1951.¹

From 1949 to 1952 baseball was, literally and figuratively, on trial before the nation. To some extent, baseball had become more than one entertainment industry among others; it had transformed into the “National Pastime” with all the attendant myths, tropes, and symbolism which that implied. There had not always been such a concept as the National Pastime – it had to be created. To quote Jerold Duquette on this score: “The careful and successful campaigning by organized baseball to convince Americans that the interests of baseball were the interests of America did help to legitimize baseball law and internal self-government. But, it also made Americans feel that the game belonged to them and not to the owners.”² Ostensibly, the Commissioner of Baseball protected the interests of the owners, the players, and the fans as a semi-public arbiter, and, in this way, baseball embodied the ideal of the self-governing industry. After the owners sacked former Senator Albert “Happy” Chandler in 1951 they considered Earl Warren, General Eisenhower, and General MacArthur as replacements before settling on Ford Frick, a former sportswriter and the choice friendliest to ownership.³

Baseball had muddled through the Great Depression and rallied the nation in wartime, but the postwar period brought rapid changes. The cozy status quo was about to be tested. The debate over the reserve clause that raged over the Players’ League war of the late 19th century had never been settled, though a loose consensus reigned – the reserve clause was immoral and illegal, but necessary for the great American game to survive. The same debates of the early 20th century, with the added specter of gambling, played out in numerous settings throughout the immediate postwar period. *Federal Baseball*

¹ U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 35.

² Jerold Duquette, *Regulating the National Pastime*, 43.

³ “Letter from Clark Griffith to Branch Rickey,” Box 35, Branch Rickey Papers, Library of Congress, Manuscript Division, Washington D.C.

protected Organized Baseball from antitrust litigation, but the reserve clause remained unenforceable under contract law. More importantly, in the intervening years since 1922 the Supreme Court had begun to methodically kick the legs out from under baseball's antitrust exemption. The *Federal Baseball* decision had rested on the limits of the commerce clause of the Constitution, but the understanding of the commerce clause had been completely overturned in a series of cases, most memorably in *Wickard v. Filburn* (1942), the famous case which ruled that the transportation of wheat across state lines constituted commerce.⁴ More foreboding for baseball's jurisdictional exemption, the Court reversed half a century of insurance law with *United States v. South-Eastern Underwriters Assn* (1944).⁵ Around that time, Supreme Court Justice Robert Jackson commented to fellow Justice Sherman Minton: "If I were to be brutally frank, I suspect what we would say is that in any case where Congress thinks there is an effect on interstate commerce, the Court will accept that judgment. All of the efforts to set up a formulae to confine the commerce power have failed."⁶ Baseball's self-government, once an unbreachable dam, had begun to show cracks in the façade. The academic press began to take notice of the incongruity between baseball's antitrust status and the direction of Constitutional interpretation. Lawyers and laymen predicted that if baseball had to answer to the rule of reason, it would be ruined.

This chapter will examine the way different institutions and legal actors made decisions regarding baseball law between 1949 and 1952. The "courtroom" extended from newspapers to the Appellate Court for the 2nd District to the halls of Congress and, finally, to the US Supreme Court – the last of these is the subject of the next chapter. Two questions needed answering: Did the Federal government have the authority to rule on the reserve clause and was the reserve clause a reasonable or unreasonable restraint of

⁴ *Wickard v. Filburn* 317 US 111 (1942), Opinion of the Court.

⁵ A great number of precedents pointed to this conclusion, some of which will be discussed below. In reference to the commerce power generally: *Wickard v. Filburn* 317 US 111 (1942) encompassed wheat produced for local consumption, *Thorton v. United States* 271 US 414 (1926) ruled that diseased cattle moving between states constituted commerce, *United States v. Simpson* 252 US 465 (1920) ruled that whiskey transported across state lines for private consumption constituted commerce. Most recently, the Supreme Court had overturned years of precedent in *United States v. South-Eastern Underwriters Assoc.*, 322 US 533 (1944) "The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one; to govern affairs which the individual states, with their limited territorial jurisdiction, are not fully capable of governing."

⁶ Stuart Banner, *The Baseball Trust*, 95.

trade? The first question had all but been resolved by the New Deal Supreme Court: the answer was yes. Yet the Supreme Court had not *specifically overturned* the Holmes' precedent that baseball did not constitute commerce nor was it interstate. The second question proved to be the tricky one. Did the reserve clause promote competition or restrict it? The reasonableness question encompassed concerns for economics, law, values, and history.

The first section of the chapter will deal with the cause of all the fuss; namely, the Mexican League. The rise of a rival league outside of organized baseball created the impetus for litigation, and also attracted the notice of the House of Representatives. This chapter examines the first two Acts in the settling of the reserve clause problem: the court case *Gardella v. Chandler* (1949) and the 1951 Hearings of Emanuel Celler's Judiciary Committee. The *Gardella* section examines the narratives and debate surrounding this lawsuit. Each of the three appellate judges issued a separate opinion, and each opinion illustrated different priorities and values in the context of antitrust. In this way, I scrutinize the events of Danny Gardella's court action in order to understand the operation of the reserve clause narratives in a legal context. The Celler Hearings section analyzes many aspects of this extended debate from the formation of the witness list to the publishing of the report. I employ the papers of Emanuel Celler in order to discern the reasoning behind the outcome. By exploring these events, I hope to set up a framework to understand the Supreme Court's subsequent 1953 decision.

Other scholars, including Stuart Banner and Stephen Lowe, have covered the events of this chapter. Yet no clear analytic or holistic explanation has emerged. Banner, as usual, came closest when he wrote: "When one places *Toolson* in its context, however, the decision becomes much easier to understand. The late 1940s and early 1950s were a period in which baseball's immunity...was repeatedly challenged...There were moments when baseball seemed to be on the brink of losing its immunity, and other moments when Congress seemed poised to enact a statute confirming that immunity."⁷ Without a theoretical structure, however, these events seem simply strung together, unrelated. In the end, why

⁷ Stuart Banner, *The Baseball Trust*, 91-92.

baseball did not lose that immunity remains an important question to resolve. My focus on rhetoric and narrative, as integral to the process of antitrust, pace Peritz, and especially the mechanism by which economic ideas and cultural beliefs enter into legal decision making, provides a more solid understanding of baseball law than a simple play-by-play narrative.

In this chapter I argue that the numerous narratives created by players, owners, and writers were differentiated and legitimized by these legal events. In some settings, arguments in favor of the reserve clause found purchase, and in others the opponents of the system won the day. In the first case, Judges Chase, Hand, and Frank all supported different visions of antitrust and the baseball industry. In aggregate, then, a very ambiguous story emerged. Was the reserve clause reasonable? Depended on who you asked. Although these lines of argumentation did not necessarily overlap the rule of reason framework brought the discordant threads together. In attempting to reconcile these stories, Chairman Celler's committee invited baseball "luminaries" to testify. The hearings did prove illuminating. What had the Congressmen decided? I argue that one story in particular emerged out of the debate and came to dominate alternative arguments and beliefs: the reserve clause stopped gambling and, a "clean game" being crucial to profits, was necessary for the economic viability of the national pastime. This story fit comfortably with the thrust of contemporary antitrust jurisprudence. Put another way, perhaps, the reserve clause "passed" the rule of reason test on the authority of Congress.

Prelude: Mexican League War

The reserve clause created an almost comical disparity in bargaining power between players and owners. Moreover, the labor situation in Major League Baseball had been stagnant for some time. During this period, historian Charles P. Korr argued, the player's viewed themselves as professionals and gave little consideration to unionization.⁸ In 1946 a labor lawyer with the Congress of Industrial Organizations named Robert Murphy attempted to organize the players under the banner of the American Baseball Guild. The league, hostile to such an effort, literally locked Murphy out of the Pittsburgh Pirates' locker

⁸ Charles P. Korr, *The End of Baseball as We Knew It: The Players' Union 1960-81* (Chicago: University of Illinois Press, 2002), 5-16.

room.⁹ Pirates' Ownership had replacement players ready to step into action if the players' voted to strike. As it turned out, they had no need to worry: the players voted down the strike action 15-3. However unsuccessful on its face, this example of the player's potential organization provided the leverage needed to force concessions. Their "loyalty" would be repaid in part. Though small compared to the Guild's original demands, the owners conceded 1. A \$25 a week stipend during spring training 2. A minimum salary raise to \$5,000 3. A revitalized pension plan. 4. And a system of player representation. Although this system represented little more than a house union the collective protection of the pension system gave Major Leaguers a small sense of identity as a group, in *opposition* to ownership.¹⁰ This tension, under the stewardship of Marvin Miller, would eventually produce the hugely powerful Major League Baseball Players Association in 1966.¹¹ To the further advantage of the players, as the economic tide began to flow in the threat of trade war from competing leagues resurfaced. Two leagues vied to become "major leagues" – the Pacific Coast League and the Mexican League.

Unlike some potential challengers to MLB hegemony like the Pacific Coast League, the Mexican League had no reservations about "going outlaw" and challenging the Major Leagues directly. The few leagues not within Organized Baseball were called "outlaw leagues" and players who played in them were routinely blacklisted. Beginning in 1946, the millionaire Pasquel Brothers began to aggressively compete for Major league talent. One player recalled Jorge Pasquel laying out \$20,000 on a hotel room desk.¹² With promises of free medical care, housing, cars, and astronomical salaries many players crossed the border to play for Pasquel. Stan Musial, the St. Louis Cardinal's star, earned \$13,500 in 1946. Pasquel offered Musial \$125,000 signing bonus and a five year \$250,000 contract. Though Musial rejected the offer, he parlayed his newfound bargaining power into a \$5,000 bonus and a 1947 salary of \$31,000.¹³ Similarly, Cleveland Indian's ace pitcher Bob Feller rejected Pasquel's multiyear \$500,000 offer, but

⁹ Jerold Duquette, *Regulating the National Pastime*, 44.

¹⁰ For coverage of this period see the much more able Charles P. Korr, "A 'House Union,'" *The End of Baseball as We Knew It*, pp. 15-34.

¹¹ Robert Burk, *Much More than a Game*, 117.

¹² *Ibid*, 85.

¹³ *Ibid*.

managed to up his total salary to \$70,000 with the Indians.¹⁴ The astronomical salaries offered by the Mexican League served to highlight the effects of the reserve clause on individual player salaries.

For players that did go to play in Mexico, the reality turned out to be a bit different from Pasquel's promises. In at least one ballpark a railroad track literally ran through the outfield.¹⁵ When they attempted to return stateside they found that employment in organized baseball had been foreclosed to them. Major League Commissioner Albert "Happy" Chandler had blacklisted all of the Mexican League "contract jumpers" for five years. After quitting Mexico, players Max Lanier, Lou Klein, and Fred Martin played winter baseball in the Cuban Professional League. In retaliation, Organized Baseball negotiated with the Cuban League and gave numerous concessions in exchange for a promise not to employ the Mexican League Players.¹⁶ Danny Gardella, a former outfielder for the New York Giants, later alleged that Major League Baseball even attempted to keep him from playing semi-professional ball.¹⁷ However effective, the brutality with which baseball maneuvered to punish players who went to play in the rival league began to warrant attention from the Federal Government. Moreover, players, not entirely defenseless, began to seek legal remedies to the extralegal bullying.

Though several players filed lawsuits against Major League Baseball by 1949, the most dangerous had been filed by Gardella. Gardella had played for the Giants during the war seasons of 1944 and '45, but when more talented players returned from military service he knew he would likely be cut from the club.¹⁸ In 1946 Pasquel offered him \$8,000 along with a \$5,000 signing bonus to play for the Veracruz Blues. After several disappointing seasons in the increasingly indebted Mexican League, Gardella headed back to New York. Blacklisted with the other "jumpers" he made ends meet playing semi-professional ball. By 1947 he was working as an orderly in a Mt. Vernon hospital.¹⁹ Connected with

¹⁴ Robert Burk, *Much More than a Game*, 85.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Milton Richman, "Former Giant Thinks He is Helping 'To End Evil,'" *Washington Post*, Feb 11, 1949.

¹⁸ When Gardella left the Giants *Time* magazine commented, "Giant Manager Mel Ott was not exactly sleepless... [because of] Gardella's knack of making fly balls look hard to catch." From Stuart Banner, *The Baseball Trust*, 97.

¹⁹ Associated Press Report, "Court Hints Violation of Trust Laws: \$300,000 Suit to be Pushed," *Chicago Tribune*, Feb 10, 1949.

a lawyer through his dentist, Gardella decided to challenge baseball under the antitrust laws. Essentially, the argument of the plaintiff was two-fold: baseball now constituted interstate commerce, thereby obviating the judicial exemption provided by *Federal Baseball*, and, anticipating a trial, the restraints of trade implemented by baseball, especially the reserve clause and the blacklist, were patently unreasonable under the Federal Antitrust statutes. Baseball owners maintained that “because our partnership arrangement and cooperative agreements are necessary in the promotion of fair competition and are therefore in the best interests of the public” baseball would be found to be an entirely legal enterprise.²⁰ But which story would the courts find convincing in the first big test since 1922?

Act I: Of Peons and Superstars

As baseball became more intricate as a business, more prominent in the cultural imagination of the nation, and more out of step with dominant antitrust ideas, more lawyers and professors commented on “baseball law.” The *Federal Baseball* decision had rested on the limits of the commerce clause of the Constitution, but the understanding of the commerce clause had been completely upturned. A note examining the present state of baseball law published in the *Virginia Law Review* in 1946 reached this same conclusion though found the situation lamentable: “Perhaps Baseball has impaired some of its players' rights by enforcing contracts that the law will not enforce, and perhaps it is improper to freeze out competition in this field. But the two ‘evils’ have resulted in an undeniably ‘honest’ sport and the type of competition which is so highly cherished by Americans everywhere.”²¹ This argumentative motif showed up again and again in the baseball debates of the late 1940s. The Black Sox had indelibly scarred the reputation of the players. Yet the evolution of this idea did not stop at the conclusion “the players are dishonest.” Legists, sportswriters, owners, and even players argued that the public demanded an “honest” sport, and, following logically, baseball could not be profitable if dishonesty proliferated. Therefore, the reserve clause, in stopping dishonesty and increasing on field competition, was an economically vital

²⁰ “Report for Submission to the National and American Leagues on August 27, 1946” from Stuart Banner, *The Baseball Trust*, 95-6.

²¹ M. L. C., “Baseball and the Law – Yesterday and Today,” *Virginia Law Review* 32 (1946), 1176.

extralegal construct. The, lamentably, anonymous author of the note would not be the last to conflate the on field competition of a sporting contest with the abstract economic ideal of competition.

The view of the *Virginia Law Review* note largely reflected the consensus among the legal community. “[The agreements] maintain law and order within the official family,” wrote John Neville, a former Justice Department prosecutor, “an accomplishment not without appeal to the fans who view the commissioner as a sort of a quasi-public overseer dedicated to preserving the game for them on a high plane.”²² Territory rights and the reserve clause, the owners argued, were entirely necessary to keep up the integrity of baseball. Neville did not mean to be abstract in his invocation of “high plane,” for in this phrase he meant a game free of gambling and crookedness. Thanks to baseball law the shadow of Shoeless Joe and the Black Sox had begun to recede. “In all fairness it must be recognized...that thanks in no small measure to the vigilance of the commissioner and to the agreements, organized baseball, with the stigma of the Black Sox scandal constantly haunting it in the background, has emerged with a reputation for honesty on the playing field which is unparalleled in sportsdom and justly deserving of the respect and confidence which it commands of all who follow the game.”²³ These beliefs reflected a set of cultural preferences embedded in vague economic criteria. The specter of the great cheating scandals of the past half century constituted one portion of the procompetitive effects attributed to the reserve clause. Baseball was certainly a monopoly, Neville noted, everyone knew that. The important question was how the Supreme Court would rule on the subject if given another chance. Neville predicted that the Supreme Court Justices Black, Douglas, Murphy, and Rutledge along with one other justice would likely abandon the *Federal Baseball* precedent and hold baseball to account under the rule of reason standard.²⁴

Both reviews agreed that the present *Gardella* action could lead all the way to the Supreme Court and in such a case the law looked to be running against the *Federal Baseball* case upon which baseball’s antitrust “exemption” rested. Both reviewers took for granted that *on the merits* a court would find against

²² John Neville, “Baseball and the Antitrust Laws,” *Fordham Law Review* 16 (1947), 209.

²³ *Ibid.*

²⁴ *Ibid.*, 229.

baseball, but overturning *Federal Baseball* and striking down specific provisions of baseball's self-governing "law" did not constitute equivalent legal outcomes. A petitioner would have to establish jurisdiction to overturn *Federal Baseball*, but a rule of reason trial would be an entirely separate affair. Indeed, all the debate concerning commerce tests beclouded the deeper issue of reasonableness. The Virginia note and the Neville review both ascribed the honesty of baseball to "baseball law" which vested legal authority in essentially cultural arguments.

Gardella's case had a number of legal hurdles to clear before reaching the Supreme Court. Gardella and his lawyer Frederic Johnson claimed \$100,000 in lost wages, which became \$300,000 under the Sherman Act's treble damages clause.²⁵ The District Court Judge Henry Goddard faced a nearly impossible task in whether to decide for the player or the owners. On the one hand, he recognized that the law had changed substantially such that, "it is quite possible that the Supreme Court may not adhere to its earlier decision [*Federal Baseball*]."²⁶ But on the other hand, as a lower court Judge, Goddard had to respect the binding precedent of the Supreme Court. This tension was not unique to this case, of course, but the circle proved tough to square. Goddard resolved the case in favor of Organized Baseball on the grounds that the Second Circuit, the appellate court above Goddard, had used *Federal Baseball* as controlling precedent the previous year in order to decide a case dealing with the opera industry.²⁷ Gardella appealed the decision to the Second Circuit – a three man panel comprised of Justices Harrie Chase, Jerome Frank, and Learned Hand. Each issued a separate opinion.

Judge Chase voted to affirm the decision of the lower court finding for baseball on similar grounds as Goddard.²⁸ Gardella's complaint alleged that baseball had become interstate commerce by reason of broadcasting in radio and television, considerations absent in 1922. Telegraph accounts of the

²⁵ Robert Burke, *Much More than a Game*, 106.

²⁶ *Gardella v. Chandler*, 79 F. Supp. 260, 263 (S.D.N.Y. 1948) quoted in Stuart Banner, *The Baseball Trust*, 98.

²⁷ *Conley v. San Carlo Opera Co.*, 2 Cir., 163 F. 2d. 310 quoted in Stuart Banner, *The Baseball Trust*, 98.

²⁸ A controlling decision of the Supreme Court requires [that we affirm]," Chase wrote, "Even if that decision is distinguishable, the allegations in the complaint fail to state a cause of action over which the district court has jurisdiction." *Gardella v. Chandler*, 172 F.2d 402 (1949), Dissent, from Waller, Spencer Webber, Neil B. Cohen, and Paul Finkelman Eds., *Baseball and the American Legal Mind*, 82-83.

game did however form part of the baseball business at that time and Chase did not see how those transmissions differed in any “material way.”²⁹ Chase also took a narrow, economic view of the antitrust statutes. The only illegal restraints, he wrote, were those which had an effect upon market price.³⁰ The restrictions on the baseball players’ labor market did not exert a clear effect on the price of tickets.

Gardella stated as his complaint that by being blacklisted he had been deprived of his means of livelihood – he did not illustrate how those actions appreciably altered the market price. This view of antitrust, as only pertaining to market price and consumer welfare, represented the most conservative application of the law. Chase did not have to look far to find a Supreme Court case to vindicate his view. In *Apex Hosiery Co. v. Leader* (1939), Justice Stone wrote: “It is in this sense that it is said that the restraint, actual or intended, prohibited by the Sherman Act, are only those which are so substantial as to affect market prices.”³¹ Baseball’s narrative fit quite safely into this interpretation of competition policy. If competition policy only existed to protect the consumer, then what merit did any challenge to the reserve system have? Moreover, baseball’s barons increasingly aligned their rhetoric with this reasoning: the reserve clause protected the consumer from gamblers. In a memo to his colleagues, Chase did acknowledge that unencumbered by the *Federal Baseball* case he would likely have found for Gardella.³² Yet, in the name of judicial restraint, Chase voted to dismiss the case. However, his colleagues did not feel the same way.

Judge Frank took a less stylized, narrow view of the case and voted to reverse the lower court decision and remand the case for trial. The language Frank used sounds more like that of the Players’ League rhetoric of the 19th century than of a dispassionate jurist, which makes his opinion divergent and somewhat unique. “We have here a monopoly which, in its effect on ball-players like the plaintiff,” Frank wrote, “possesses characteristics shockingly repugnant to moral principles that, at least since the War

²⁹ *Gardella v. Chandler*, 172 F.2d 402 (1949), Dissent, from Waller, Spencer Webber, Neil B. Cohen, and Paul Finkelman Eds., *Baseball and the American Legal Mind*, 82.

³⁰ *Ibid.*

³¹ *Apex Hosiery Co. v. Leader* 310 U.S. 469, Opinion of the Court, cited in *Gardella V. Chandler* 172 F.2d 402 (1949), Dissent.

³² Stuart Banner, *The Baseball Trust*, 99.

Between the States, have been basic in America.”³³ Given the nature of the reserve clause and the quasi-peon status of the players, Frank believed that every effort should be made to fit baseball jurisprudence into the overall jurisprudential fabric of the United States even if it meant stretching the role of the lower court within the justice system.³⁴ Frank couched his argument in morality rather than economics. Slavery was *wrong* not merely *inefficient*. Clearly, he had a more expansive view of the purpose of antitrust law and of the role of judges in that system. Moreover, following the reasoning outlined by the law reviews, the Supreme Court had clearly begun to move towards a view of the commerce clause which undermined the *Federal Baseball* case and left it “an impotent zombie.”³⁵ As we will see below, Frank’s immoderate rhetoric, resting as it did on moral grounds, won him several prominent detractors. In anticipation of criticism Frank wrote, “I may add that, if the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery.”³⁶ Yet the balance of the evidence from law reviews gestures toward the exact conclusion reached by Frank, though perhaps in more strictly legal reasoning. His concluding language labelling organized baseball a “private (even if benevolent) dictatorship” borrowed language almost verbatim from *American League Baseball Club v. Chase* (1914) – a similarly vicious attack on the baseball monopoly.³⁷ Frank focused on the moral, Chase the economic. Frank issued an activist opinion, Chase a reticent one. The debate was up to the great Learned Hand to resolve.

Though originally planning on finding for organized baseball, Justice Learned Hand reversed his decision and *Gardella* won the case. In an internal memorandum outlining his early reasoning, Hand wrote: “If I had to bet at even odds, I think I should bet that five of the nine [of the Supreme Court] would

³³ *Gardella v. Chandler*, 172 F.2d 402 (1949), Opinion of the Court, from Waller, Spencer Webber, Neil B. Cohen, and Paul Finkelman Eds., *Baseball and the American Legal Mind*, 89.

³⁴ Obviously this would be done within limits. He justified the judicial activism by quoting fellow justice Learned Hand from an earlier opinion: “I reach that conclusion somewhat hesitantly... This court cannot, of course, tell the Supreme Court that it was once wrong. But ‘one should not wait for formal retraction in the face of changes plainly foreshadowed.’” *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ “The right to contract for their labor wherever they will, of 10,000 skilled laborers, is placed under the dominion of a benevolent despotism through the operation of the monopoly established by the national agreement.” *The American League Baseball Club of Chicago v. Chase* 149 N.Y.S. 6 (1914), Opinion of the Court.

not follow the Federal Baseball Case, it does not seem to me proper for a lower court to overrule that unanimous opinion of the court of last resort without a more nearly specific warrant.”³⁸ However, he changed his mind and found with Justice Frank and issued a separate opinion dissenting in part.

Reasoning that the extent to which baseball was or was not interstate commerce was not a legal question but rather a factual one, Hand concluded that the player should be given a chance to prove his allegations at trial.³⁹

In this way, the 2nd Circuit’s various rulings in the *Gardella* case created quite a legal and logical patchwork. The justices seemingly did not agree on the purpose of the statutes, nor on the proper resolution of the case. Similar to Judge Bissell, of the Chase case, and Judge Stafford, of the Federal League case, Judge Frank did not very much care about the economic justifications of the restraint in question. Organized Baseball had clearly monopolized the industry, and blatantly used that power to perpetuate a morally questionable labor relationship. “Defendants suggest that ‘organized baseball,’ which supplies millions of Americans with desirable diversion, will be unable to exist without the ‘reserve clause,’” Frank wrote. “Whether that is true, no court can predict. In any event, the answer is that the public’s pleasure does not authorize the courts to condone illegality, and that no court should strive ingeniously to legalize a private (even if benevolent) dictatorship.”⁴⁰ In this way, the narrative of Organized Baseball had fallen on very deaf ears. The system was so reprehensible, argued Frank, that the Court should make every effort to “distinguish” the case from *Federal Baseball* and thereby send it to trial.⁴¹ Thus, he *linked* together the jurisdictional and normative questions. The players, it seemed, had a strong moral case, but only in certain courtrooms did this narrative become manifest in law.

In contrast, Chase privileged a legalistic narrative which favored baseball. Even if the Court had jurisdiction, which Chase insisted it did not, without a demonstrable effect on the public welfare, the

³⁸ Stuart Banner, *The Baseball Trust*, 99-100.

³⁹ *Gardella v. Chandler*, 172 F.2d 402 (1949), Concurring Opinion, Webber Waller, Neil B. Cohen, and Paul Finkelman Eds., *Baseball and the American Legal Mind*, pp. 87-88.

⁴⁰ *Gardella v. Chandler*, 172 F.2d 402 (1949), Opinion of the Court.

⁴¹ *Ibid.*

Courts could not strike down a restraint of trade. This reading privileged the economic purpose of the antitrust laws. Judge Hand leaned on a much older source for his ruling: common law. “[W]hatever other conduct the [Antitrust] Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling,” Hand wrote.⁴² The clarity expressed in the law reviews did not bear out here. The legal complexity of the reserve clause thus mirrored its functional complexity.

Though not an unexpected result from a legal perspective, the sporting press exploded. The press played a role in covering the baseball controversy, but also weighed in with, debatable, authority. The coverage of the Gardella case illustrated the extent to which baseball was a keenly observed and written-on industry. Most of the sports press, the owners, and a majority of players felt strongly that Frank’s decision was the wrong one. Many of the nation’s sportswriters mocked the language of Frank’s opinion which alluded to peonage on the part of the baseball players. Veteran baseball correspondent for the *Washington Post* Shirley Povich, whose column was carried in many papers throughout the US, derided Frank’s language. “In a WEEK when Joe DiMaggio signs for \$90,000, Tommy Henrich accepts \$40,000 from the Yankees and Ted Williams indicates the Red Sox will pay him \$100,000 for a season of baseball,” Povich wrote on Feb 11, 1949, “it is a mite flabbergasting to be handed a court opinion that the baseball contract ‘results in something resembling peonage of the ball player.’”⁴³ One particularly acerbic article entitled “Shed a Tear for Peon Feller,” in reference to the Cleveland pitcher Bob Feller who made \$70,000 a year, made the case for the reserve clause on the grounds of competition and fan welfare.⁴⁴ Baseball would probably collapse without the reserve clause, the author argued, and it was necessary to keep stars on small market clubs for the good of the fans in those markets. “[All the rules] are designed to keep the stars spread around so that every fan in the nation can have a case of pennant fever for at least a few weeks early in the season,” the author opined.⁴⁵ This unabashedly paternalistic

⁴² *Gardella v. Chandler*, 172 F.2d 402 (1949), Concurring Opinion.

⁴³ Shirley Povich, “This Morning with Shirley Povich,” *The Washington Post*, Feb 11, 1949.

⁴⁴ “Shed a Tear for Peon Feller,” *Chicago Daily Tribune*, Feb 12, 1949.

⁴⁵ *Ibid.*

attitude portrayed the reserve clause as the protector of the fans against the greedy players. In this way, the sporting press framed baseball's rules as procompetitive measures. The Commissioner of Baseball, Albert "Happy" Chandler, intoned: "No major leaguer makes less than \$5,000 a year and some make up to \$100,000. If you call that peonage, then a lot of us would like to be in on it."⁴⁶ Justice Frank's quip did little to forestall the deluge of criticism. As illustrated by the three separate decisions, the debate had a number of fault lines, including the purpose of antitrust law, the definition of commerce, the morality of the reserve clause, and the economic effects of the restraint of trade. The protectors of Organized Baseball had certainly not ceded the moral aspect of the debate, and the sportswriters did their part to paint the players as avaricious ne'er-do-wells.

Moreover, the owners successfully framed the debate around the dual extremes of immunization and atomization. Either baseball would be made exempt from antitrust law or would be broken up and destroyed by it. "Without the [reserve] clause, a player could offer his services each year to the highest bidder," the AP story read. "Chaos would result, officials of the game declare, if the reserve clause ever is successfully attacked."⁴⁷ Baseball's owners had framed the question in terms of a life or death struggle. Many businesses under antitrust scrutiny attempted this line of defense, but no industry was positioned to make as effective a stand as baseball. Congressman A. S. Herlong of Florida declared the decision disastrous and went on to say that the game should be preserved "for the sake of American Youth."⁴⁸ Even players began to climb on.

Many players of all stripes challenged the *Gardella* decision and full throatically supported the reserve system. The support of the people supposedly harmed by the restraints did a great deal to establish the validity of the owner's claims. Writers for the Associated Press conducted interviews with various players and published the story several days after the opinions in *Gardella v. Chandler* were handed down. The aforementioned Bob Feller remarked, "[b]aseball would have to undergo a thorough

⁴⁶*New York Times* article quoted in Jay H. Topkis, "Monopoly in Professional Sports," *Yale Law Journal* 58 (1948-9), 694.

⁴⁷ Associated Press, "Court Hints Violation of Trust Laws," *Chicago Tribune*, Feb 10, 1949.

⁴⁸ Red Smith, "Anti-Gardella Blasts Don't Make Sense," *The Washington Post*, Feb 12, 1949.

overhauling if the reserve clause is abolished. I don't see how they could operate."⁴⁹ He did offer one caveat: "I feel that an athlete should be able to practice his profession 12 months of the year wherever he desires as long as he maintains a respect for the public."⁵⁰ Respect for the public of course meant playing the game the right way and not running with gambling interests – the owner's position that the reserve clause clamped down on gambling had diffused down to many of the players. Cardinal's superstar Stan Musial said, "I don't know much about the case, but I think baseball has done all right for more than 100 years the way it is."⁵¹ The *Gardella* case didn't even seem relevant to the players settled in organized baseball. Bob Lemon, an all-star pitcher for the Indians remarked, "I can't see where it will do ball players any good."⁵² Superstars clearly had little problem with the reserve. Marginal players too spoke to the media in defense of the reserve clause.

Even Mickey Owen, a former Dodger player who was also suspended from baseball for five years because he jumped to the Mexican League, took to the press to badmouth Gardella.⁵³

I apologized [to Commissioner Chandler] for my actions and we had a long talk...I am speaking for all the other players involved, except Gardella, when I say that we are wholly in sympathy with organized baseball in this fight. We can see our mistakes now. I didn't know I had it so good until I was out of baseball.⁵⁴

What had Owen to apologize for? Ungratefulness for one, perhaps dereliction of duty for another. Getting another job for a higher salary would be a matter of course in most industries, but in baseball "jumping" a contract revealed greed and dishonesty on the part of the player. Perhaps Owen simply expressed these opinions in order to get reinstated, yet the majority of players who did speak out agreed with baseball's ownership, regardless of their eligibility. Max Lanier, another player suspended after the Mexican league war, said, "I don't want to hurt anybody – I just hope that commissioner Chandler will let us play again."⁵⁵ Judge Frank felt that the owners had abused the players. The players, apparently, did not agree

⁴⁹ Associated Press, "Reserve Clause Wins Approval in Player Poll," *Chicago Daily Tribune*, Feb 15, 1949.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Associated Press, "Ex-Dodger Says Reserve Clause Vital to Game," *Washington Post*, Feb 11, 1949.

⁵⁴ Ibid.

⁵⁵ Associated Press, "Reserve Clause Wins Approval in Player Poll," *Chicago Daily Tribune*, Feb 15, 1949.

with this assessment. This presumption of guilt and wrongdoing on the part of the players represented one of the many shadows thrown by the Black Sox.

Gardella did have some defenders among players, but very few indeed. Though salaries ranged from the minimum of \$5,000 to six figure deals for the very best major league players (the Major League average was \$13,000), Minor League players, at most, made \$3,000 a year and many made as little as \$750.⁵⁶ As Burk wrote: “At the minor league level...the players’ economic situation was far worse, since low wages coexisted with a shrinking number of teams and jobs.”⁵⁷ Former minor leaguer George Luginsland, quoted in a March edition of the *New York Daily News*, said, “I was in the Giant farm system... I look back at a lot of dirty rooming houses and undigested meals (just try to live on \$100 a month) and realize it did me a lot of good. The glamor wore off.”⁵⁸ For every DiMaggio and Feller there were hundreds of Luginslands. Baseball’s large underclass constituted a largely invisible group of part-timers whose time in baseball never amounted to a career; however, it is unclear whether even poor players supported Gardella’s effort.

Gardella did have some support in the press. Nationally syndicated columnist Red Smith dug in and staunchly defended Gardella in his Feb 11 column. Smith quotes Edgar P Feeley, an attorney for the Giants who said, “Most anyone familiar with baseball law knows the reserve clause benefits the players most.”⁵⁹ Smith dismissed this as preposterous. How could the reserve clause benefit the players if it created a system in which able players could be held on the bench in perpetuity? Stan Rojek, for example, was stuck behind a talented Brooklyn Dodgers outfielder but could have “sold himself to the Cubs or Phillies for \$20,000 by merely lifting an eyebrow.”⁶⁰ With hundreds of players controlled by each team through the extensive farm systems, many like Stan Rojek rode the pine for want of jobs. Smith also rejected the supposition that baseball would be destroyed by antitrust law – baseball would certainly

⁵⁶ Robert Burk, *Much More than a Game*, 107.

⁵⁷ *Ibid.*

⁵⁸ Quoted in Jay H. Topkis, “Monopoly in Professional Sports,” *Yale Law Journal* 58 (1948-9), N. 31.

⁵⁹ Red Smith, “As Winter Sees It: Anti-Gardella Blasts Don’t Make Sense,” *The Washington Post*, Feb 12, 1949.

⁶⁰ *Ibid.*

survive. “If some of baseball’s business methods are illegal, then they bloody well ought to be changed,” Smith quipped.⁶¹ Yet how preposterous were Feeley’s claims if everyone believed them? And moreover, did the “truth” even matter? Baseball *needed* the reserve clause to restrain the players. The players themselves said so. The owners were not behaving as if baseball would survive. Henry McLemore, another veteran sportswriter, wryly observed that the baseball owners were reminiscent of southern plantation owners after the Emancipation Proclamation.⁶² In case any observers missed the rhetorical tinge of the debate, the contrast between the owners and the owned, one journalist compared Gardella to Dred Scott.⁶³ The moral question, which seemed so clear to Judge Frank, was apparently not clear at all.

Gardella himself spoke to the *Washington Post* after his victory in the 2nd Circuit Court of Appeals. The triumphant former ballplayer pitched the victory in starkly moral terms. ““Let’s say that I’m helping to end a baseball evil. That’s what it amounts to as far as I’m concerned.””⁶⁴ The tenor of the debate surrounding Gardella’s case possessed a distinctly moral tone. Baseball players were *enslaved*, trapped in *peonage*. Back in 1887, over a half century before, John Montgomery Ward had written that: “The reserve-rule...inaugurated a species of serfdom which gave one set of men a life-estate in the labor of another.”⁶⁵ Gardella would certainly not be the last to remark on the abject wrongness of the reserve rule. This historical narrative of struggle against oppression by the ballplayer was not, as we have seen, even accepted by all the ballplayers. What was going on here? Nobody seemed able to agree on anything at all. Yet, for all the bluster and spilled ink over Gardella’s case the end result turned out to be fairly dull – baseball paid off Gardella to keep the case from reaching an unfavorable conclusion at the US Supreme Court. \$60,000 seemed a small price to pay to keep baseball’s judicial exemption safe outside of the 2nd Circuit.

⁶¹ Red Smith, “As Winter Sees It: Anti-Gardella Blasts Don’t Make Sense,” *The Washington Post*, Feb 12, 1949.

⁶² Henry McLemore, *Los Angeles Times*, Feb 16, 1949 quoted in Stuart Banner, *The Baseball Trust*, 101.

⁶³ Stuart Banner, *The Baseball Trust*, 101.

⁶⁴ Milton Richman, “Former Giant Thinks He is Helping ‘To End Evil,’” *Washington Post*, Feb 11, 1949.

⁶⁵ John Montgomery Ward, “Is the Base-ball Player a Chattel?” *Lippincott Magazine* 40 (May 1887), 311.

Thus the consensus had moved considerably since 1910 when Evers and Fullerton wrote that even though the reserve system disadvantaged the players it was necessary to preserve the national game. It seemed that nearly everyone involved in the enterprise agreed that the reserve clause helped the players, made money for the owners, and protected the public, in no particular order. The reserve clause had historically been justified as an attempt to create even competition between teams. Some still employed this argument, but an even more compelling narrative had emerged. In order to avoid another Black Sox scandal, an event blamed almost entirely on the players, Organized Baseball needed rules in place to restrict the urge to cheat. The dishonest player motif could be found in law reviews and on the sports pages. The fact that the reserve clause could now be challenged in New York, Vermont, and Connecticut, where the Frank ruling acted as precedent, mattered little. Frank's ruling did little but add another voice to the loud and acrimonious debate. In the public debate, the players had transition from victims to villains.

Chandler and the owners settled with Gardella out of court, but \$60,000 only bought them a reprieve, not a solution. With *Gardella v. Chandler* officially on the Second Circuit books, any player dissatisfied with the status quo could drag baseball into court – and after the 1950 season two minor leaguers, George Toolson and Walter Kowalski, did just that. By April of 1951 the number of antitrust cases aimed at baseball had grown to four – another player, Jim Prendergast, and Jack Corbett, the owner of the minor league El Paso Texans, also brought suit.⁶⁶ Court challenges and appeals take a good deal of time, however, and in the interim, another threat loomed for Baseball's Barons: Congressional action. On April 14, 1949, before the Gardella case had been settled out of court, Representatives Albert Herlong (D. FL) and Wilbur Mills (D. AR) introduced a bill in the House to provide a legislative exemption for baseball which would preempt a potentially disastrous Supreme Court reversal.⁶⁷ The Associated Press report promised the testimony of “many stars,” including Ted Williams, Joe DiMaggio, Bob Feller, Jackie Robinson, and Dixie Walker, among other sports “luminaries.”⁶⁸ While *prima facie* this seemed to be a

⁶⁶ Stuart Banner, *The Baseball Trust*, 106.

⁶⁷ Associated Press, “Bill in Congress Proposes to Bar Anti-Trust Prosecution of Sports,” *New York Times*, Apr 6, 1949.

⁶⁸ *Ibid.*

boon for Organized Baseball, counsel for baseball, former Assistant Attorney General of the Antitrust Division of the Justice Department under Herbert Hoover, John Lord O'Brian, argued that baseball should not support the legislation, given that it would likely fail.⁶⁹ The bills died before reaching the floor. However, against the background of mounting litigation in early 1951, Representative Emmanuel Celler, powerful chairman of the House Judiciary Committee and no friend of monopolists, announced that the Subcommittee on the Study of Monopoly Power would turn its gaze to baseball.

ACT II: "Would not even bet a Coke"

This section examines the 1951 Hearings on baseball in depth in order to fully understand the context and importance of the events themselves as well as the ideas and points of view they validated. The hearings lasted sixteen days and featured testimony from famous ballplayers like Ty Cobb as well as former minor leaguers like Ross Horning. Sportswriters, management, and the occasional Senator also testified before the committee. Many voices spoke, and many voices were not heard. We will revisit the construction of the witness list, but for now suffice it to say not much thought went into which "luminaries" to bring in. A few voices, like the aforementioned Horning and a ballplayer turned man of the cloth named Reverend Francis Moore, spoke out against the reserve clause. These proved to be the exceptions. With almost monolithic solidarity, the witnesses testified that the reserve clause helped players, fans, and owners. It increased competition, kept the players honest, and assured every fan a chance to catch "pennant fever." Even dissenters agreed that the game had been successfully cleaned up by the Commissioners of Baseball. And more to the point, no one had ever come up with a decent replacement for the system. Here, in the thicket of winding questions, a dominant narrative began to take shape. Building on the rhetoric surrounding the *Gardella* case, the witnesses created a powerful case in favor of the clause.

The hearings, of course, did not possess the adversarial characteristics of a trial nor the onerous rules of evidence for a rule of reason case, but the hearings ended up attempting to decide some of the

⁶⁹ Stuart Banner, *The Baseball Trust*, 105.

same issues involved in such a trial. The American Bar Association described some of the questions that entered into a rule of reason case.⁷⁰ What were the “anticompetitive effects” of the various restraints of trade? What was the intent of the rules imposed? Did the rules produce “procompetitive” or positive effects tending to increase efficiency? Did less restrictive alternatives exist that could produce the same result? On balance, how did these effects way out? James Hartley summed up rule of reason interpretation in the ABA monograph: “If, one balance, the restraint has a substantial anticompetitive effect, it is illegal; if the effects are ambiguous, or are procompetitive, the restraint is legal.”⁷¹ Most writing on the purpose of Committee hearings has emphasized the public, propaganda value of a hearing.⁷² Those elements were certainly present in abundance during the 1951 Hearings on baseball. Opening statements often dealt with newspaper stories from the day before and the most high profile witnesses testified before standing-room only crowds.

Yet, I argue that, the Congressional Hearings also verified and privileged certain narratives above others and thereafter cloaked these ideas in Congressional authority. Moreover, the Hearings brought together in one document many stories spun by many different actors. The broad accord reached by all these witnesses held that the nature of the baseball business required measures which would be inappropriate in other industries. For example, baseball teams required absolute loyalty from their players in order to make money; therefore, any mechanism, like the reserve clause, tending to reduce incentives to “cheat” needed to be in place, and was procompetitive. Or so the story went. In this way cultural uniqueness ran together with economic uniqueness. Indeed, the entire concept of uniqueness became manifestly important. Although many within the baseball world believed these ideas before the hearings, they had little official or legal legitimacy. However, on the other side of the hearings, these arguments were verified and made “true,” such that, when the US Supreme Court had to decide a new challenge to

⁷⁰ James Hartley et al. *The Rule of Reason*, 102-126.

⁷¹ Ibid.

⁷² Stuart Banner argued that the purpose of the hearings was to help baseball. While this may have been the end result, I would tend to disagree with this assessment. Regardless, even if the hearings were truly a waste of time that passed no legislation, they had many unintended effects. “From the beginning, it was clear that the primary purpose of the hearings was to protect baseball from antitrust litigation.” Stuart Banner, *The Baseball Trust*, 107.

the reserve system in 1953 they had a difficult time reconciling strictly legal criteria with the dominant narrative concerning the baseball business.

In this chapter I examine the testimony of representative witnesses and attempt to draw out the reasons for the emergence of this, for lack of a better name, “uniqueness” narrative. Structurally, the first part of the section deals with the immediate context of the hearings, the second deals with the content of the hearings themselves, and the third deals with the report produced from the proceedings. I close by setting up the background of the *Toolson* case.

The opening of the 1951 Hearings into baseball brought a charm offensive by the Chairman of the Subcommittee, as well as the parent Committee, Emanuel Celler. Chair of one of the great standing committees, Celler ruled from 1949 to 1972 with “an iron hand in a velvet glove.”⁷³ Celler had entered Congress in 1923, a Democrat from Brooklyn, and he proved himself to be no fan of trusts upon taking up the gavel of the Judiciary Committee. Appearing on TV “willy-nilly” in the words of Red Smith, Celler even sat in on the fake TV trial. On this show, cleverly entitled “On Trial,” Celler appeared as an expert witness.⁷⁴ Amidst the gray pixels, the viewer saw the stage transformed into a courtroom with a faux judge and faux witness stand. The question before the “court” was the great American game of baseball: the reserve clause, the farm system, league finances, and the 1952 pennant race were all under review. The host called the show’s expert witness and led him to the fake witness stand. Celler “testified” that the integrity of baseball was beyond question since the Black Sox scandal of 1919. Celler continued, “The weight of the evidence [before the Subcommittee] was to the effect that the reserve clause should be preserved, but...in many respects the reserve clause should be modified.” The debate over the alleged

⁷³ Stephen Lowe, *The Kid on the Sandlot: Congress and Professional Sports* (Bowling Green: Bowling Green University Popular Press, 1995), 15.

⁷⁴ The following account from Red Smith, “Views of Sport,” *New York Herald Tribune*, undated, “Clippings,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

peonage of the baseball player had made national headlines. Mr. Paul Porter, in cross examination, challenged Celler on this question with quiet irony. “At \$18,000, [Ned] Garver wasn’t exactly a peon?”⁷⁵

“Not a peon,” Celler responded, “but he is enslaved to a contract which is most inequitable and if I were a baseball manager...I would offer him \$100,000.”

After describing the farm systems as a sort of oligopoly (which Red Smith misspelled “oligockoly”), the show began to conclude. The “judge,” clad in black judicial robes, turned to the camera. The audience was the jury, he said, write in to the show and give your verdict. Guilty or not guilty? Were baseball’s rules a necessary evil or just plain evil?

That question would be raised again and again in the sixteen days of testimony, both in Congress and on television. Celler was also scheduled for *Vanity Fair*, a show moderated by Dorothy Doan, on July 27 for an hour long program (Celler could not go as he was managing a bill on the floor of the house).⁷⁶ In the letter inviting him to come on the air the show’s producer gave some example questions: “Is this vital clause legal? Will the investigation be in the interests of the players, management, public or all three?”⁷⁷ On August 5th Celler took to the airwaves on *The Peoples Platform* radio show to talk about the baseball monopoly. Friends sent him opinion pieces from the *New York Daily Mirror* and the *Portland Oregonian*. One friend wrote, “Apparently your Hearings will get a fine press all over the land.”⁷⁸ Celler, in his autobiography, likened the baseball hearings to kicking a hornet’s nest.⁷⁹ In general, the view of the public might have been best summed up by a cartoon that appeared in the *Sporting News* captioned “Now for the Verdict!” (See Appendix, Figure 3).⁸⁰ “Organized Ball” is depicted as a turkey being ripped apart

⁷⁵ Ned Garver was a pitcher for the basement-dwelling St. Louis Browns, the second team in a one team city. In 1950 he lead the league in ERA+ but finished five games under .500 on a terrible side. In 1951 Garver finished second in the MVP voting but made only \$19,500 (\$177,475 in 2014 dollars). <http://www.baseball-reference.com/players/g/garvene01.shtml>.

⁷⁶ Letter from Hazel Arnett to Emanuel Celler, “Baseball Correspondence 1951-52,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Stephen Lowe, *The Kid on the Sandlot*, 16.

⁸⁰ “Now for the Verdict!” “Sporting News Clippings 1950-1953,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

by number of “surgeons.” Celler can be seen in the foreground donning enormous rubber gloves. A bone saw lies on the table. A little boy in the background pleads: “Why don’t they leave it alone?”

The Subcommittee on Antitrust and Monopoly decided to begin baseball hearings during the 82nd Congress in 1951. The subcommittee had been formed by the 1946 Legislative Reorganization act as a standing subcommittee of the Judiciary Committee.⁸¹ Celler appointed himself the chairman of the subcommittee, and in this way positioned himself at two crucial legislative bottlenecks. A chairman could, by use of his prerogatives, “expedite measures they favor and...retard or pigeonhole those they dislike.”⁸² In a general case, the hearing process operated by what contemporary political scientists called the “noise principle” – “wait to see who hollers, and then relieve the hollering as best you can to see who else hollers.”⁸³ According to political scientist George Galloway, the ideal congressional hearing would provide an opportunity for the testimony of interest groups, distinguished experts, and spokesmen of the public interest.⁸⁴ Yet although the witnesses for the Subcommittee’s steel and newsprint hearings lived up to these standards, the witness list for baseball left something to be desired. The former contained the Attorney General, distinguished economists, prominent lawyers, and interested parties, while the latter contained famous baseball players, owners, and sportswriters.

Once the hearings were announced in the summer of 1951, Representatives Herlong and Mills reintroduced their sports bill designed to exempt baseball from litigation, and Representative Melvin Price (D. IL) did likewise. In the Senate, Edwin Johnson (D. CO), who was, at this time, also president of the Western League, introduced a bill to exempt baseball from the antitrust statutes. In an interview with the *New York Times* on May 5, 1951, Celler said plainly, “In my opinion baseball is now operating in violation of the antitrust laws.”⁸⁵ Thus Celler’s position became clear. In the same article, Celler said, “[I]t will be necessary to call the commissioner of baseball, some of the owners, and representative

⁸¹ George Galloway, *The Legislative Process in Congress* (New York: Thomas Crowell Company, 1953), 312.

⁸² *Ibid.*, 289.

⁸³ Quoting Julius Cohen from George Galloway, *The Legislative Process in Congress*, 302.

⁸⁴ George Galloway, *The Legislative Process in Congress*, 299.

⁸⁵ “Celler Favors Airing of Dispute Over Baseball’s Reserve Clause,” *New York Times* May 5, 1951.

players.”⁸⁶ President Harry Truman weighed in with his support the next month.⁸⁷ Who exactly would testify remained up in the air.

Meeting on July 25, 1951, the Subcommittee members took time to establish early positions on the subject. Rep Keating did not support the hearings “given the state of the world as it is,” presumably referring to the Korean War.⁸⁸ Rep McCulloch worried that cancelling the hearings would have bad optics as it would appear they had been pressured to cancel.⁸⁹ Associate Counsel, and future US Supreme Court Justice, John Paul Stevens indicated that if baseball lost an antitrust case in court, the game would suffer. The Chairman saved the longest speaking time for himself. Baseball was worth hundreds of millions a year, he said, and was broadcast nationally on television and on the radio. “Hundreds of small stations are deprived of the right to broadcast,” he continued, “In the minor leagues attendance has fallen off to nothing with the televising of major league games.”⁹⁰ He further expressed concerns regarding Organized Baseball’s refusal to allow the St. Louis Browns to move to San Francisco.

The hearings began on the morning of July 30, 1951 in room 346 of the Old House Office Building with the testimony of Ty Cobb. Before his testimony began, Celler read a short statement into the record. Chairman Emanuel Celler said, “It is the earnest desire of the subcommittee to preserve the integrity of baseball, which has traditionally been considered our national pastime.”⁹¹ The subcommittee would hear the testimony of “representatives of management, from players, and from experts and writers on baseball. This latter group will, we hope, provide us with a fair expression of the points of view of the general public.”⁹² The immediate business of the hearings concerned House Resolutions 4229, 4230, and 4231, which were all designed to exempt all organized sports from antitrust. These bills amended the

⁸⁶ Ibid.

⁸⁷ “Truman Approves Baseball Reserve Clause Investigation,” *The Washington Post*, July 19, 1951.

⁸⁸ “Minutes of the Meeting of the Subcommittee on Study of Monopoly Power, July 25, 1951,” “Minutes of Meeting,” Box 52, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 2

⁹² U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 2.

antitrust statutes such that they “shall not apply to organized professional sports enterprises or to acts in the conduct of such enterprises.”⁹³ Celler took care in discussing the questions before them. Did baseball require an exemption, or should “full and free competition” reign? Did the “public interest” require an exemption? The testimony would tell. Ty Cobb Stepped into the box, but it remained unclear how helpful he would be in answering those questions.

The sporting headlines carried an interview with the cantankerous old ballplayer on the eve of his testimony. “Of course, it’s still a sport,” Cobb said, “It’s never been a business.”⁹⁴ Apparently Cobb had forgotten his 1913 holdout which almost precipitated a Congressional investigation.⁹⁵ After a lengthy introduction and what can only be described as light questioning, Povich wrote “the politeness had been quite suffocating,” the Chairman turned the conversation to the reserve clause.⁹⁶ “There are many thousands and thousands of other boys that live on farms,” Cobb began:

They are big and strong and husky...[baseball] made it possible for them to greatly improve themselves...And a lot of those boys are able to advance in their profession and secure great salaries... I have a reverence for baseball myself, and I am loyal to it because of what it has done for me...and there must be something, I feel, for the protection of baseball as we have it today. If we did not, the strongest clubs in the largest cities, or the ownership that has the most money...could hire away from the weaker clubs, then you would have an unwieldy league.⁹⁷

In this way, Cobb’s testimony blended together the American mythos with the reserve clause. Baseball lifted poor boys up by their bootstraps and offered generous salaries. Through this lens, it must have been easy to see the greed of the players. However, under further questioning it became increasingly clear that putting old baseball luminaries in front of Congress would not prove illuminating. When asked what protected him during his 1913 holdout (Cobb’s words from 1913 had to be read into the record because he had forgotten them) Cobb responded, “The public – the standing of the ballplayer through his efforts and

⁹³ H. R. 4229, 82nd Cong., 1st Sess.

⁹⁴ “Baseball a Sport, Not Industry, Says Cobb,” *New York Times*, Jul 30, 1951.

⁹⁵ For more on this see Stuart Banner, *The Baseball Trust*, 42-45.

⁹⁶ Shirley Povich, “This Morning,” *The Washington Post*, Aug 1, 1951.

⁹⁷ U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, pp. 1509, 12

play.”⁹⁸ He demurred when asked how public opinion would help players of lesser caliber. Though Celler decided that the hearings would not be broadcast on TV or radio nor photographed by the press, the Cobb testimony caused quite a stir in the press. However, when national league president Ford Frick took his seat at the witness table the velvet glove came off.

Ford Frick, a former sportswriter, read into the record a prepared statement glorifying the history of baseball. “Baseball is the kid on the sandlots and the shirt-sleeve fan in the stands...baseball is hot dogs and peanuts,” etcetera and so forth he meandered.⁹⁹ He eventually got around to the propriety of the reserve clause. Primarily the clause prevented “tampering” – a phrase defined by major league rule 3 (g) as “negotiations or dealings respecting employment...between any player, coach, or manager and any club other than the club with which he is under contract.”¹⁰⁰ Thus, Frick’s testimony cut to the heart of the intent question. Whatever the actual effects of the clause, Frick alleged that the rules of the game had evolved over time “to insure fair and honest competition and to preserve public confidence in baseball’s honesty and integrity.”¹⁰¹ The reserve clause reflected the “unique and unusual” services of the ballplayer not an attempt to concentrate power in the hands of ownership. The outlines of the argument baseball had planned thus became clear, and they appeared to be very similar to the arguments advanced in the *Gardella* case. The players needed to be restrained from being tampered with, after all. In terms of a suitable mechanism to replace the clause, after sixteen years of thinking on the subject Frick and the owners had not been able to conceive of one.¹⁰² More importantly perhaps, the story spun by Frick, soon to be named the 3rd Commissioner of Baseball, accorded well with Cobb’s testimony. Thus far, then, players and owners seemed to be in agreement. If the thrust could be summed up in one sentence, it was this: “Frankly, gentlemen, I don’t see why all the furor about the reserve clause.”¹⁰³

⁹⁸ U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 12, 13-15.

⁹⁹ *Ibid*, 28.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*, 28-29.

¹⁰² *Ibid*, 35.

¹⁰³ U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 30.

After Frick's eighteen page paean to baseball concluded, the Chairman could hardly disguise his animosity saying, "Now it is going to be our turn."¹⁰⁴ Povich described the change in his column the next morning, "It wasn't quite the friendly clambake people said it would be."¹⁰⁵ Ernest Goldstein, the general counsel, focused many of his questions on the reserve rule, but did not accept Frick's economic claims at face value. "Now, to what degree is competition lessened within organized baseball if player X, violating his reserve rule, goes to a league outside of organized baseball?" Goldstein asked.¹⁰⁶ Frick repeated his earlier point that baseball players were unique. "Let us take a hypothetical case along that line. Let us take a class D league player, a minor league player, who resigns from organized baseball in order to operate a gasoline station. Is the reserve rule invoked against him to prevent him from operating a gasoline station?" Frick responded, "Theoretically, yes; actually, no."¹⁰⁷ This answer did not satisfy the questioner: How exactly did this promote competition? Frick, who had already insisted he was not a lawyer, did not understand the importance of the question. The strength of baseball's many-faced argument rested in its plausibility and in the history of the business, not in technical questions. A whole series of questions pertaining to a hypothetical voyage in which Stan Musial voyaged to Afghanistan went absolutely nowhere. Frick, however, did succeed in bringing the point around to a very clear example: suppose a player assaulted an umpire, he would have to be blacklisted. On the face of things, the "D league gasoline manager" and "Stan Musial world traveler" had little to do with this hypothetical assailant. Yet the exchange illustrated something important, the reserve clause narrative did not have a thorough internal logic, but rather derived its strength from the sheer number of people who held the belief to be true. Even players specifically harmed by the reserve system, like Mickey Owens above, supported the clause. Unanimity, or near unanimity, conferred a great deal of authority, especially when the Congressmen had conferred upon the witnesses a vaguely defined expertise.

¹⁰⁴ Ibid, 44.

¹⁰⁵ Shirley Povich, "This Morning," *The Washington Post* Aug 1, 1951.

¹⁰⁶ The following questions and answers are from U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 49-52.

¹⁰⁷ Ibid, 50.

John Drebinger wrote an article critical of the witnesses after the first week of testimony on August 5, 1951. “As this somewhat bewildered observer sees it, how all this is to be determined by the calling of hundreds of persons only hazily familiar with the inner workings of baseball,” Drebinger began, “with almost assuredly no knowledge whatever of the nation’s anti-trust laws, unless they happen to be talented lawyers, is something we can’t begin to fathom.”¹⁰⁸ Star players filed in and out of room 346 over the coming weeks, and they voiced nearly unanimous support for the reserve clause. Fred Hutchison, a player for the Detroit Tigers and the players’ representative of the American League testified on October 19, 1951. Representative Lane inquired if, speaking for the players, Hutchison believed that most supported the reserve clause “as a whole” the player responded, “Yes, sir.”¹⁰⁹ Dodger’s star “Pee Wee” Reese stated emphatically that baseball could not operate without the reserve clause. “I would not want to say anything against baseball,” he continued, “because baseball has been wonderful to me.”¹¹⁰ Defenders of the reserve clause frequently shifted the rhetoric onto life or death grounds. Baseball could not survive as an industry without the reserve clause; therefore, any move to moderate or outlaw the practice would be “against” baseball. Sportswriters also trumpeted this view. When Assistant Counsel John Paul Stevens sent a survey out to 300 prominent sportswriters asking, among other questions, “What is the general attitude of the players on the team you cover towards: (A) Reserve rule?” 75 answered favorable and only 1 answered unfavorable.¹¹¹ In front of the hearings, sportswriters confirmed this consensus. Walter W. “Red” Smith, the writer who defended Gardella in the press, testified on October 18. When asked if he supported the reserve system Smith stated: “yes...and for the reasons which I know have been submitted here many times. I think they are all good reasons.”¹¹² Indeed, many witnesses had advanced a narrative

¹⁰⁸ John Drebinger, “Sports of the Times: Who’s investigating what?” August 5, 1951, “Clippings,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

¹⁰⁹ U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 847-848.

¹¹⁰ *Ibid.*

¹¹¹ Survey of Sportswriters, “Surveys,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

¹¹² U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 833.

in favor of the reserve system by the time Smith testified. It appeared increasingly likely that Celler, who had set out seeking monsters to slay, would find no monsters at all.

The exceptions to the rule, I think, demand attention because they proposed alternative stories. Yet the point bears repeating: only two witnesses spoke at length against the reserve clause. On Tuesday August 7, the Chairman read a brief notice into the record before proceeding. After polling 300 sportswriters from across the country, Celler said, most he learned that believed that the men to appear before the hearings made up a representative group. Yet hardly any minor leaguers had appeared. In response to this Ross C. Horning was called to testify. Horning, born in Watertown South Dakota, had played Organized Baseball in the Western League for the Sioux Falls Canaries beginning in 1941.¹¹³ As players in the low minors, the Canaries frequently made overnight trips of hundreds of miles, sleeping in the bus to save on hotel bills. Horning made \$60 a month. Returning from the war in 1946, Horning failed to make the AAA Sacramento Team to which his contract had been assigned and therefore became a free agent. The young second baseman returned to Sioux Falls at \$175 a month. Horning began to take college courses and “had a very fine room at the YMCA” when he was transferred to Hutchinson, Kansas by the Chicago Cubs – the Cubs had a working agreement with both teams.¹¹⁴ Wishing to stay at Augustana College, Horning refused to go. The Cubs promptly blacklisted Horning. The sort of economic leverage on display certainly did not surprise the Representatives, they were after all on the third day of testimony, but Horning gestured to a larger point regarding the construction of the witness list. Minor League players would not come and testify, Horning stated, for fear of reprisals by their home club.¹¹⁵ Horning continued on the subject of skewed representation, “The general public, or baseball fan, when he thinks of baseball, thinks of major leagues...He thinks of huge salaries, of terrific baseball parks...That is baseball. Only 5

¹¹³ Ibid, 347-348.

¹¹⁴ Ibid, 356-7.

¹¹⁵ Ibid, 364. “I believe you would have a difficult time obtaining active minor-league ballplayers who do not have a suit pending against baseball’s reserve clause...who will simply come up here and tell you about the operation, because when they go back to their home club, they will have a difficult time.”

percent of baseball players in the United States play that way.”¹¹⁶ Horning cited the Shirley Povich article from that morning, “[Povich] said: ‘This peon is being forced to enter baseball. He has to live in the best hotels, play in these good ball parks, accept this \$125,000.’ That is not the norm by far.”

Even this sharp criticism failed to strike at the heart of the matter. When Counsel J. P. Stevens asked if Horning had ever bet on baseball or knew anyone who had, he responded, “They would not even bet a coke, or would not even bet a malted milk or anything of that nature.”¹¹⁷ Gambling, apparently, had been driven out of the game entirely. In 1919 players had conspired to throw the World Series for thousands of dollars. In 1951 they “would not even bet a coke.” Stevens obviously intended the question to speak to the reserve clause, and although Horning did not cite the reserve clause in his response, this was the presumed reason. When the testimony of the Minor Leaguer finally turned specifically to the reserve clause, the Congressmen asked the same set of questions. When the Chairman asked about the competitive balance question Horning responded that the richest clubs owned the best players anyway.¹¹⁸

The moral conversation about the reserve clause came into stark relief with the testimony of Father Francis A. Moore, a Jesuit Priest, on October 22.¹¹⁹ Moore began his prepared statement by stating that his views did not reflect those of the Catholic Church. “It is a controversial issue,” Father Moore said, “and it is my own personal view.” Moore, who had never played in organized baseball, set out to prove that the reserve clause was both wrong and unnecessary, a tall task for a lone Priest from San Jose. “I think the use of the reserve clause is morally unjust,” he stated flatly.¹²⁰ “[T]he reserve clause is not necessary for the existence and welfare of baseball, which I intend to prove to the best of my ability.”¹²¹ He came to testify not for personal aggrandizement but to seek the truth.¹²² He argued that under free

¹¹⁶ U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 372.

¹¹⁷ *Ibid.*, 350.

¹¹⁸ *Ibid.*, 375-6.

¹¹⁹ *Ibid.*, 911.

¹²⁰ *Ibid.*, 912.

¹²¹ *Ibid.*

¹²² “In our Jesuit rules we have an axiom which says that in discussing a controversial point we should not do it in such a way that we merely want to gain the upper hand, but that the truth may appear.” U.S., Congress, House, Committee on the Judiciary, *Organized Baseball*, Hearings, before the Subcommittee on Study of Monopoly Power, on H.R. 2449, 82nd Cong., 1st sess., 1951, 912.

competition for players league parity would be increased rather than lessened. On the subject of loyalty between players and teams, Moore testified: “I am inclined to judge that the public will have more confidence in the loyalty of a player to his team if they know that the player is free not to play for the team and yet wants to play for them.”¹²³ Why could the same results not be created by a normal system of contracts? Eliminating the perpetual renewal clause would not necessarily eliminate the tampering clause, he argued. After a brief back and forth between Moore, Stevens, and Rep. Hillings, Chairman Celler asked, “in other words, you want the same law that applies outside of baseball to apply to baseball?” Moore responded, “Yes, sir.”¹²⁴ The fact that this view was left to an unknown man who had never played in anything above semi-pro ball to perpetuate is remarkable given that, for the first half-century of the reserve clause debate, strong opposition to the reserve system existed, if not on economic grounds then moral ones. Where was the latter-day John Montgomery Ward? Or even Danny Gardella? Perhaps what Moore said was, to use his own words, “the objective truth.” But in the end, it simply did not matter. Not only did he have little by way of authority, but the sheer volume of other voices drowned his out. The pendulum had swung very far in the direction of the reserve clause.

The extent to which threats of reprisal dissuaded minor leaguers from testifying cannot easily be discerned. After the publication of the report of the hearings in 1952, Celler received a letter penned by “a busted minor leaguer.”¹²⁵ “Your committee could find no evidence that the necessary reserve clause was being wickedly and fraudulently prostituted by professional baseball’s farm system... I said ‘necessary’ reserve clause. ‘Convenient’ would be a better word.”¹²⁶ Why did these narratives not make it into the Congressional record in any substantial way? The minutes of the meeting of September 19 illustrated a number of decisions made by the subcommittee as to the witness list. Up to that point the witness list had indeed been bewildering. This midway conference provided an opportunity to change course. In this

¹²³ Ibid, 915.

¹²⁴ Ibid, 921.

¹²⁵ Letter to Emanuel Celler from Anonymous, 1953, “Baseball Correspondence Feb-Mar 1953,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

¹²⁶ Ibid.

meeting, the committee decided to limit the hearings to baseball – they would not invite representatives of other sports to testify, and any bill they reported out would include baseball only.¹²⁷ “The Chairman said that other sports would be left out...since every sport is different.”¹²⁸ General counsel for the Committee suggested that “we should hold a very short hearing on baseball only, write a good report, and let the record speak for itself.”¹²⁹ Whose voices would comprise this record? Goldstein further suggested a number of player witnesses to be requested, and if needed subpoenaed, to appear: Danny Gardella, Joe DiMaggio, Harold “Pee Wee” Reese, Phil Rissuto, Ned Garver, and Al Widmar. Gardella had clear reason to appear, but the exact perspective expected of the other players remained opaque. Additionally, they wanted to invite Philip K. Wrigley, Jr., the owner of the Chicago Cubs, in order to investigate the problem of franchising. Branch Rickey would also be invited to testify on that score. Additionally, Fred Hutchinson and Paul Kiner, the player representatives for the National and American Leagues, would also be called.¹³⁰ The amount of discussion on these points appeared brief. In this way, the construction of the witness list was, at best, thoughtless. Compared to the earlier investigations of steel, newsprint, and theater monopolies, the baseball hearings stood out as poorly constructed.

By way of example, in 1950 the Shubert theater company controlled upwards of sixty percent of the theater business in New York City and close to ninety percent of the theater business nationwide.¹³¹ Almost all theater enterprises in the United States flowed through the Shuberts and the government, in a suit against the theater group, alleged that the defendants formed an unlawful cartel. The extent of control almost exactly mirrored baseball. Moreover, the traditional view that theater and the opera were not “commerce” did not stop the government from investigating the alleged trust. The Shuberts even employed some labor practices similar to the reserve clause. A letter received by Celler on Feb 24, 1950

¹²⁷ “Minutes of the Meeting of Subcommittee on Study of Monopoly Power Sept 19, 1951,” “Minutes of meeting,” Box 52, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Paul P. Kennedy, “The Government vs. The Shuberts,” press clipping. “Correspondence, Clippings, Notes,” Box 59, The Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

explained the practice of employing orchestras of “house men.”¹³² The anonymous author wrote, “There exists in every Shubert controlled house a group of musicians known as house men. In order to keep there jobs they are compelled to kick-back as much as ten to twenty dollars per week. . . . Due to the scarcity of work the kick-back has been expanded to cover more and more musicians other than house men [sic].”¹³³ The author did not sign the letter for fear of being blacklisted from the theater companies.¹³⁴ Though clearly different in intent, the house men system possessed the same effect as the reserve system. Employees were asked to take less money in order to work for an employer controlling upwards of ninety percent of the market for labor. If they refused to do so or worked outside of the monopoly they would be blacklisted and unable to work. The crucial difference then must be that baseball articulated clearly and loudly a narrative which justified the practice while the Shuberts did not. On Feb 22, 1950, Celler issued a “furious blast” against the Shuberts in the press, declaring that the Shubert monopoly was “very malodorous.”¹³⁵

In this way, the stacked deck in favor of the reserve system did not explicitly derive from a desire on the part of the Congressmen to privilege baseball, but rather reflected the unspoken belief that these players, owners, and sportswriters truly held balanced and well-founded ideas. Who better to discuss baseball than the men who devoted their lives and livelihoods to the sport? The most powerful member of the Committee, Celler, clearly possessed strong feelings about the application of competition policy. Based on the evidence, he earnestly tried to improve the position of baseball in a constructive way. For example, his handwritten notes include ideas for changing the system. He wrote on one note card, “Modified reserve: 5 years.”¹³⁶ This proposed system closely mirrored the one baseball would eventually

¹³² “Letter to Emanuel Celler from anonymous, Feb 24, 1950,” “Correspondence, Clippings, Notes,” Box 59, The Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ Oscar Davis, “Celler Sets off Blast: U. S. Suit Against Shuberts follows N. Y. Rep’s Attack,” *The Washington Daily News*, Feb 22, 1950, “Correspondence, Clippings, Notes,” Box 59, The Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

¹³⁶ Misc. notes, “Notes,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

adopt in 1976.¹³⁷ Celler's statements to the media, his insistent questions, and his prior positions on antitrust all support a charitable reading of the Hearings. Moreover, no less a mind than John Paul Stevens handled a great deal of the questioning. What I am suggesting, then, is that these events represented a great deal more than, to borrow Stuart Banner's phrase, "Glorified Wind-Jamming Sessions."¹³⁸ The account of baseball's business practices, summarized by the report of the subcommittee the following year, illustrated the consensus that baseball's rules needed to be in place. In the end, the subcommittee did not recommend passage of H.R. 4229.

The Congressmen summarized their findings in a book length report. They proposed five possible reforms: "(1) legislation outlawing the reserve clause; (2) favorable consideration of the bills designed to give baseball an unlimited exemption from the antitrust laws; (3) the enactment of a comprehensive baseball code to be enforced by a governmental agency; (4) a limited exemption for the reserve clause; or (5) that no legislation be enacted at this time."¹³⁹ The first option hardly seemed feasible. The "overwhelming preponderance of the evidence" suggested that baseball needed a reserve clause.¹⁴⁰ The second option appeared undesirable as well. Amending the antitrust statutes to exempt all professional sports would not only disrupt antitrust thought and jurisprudence but seemed imprudent given that the hearings had only investigated baseball. They reported H. R. 4229 "unfavorably," essentially killing the bill.¹⁴¹ The creation a regulatory agency in charge of baseball got even less traction, and the writers of the report dismissed this out of hand. The fourth solution best accommodated the available evidence. In essence, the bill "would state in general terms that the antitrust laws shall not apply to" restraints like the reserve system.¹⁴² Thus, they settled on the last option. "There is, however, no need to enact a special rule of reason for baseball unless such a rule is not already applicable to this industry. Organized baseball,

¹³⁷ Even today baseball players are "reserved" for six years of Major League service time.

¹³⁸ Stuart Banner, *The Baseball Trust*, pp. 104-112.

¹³⁹ *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power*, Emanuel Celler, chairman, 229.

¹⁴⁰ *Ibid*, 229.

¹⁴¹ *Ibid*, 230.

¹⁴² *Ibid*, 231.

represented by eminent counsel, has assured the subcommittee that the legality of the reserve clause will be tested by the rule of reason... The Department of Justice has not disputed baseball's position that the reserve clause is legal under the rule of reason."¹⁴³ The Congressmen believed that legislation could be passed after a trial court ruled on the current Toolson, Kowalski, and Corbett lawsuits under the rule of reason standard. In this way, the only thing actually produced by the hearings, aside from a spectacle, was a compilation of testimony.

What then did the report decide? The subcommittee largely followed the path set out by the evidence at hand. The near unanimity of the players, ostensibly the group injured by the system, held a considerable amount of import. The report summarized the testimony of the player witnesses as follows:

[I]t is fair to state that they were in substantial agreement that some sort of reserve clause was necessary for the successful operation of professional baseball and that, if adequate safeguards were included in the baseball contract, the reserve clause itself would not be detrimental to the interests of baseball players. Indeed, it was the opinion of most witnesses that in the long run the reserve clause was in the best interests of the players as well as of the fans and the persons who have a financial interest in the game.¹⁴⁴

Even critics of Organized Baseball like Ross Horning recognized that the centralization of power in baseball following the 1919 World Series had effectively cleaned up the game.

History represented another large piece of evidence working in favor of the reserve clause. The authors of the report provided the following summary: "After the reserve rules were adopted, the widespread practice of 'revolving' was curtailed, competition was improved, and consequently further interest in baseball grew rapidly."¹⁴⁵ The report quoted at length from particularly compelling pieces of testimony. Almost all students of the game's history attributed the early problems in the business to the players and the great success thereafter to the reserve clause. During the hearings, this view of history was reproduced by sportswriters and "historians" and in this way became embedded in the report. Given that

¹⁴³ *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power*, Emanuel Celler, chairman, 231.

¹⁴⁴ *Ibid*, 212.

¹⁴⁵ *Ibid*, 214.

no contemporary individual advanced a more compelling narrative, the Subcommittee can hardly be faulted for its acceptance of the owners' version of history. The congressmen simply had no alternative.

Ray Fisher, a former player and amateur historian, testified that even the earliest iterations of professional baseball suffered from *crookedness*. The report recounted his testimony: “[Before the reserve clause] [c]lubs raided each other...contract jumping became commonplace; there was no balance of competition; clubs were organized and then folded up like falling leaves; gambling flourished; thrown games were an accepted occurrence; even honest players were under suspicion.”¹⁴⁶ Fisher attributed the disappearance of these problems to the reserve rule. Fisher had been suspended from baseball in 1921 for “jumping” his contract, but apparently testified without irony.¹⁴⁷ Lee Allen, a sports broadcaster, further explained that the system really *helped* the players. “To illustrate: Player Smith is a member of the Brooklyn Dodgers in 1951. During the course of the playing season he contracts to play for the New York Giants in 1952... Several days afterward, while playing for the Dodgers against the Giants, he commits an error that costs his team the game. The public, knowing that Smith is to join the Giants, immediately suspects that the player intentionally lost the game. The reserve rule prevents any such situation from arising, and therefore is actually a protection for the player.”¹⁴⁸ On top of these considerations, no executive had ever been able to advance a less restrictive rule.

The overall picture might be best summarized by this assessment: “The history of baseball has demonstrated that cooperation in many of the details of operation of the baseball business is essential to the maintenance of honest and vigorous competition on the playing field. For this reason organized baseball has adopted a system of rules and regulations *that would be entirely inappropriate in an ordinary industry* [emphasis mine].”¹⁴⁹ The authors of the report plainly captured the dominant narrative produced by the hearings. The reserve clause established relative parity between the various teams and also kept

¹⁴⁶ Testimony from hearings quoted in *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power*, Emanuel Celler, chairman, 214.

¹⁴⁷ Bill James, *The Bill James Historical Baseball Abstract*, 136.

¹⁴⁸ *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power*, Emanuel Celler, chairman, 212.

¹⁴⁹ *Ibid*, 229.

players honest. In the context of these findings, how would the US Supreme Court handle the impending litigation? Peter Craig, a researcher employed by the Judiciary Committee for the baseball hearings, described baseball's legal strategy in a law review article: "Organized baseball relies on three lines of defense to preserve its existing hegemony. It possible it hopes to prevail in the jurisdictional argument founded on the *Federal Baseball* decision. Failing this, it asserts that monopsonistic restraints in the personal service market are not within the prohibition of the Sherman act. And, finally, it claims its restrictions are reasonable in the light of the peculiar economic conditions prevailing in professional sports."¹⁵⁰

Regardless of how the Court decided, the debate that played out between the Gardella Case and the Hearings would certainly play a role, if not directly, then in setting the stage for the arguments to follow. The consensus over the reserve clause no longer reflected Hugh Fullerton's 1910 formulation. Outside of Judge Frank, Father Moore, Danny Gardella, and the present litigants, few people had a bad thing to say about baseball's labor arrangement. Thanks in no small part to the long shadow of the gambling scandals of the 1910s, the battleground of the debate had changed. So too had the armies on that battlefield. Owners, players, and sportswriters joined together in harmony: the Federal Government should keep its hands off. Like the boy in the cartoon said, "Why don't they leave it alone?"

¹⁵⁰ Peter Craig, "Monopsony in Manpower," *The Yale Law Journal*, 579.

Chapter 3: Safe at Holmes: *Toolson*, 1953

“Organized baseball is sitting on a keg of dynamite.” – Emanuel Celler letter to Mr. Spink of *The Sporting News*, September 2, 1953¹

“Q: That’s funny, Daddy. Baseball is a sport, but football and prize-fighting aren’t. How is that?”

“A: The Supreme Court says so.” – Editorial in the *Wall Street Journal*, Feb 27, 1957²

“This Court’s decision in *Federal Baseball*... made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream... The unbroken silence of Congress should not prevent us from correcting our own mistakes.” -- William O. Douglas dissenting in *Flood v. Kuhn* (1972)³

The Supreme Court’s decision in the case *Toolson v. New York Yankees* represented the endpoint of four years of an acrimonious debate which played out in Courts, in Congress, and in the sports pages. Celler’s committee had demurred from passing legislation, and rather unceremoniously left the problem to the Federal Courts. “[T]he courts may have to differentiate the unreasonable features of baseball’s rules and regulations from those which are reasonable and necessary,” the report concluded.⁴ The Chairman and his fellow Congressmen recommended “no legislative action at this time.”⁵ Thus the fate of the reserve clause rested upon the shoulders of the judiciary.

Because of Holmes’ decision in 1922, the only legal question presented in *Toolson* concerned the jurisdiction of the court – did baseball in 1953 constitute interstate commerce as defined by the Sherman and Clayton Acts as well as by the Constitution? Thus, argument regarding the merits of the case was not germane. Nevertheless, the litigants spent a great deal of the case arguing over the reasonableness of the reserve clause.

Recall that Holmes’ 1922 decision read in part: “...the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words.”⁶ Though some debate ensued as to whether Holmes was interpreting the antitrust statutes or the Constitution, the result in

¹ Letter from Emanuel Celler to Mr. Spink, September 2, 1953, “Correspondence April – December 1953,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

² From Stuart Banner, *The Baseball Trust*, 141.

³ *Flood v. Kuhn et al* 407 U.S. 258 (1972), Dissenting Opinion.

⁴ *Organized Baseball: Report of the Subcommittee on Study of Monopoly Power*, Emanuel Celler, chairman, 232

⁵ *Ibid.*

⁶ *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, et al.* 259 U.S. 200 (1922), Opinion of the Court.

1953 was the same: baseball could not be challenged under the antitrust laws in Federal Court for want of jurisdiction. Yet the definition of the phrase “interstate commerce” had changed radically in the intervening years. After the retirement of the conservative Justice Willis Van Devanter in 1937, the Supreme Court underwent a so-called “revolution” in Constitutional interpretation.⁷ The attitude of the court toward the legislature, both Federal and the several States, turned from adversarial to deferential, and many believed that the “commerce clause” no longer restricted any commercial legislation at all.⁸ Thus the question appeared easy to answer – the business of baseball undoubtedly fell within the power of the Federal Government. Crucially however, the Supreme Court had not expressly overruled the 1922 decision.

This may seem to be a fine point, but the consequences were large. As a result, the attorneys representing Toolson and his fellow litigants only had to prove that baseball now rested within the jurisdiction of the court. If they did so they would “win” the suit and the case would be remanded for trial “on the merits.” In other words, only then would a trial court decide on the “reasonableness” of the reserve clause. The lawyers for baseball were then left in the difficult position of arguing that baseball did not meet the contemporary understanding of the commerce clause. If they could convince the Court of this view, the 1922 precedent would hold and the reserve clause would, once again, be lent the authority of the highest court in the land. The defendants did have one advantage, and that was precedent. Would the new definition of legislative power countervail the weight of precedent within the Common Law – in legalese “*stare decisis*” or “to stand by things decided”? In a Common Law system, older cases carry serious weight.

If the question of whether or not the reserve clause met the “rule of reason” standard could only be answered once the *Toolson* case was decided, why then did the litigants spend so much time in the briefs and in oral arguments arguing about the answer to this question? There could be a number of

⁷ Some scholars have suggested that the usual account is somewhat overstated. See Barry Cushman, “Rethinking the New Deal Court,” *Virginia Law Review* 80 (1994), pp. 201-261. Though Cushman described the dominant narrative “as a Constitutional bedtime story” for our purposes getting it exactly right may not be overly important.

⁸ See above p. 43.

reasons for this. Most obviously, these could have been throw-away arguments designed to sway the justices. In other words, the inclusion of policy discussion in a case about jurisdiction was simply misdirection. Alternatively, the legal actors may have viewed the jurisdiction question as though it encompassed the “rule of reason” question. To expound, it was largely taken for granted that baseball’s restraints on trade would be found unreasonable at trial, and therefore a decision to reverse the 1922 precedent would *automatically* mean the destruction of the reserve system. The truth of this belief is debatable, but it may have influenced the litigants and justices regardless. Finally, the reasonableness question represented a much stronger position for the defendants, and it benefited them to move the debate to reasonableness grounds. All three conclusions may contain some truth. Regardless, from a consequentialist perspective, *Toolson* ruled the reserve clause reasonable in *effect* though not in *fact*.

The opinion itself, weighing in at fewer than 200 words, has largely defied understanding and was in many aspects bizarre and confusing. The most basic interpretation was that the Court voted 7-2 to affirm the Ninth Circuit decision in favor of the New York Yankees and the other defendants comprising Organized Baseball. “Yesterday’s ruling means that baseball cannot be challenged in the courts as an illegal monopoly. The game’s reserve clause and other restrictive agreements will remain in effect unless Congress takes action,” Jack Walsh reported.⁹ The decision was also a *per curiam* or “by the court” decision. This meant that it went unsigned. However, from archival sources we do know that Associate Justice Hugo Black wrote the draft of the opinion and Chief Justice Earl Warren appended the last clause of the decision to that draft.¹⁰ Essentially, the Court ruled that baseball now constituted interstate commerce but found in favor of the respondents regardless. Any change in this status would be left up to the authority of Congress. Why the Court decided in this manner is the subject of this chapter.

The only scholar to seriously engage with the *Toolson* case is Stuart Banner. He argued that *Toolson* was an example “of the pragmatic, instrumentalist nature of the Warren Court.”¹¹ By way of

⁹“Baseball Upheld as Sport by High Court,” *The Washington Post*, Nov 10, 1953

¹⁰ “Memo from Chief Justice Earl Warren to Associate Justice Hugo Black, October 23, 1953,” “321 Toolson 1953, Hugo Black Papers, Library of Congress, Manuscript Division, Washington D. C.

¹¹ Stuart Banner, *The Baseball Trust*, 122.

answering *why* the Court decided the way it did, Banner clued in on the concern with retroactivity. In overruling the *Federal Baseball* precedent, the Court would expose Organized Baseball to litigation concerning actions which had been legal at the time. Although he also made a half-hearted attempt to justify the decision based on implicit concerns of Yankee dominance in baseball, the crux of his argument is here: “Even if the justices thought the reserve clause was unfair, they might well have thought that imposing retroactive liability on baseball was even more unfair,” he wrote.¹² Reviewers criticized this explanation as too weak.¹³ In my view, Banner does a remarkable job of engaging with both the text itself as well as the context. In building on his work I have attempted to make a more robust causal argument which fills in the gaps of the *Toolson* history.

A case at the level of the US Supreme court encompasses more than the decision itself. The briefs, oral arguments, dissenting or separate opinions, the academic background, the precedents, popular interpretations, and the overall sociopolitical backdrop all constitute different parts of a deep, often contentious discourse. The decision itself, then, should be considered as only one final facet. Methodologically, this chapter will attempt to shed fresh light on the *Toolson* case by applying the framework developed by Peritz.¹⁴ The debates over uniqueness, competition, gambling, and labor rights which played out in the Celler Hearings and extended back to the Gardella case and beyond, all undergirded the briefs submitted in *Toolson* both directly, through the text, and indirectly, through ideas. Privately, the Justices expressed concerns about the rightness of the reserve clause and the uniqueness of baseball. During oral arguments, the debate ranged far beyond the narrow question of jurisdiction. The Justices made the connection between the logic of the Celler Hearings and the case before them clear in the decision, and further clarified this connection in subsequent decisions. For example, in the Court’s decision in *United States v. International Boxing Club* (1955) the Court insisted upon applying the antitrust laws to the boxing business, despite the industries’ manifest similarities to the baseball business.

¹² Stuart Banner, *The Baseball Trust*, 121-122.

¹³ See above, p 7, n. 32.

¹⁴ Rudolph Peritz, *Competition Policy in America*, 3-8.

Chief Justice Warren, writing for the Court, quoted directly from the Celler Report in his decision.¹⁵ Given all of these direct and indirect ties between the jurisdictional debate and the policy debate, the contention that this case was “about” jurisdiction is overly narrow. I do not mean to slight Banner’s excellent work. He expanded his study of *Toolson* far more than any previous work. Yet I do not think he went far enough in forming connections and pushing his argumentation. In this way, my argument extends the boundaries of the historical inquiry.

Why did the court decide the way it did in this case? I argue that part of the decision dealt with context. Workable competition emerged out of the antitrust amalgam of the New Deal, and this new standard proved to be in line with Organized Baseball’s story about itself. Moreover, in framing the good of the game as the public good the owners tapped into a vein of consumer oriented rhetoric. In the background too was a shift in the prerogatives reserved for the different branches of government. Yet the sum of these fall short of explaining the surprising outcome in *Toolson*. Without engaging overmuch with the question of intentionality, I argue that the ideas and beliefs which emerged out of the Celler Hearings constituted the most important factors which influenced the outcome in *Toolson*. As I sketched out above, the mechanism of action proved multiple; the decision of Congress to not pass legislation directly affected the case, but the influence of the Hearings acted indirectly through the argumentation as well. On the surface, the case involved only the jurisdictional question; however, at a deeper level the Court also engaged with the question of how baseball *should* be regulated. The fate of the reserve system rested with the starting nine of the US Supreme Court. The final arbiter’s call was “safe.”

Reaching “The Big Leagues of Legal Justice”

George Earl Toolson and Walter Kowalski sued Organized Baseball around the same time in the spring of 1951, in the wake of the favorable *Gardella* decision. Toolson, a pitcher in the New York Yankees system, had sat out the 1950 season after refusing to move from the defunct Newark Bears to the

¹⁵ *United States v. International Boxing Club of New York, Inc. et al.* 348 U.S. 236 (1955), Opinion of the Court.

Binghamton Triplets.¹⁶ George Trautman, the president of the National Association of Professional Baseball Leagues, subsequently placed Toolson on the ineligible list. In other words, Toolson had been blacklisted from playing in Organized Baseball.¹⁷ He brought suit for treble damages under the Clayton Antitrust Act (1914) and alleged violations of Section 1 and Section 2 of the Sherman Antitrust Act (1890).¹⁸ Kowalski, a third baseman in the Dodgers' farm system, alleged that the Dodgers kept him from playing in the high minor leagues in retaliation for demanding a higher salary, and similarly brought suit against Organized Baseball.¹⁹ Another case involving Jack Corbett, owner of the Minor League El Paso Texans, went into the legal pipeline around the same time.²⁰ Corbett wrote to Emanuel Celler in March of 1953 and attached a number of *LA Times* clippings defending the reserve system. The *LA Times* writers made their case "with the same arguments that the slave owners used long ago," Corbett wrote.²¹ In reference to the Pittsburgh ballplayer Ralph Kiner, Corbett predicted that the club would sell him and Branch Rickey, the club's general manager, "will probably collect from 10 to 20 percent for this job of flesh peddling."²² In combination, these cases alleged quite a laundry list of abuses of the reserve system.

The District Judge Benjamin Harrison, presiding over the Toolson Case, dismissed the case for want of jurisdiction. He did not have the requisite authority to overrule the ruling by the US Supreme Court in *Federal Baseball* (1922). "If the Supreme Court was in error," he wrote, "it should be the court to correct the error."²³ The Kowalski and Corbett cases were similarly dismissed. On appeal to the Ninth Circuit, Toolson once again lost. The judge did not write an opinion. Kowalski and Corbett both lost on appeal to the Sixth Circuit. The decision in *Gardella v. Chandler* came out of the Second Circuit, and

¹⁶ Stuart Banner, *The Baseball Trust*, 112.

¹⁷ *Toolson v. New York Yankees, Inc, Et al.* 346 U. S. 356 (1953), Brief for the Petitioners, 10.

¹⁸ Sherman Act Sec 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal..." Sec 2: "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 guilty of a misdemeanor..."

¹⁹ Stuart Banner, *The Baseball Trust*, 113.

²⁰ *Ibid.*

²¹ Letter from Jack Corbett to Emanuel Celler, March 3, 1953, "Baseball Correspondence Feb-Mar 1953," Box 1, *Emanuel Celler Papers*, Library of Congress, Washington D. C.

²² *Ibid.*

²³ *Toolson v. New York Yankees, Inc., et al.* 01 F. Supp. 93 (1951), Opinion of the Court.

therefore there was now a rather large discrepancy in how the law treated baseball.²⁴ The baseball monopoly could be challenged in Federal Court in New York, Connecticut, and Vermont but not in any other states.

The US Supreme Court would almost certainly have to grant the petition to review to resolve the conflict. It takes the vote of four justices to hear a case petitioned for writ of certiorari. In plain terms, this meant that the Supreme Court would review the case of the Appellate Court. The extent to which the baseball narrative had gained legal authority can be illustrated by a memo penned by future Chief Justice William Rehnquist, then a law clerk for Justice Robert Jackson. In the memo from May 1953, Rehnquist, in regards to the plaintiff's petitions for appeal, established a preliminary position for the Justice Jackson to take. Rehnquist wrote: "This court should keep its hands off. I feel instinctively that baseball, like other sports, is *sui generis*, and not suitably regulated either by a bunch of lawyers in the Justice Department or a bunch of shyster lawyers stirring up triple damages suits. But I feel it might be difficult to couch this result in judicial language."²⁵ *Sui generis* is Latin for unique. The language of the memo revealed that even though the Supreme Court almost certainly had to take the case, some justices, or at least their clerks, wished to dump the case on the exact grounds that Ford Frick had proposed two years earlier. Baseball would be ruined if brought under the purview of antitrust law, Organized Baseball argued, because it was a *unique* industry. This conclusion had been reinforced by the Celler Report. In other words, the overarching rhetorical strategy of baseball had worked in framing the argument before reaching the Supreme Court. Something else was going on here as well. Rehnquist's memo reflected normative rather than legal opinion with little concern for the question at hand which was one of jurisdiction only. In this way, the larger debate over policy seeped into the strictly legal questions. Although this may have only been implicit – "I feel *instinctively*... [emphasis mine]" – the operation of the rhetoric of the Gardella case and the Celler Hearings can be seen here. In the end, the Court had to

²⁴ The 2nd Circuit had to hold to the Gardella precedent which held baseball accountable to the antitrust statutes.

²⁵That brings our count of future Supreme Court justices working on monopoly in Organized Baseball from 1951 - 1953 up to two! From the Robert Jackson papers in Stuart Banner, *The Baseball Trust*, 114.

take the case, but it remained to be seen if the Justices could frame baseball's uniqueness in "judicial language."

With his usual flair, Shirley Povich responded to the decision to send the *Toolson* case to with dour predictions.²⁶ "After 31 years, the dispute over organized baseball's reserve clause has finally reached the big leagues of legal justice," Povich wrote on May 26, 1953.

The United States Supreme Court agreed yesterday to look the instrument in the eye and decide whether it contains a monster conspiracy against the working ball player or spells out a blessing for him... There is more than a possibility... that the Nation's highest court will give the fish-eye to the lower courts' ruling that baseball is not a business... Those baseball officials shyly agree, off the record, that baseball can't maintain its claims of being exempt from interstate commerce, point out that the reserve clause is the cornerstone of the game. Without it, and its guarantees that players would not jump from team to team at the end of the season, there could be no organized baseball and thus no jobs for the players.²⁷

On the sports pages, journalists did not differentiate between the jurisdictional and reasonableness questions. Arthur Daley, another sportswriter, wrote, "The realization has gripped [the owners of major league baseball] that they no longer are able to cling to Oliver Wendell Holmes' rule of 1922."²⁸ Emanuel Celler predicted that the time had come to recognize the changes wrought in the national game during the preceding three decades. Peter S. Craig, a researcher for the Judiciary Committee during the hearings, wrote a law review concerning the upcoming court decision. The Court, Craig wrote, had to choose between applying the antitrust laws, thereby undermining the viability of baseball, and granting an exemption, thereby undermining the scope of the antitrust laws in similar industries.²⁹ "Atomization" on the one hand, "immunization" on the other. "If professional team sports are 'natural monopsonies,' the burden rests upon Congress to create a public check to replace the checks normally expected of a free market."³⁰ Oral arguments were slated for October 1953.

²⁶ Shirley Povich, "This Morning," *The Washington Post*, May 26, 1953.

²⁷ *Ibid.*

²⁸ Stuart Banner, *The Baseball Trust*, 115.

²⁹ Peter Craig, "Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws," *The Yale Law Journal* 62 (4), 1953, 576-639.

³⁰ *Ibid.*, 639.

The Court agreed to hear the *Toolson* case came at a time when the basis of antitrust reasoning was undergoing a subtle but important shift. The economic underpinnings of antitrust had heretofore held pure competition as the ideal with perfect monopoly being the antithesis of that ideal. With the exception of natural monopoly, antitrust only went in one direction – toward decentralization of economic power. This antitrust philosophy, one where government was antagonistic to business, was the philosophy of the Brandeis-Frankfurter group during the 1930s. “In most industries, they argued, the size of greatest efficiency was reached at a comparatively early stage,” historian Ellis Hawley wrote. “Further growth depended upon financial manipulation, monopolistic devices, or the use of unfair practices.”³¹ By the early fifties the justice department looked to recalibrate the relationship between government and business. The Republican Party platform during the 1952 elections blandly restated the party’s commitment to free competition balanced against the rights of businesses who fairly complied.³² In the seminal work produced by the Eisenhower administration on antitrust, the Attorney General’s 1955 Committee Report which *Toolson* obviously antedated, the authors wrote of modernizing antitrust policy for the postwar world.³³ The report urged a shift towards the concept of “workable competition,” a pragmatic shift first articulated by economist J. M. Clark in 1940.³⁴ The use of perfect competition as the idea market condition “has seemed at times to lead to undesirable results.”³⁵ As described by Peritz, the new test had two parts: “(a) if it is preferable to the best practically attained alternative and (b) if market

³¹ Ellis Hawley, *The New Deal and the Problem of Monopoly*, 287.

³² During the 1952 election the Republican Party reclaimed the White House and both chambers of Congress in decisive fashion; “We will follow principles of equal enforcement of the antimonopoly and unfair competition statutes and simplify their administration to assist businessmen who, in good faith, seeks to remain in compliance. At the same time, we shall relentlessly protect our free enterprise system against monopolistic and unfair trade practices.” Theodore Kovaleff, *Business and Government During the Eisenhower Administration*, 11.

³³ Rudolph Peritz, “The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination Argument,” *Duke Law Journal* (1984), 1223.

³⁴ Based on the accounts by Edward Chamberlin, it seems J. M. Clark may not have been the best theoretical economist to build antitrust policy around. “As another instance, we have the paradoxical reasoning of Professor J. M. Clark, in his analysis of the market...*Perfect* competition, it would seem, gives the same price as perfect monopoly!” “And if we now regard perfect competition as a norm which prices under imperfect competition more or less approximate, we reach the startling conclusion that they approximate monopoly prices.” Edward Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value* (Cambridge: Harvard University Press, 1948), 4, N. 3.

³⁵ J. M. Clark, “Towards a Concept of Workable Competition,” *The American Economic Review*, 30.2 (Jun., 1940), 241.

power is not excessive, and if, in the particular industry, it does more good than ill,” then the restraint under question would be legal.³⁶ Although the Eisenhower administration continued the adversarial antitrust model of the Second New Deal, the “new” test was essentially a weaker form of the rule of reason test. The movement away from the strict construction of antitrust posited by the Frankfurter school toward the more nuanced, pragmatic economic attitudes of the Eisenhower administration can be seen, writ small, in the words and nature of the *Toolson* decision. The Rehnquist memo presented one version of this shift as applied to baseball.

A shift in economic thought undergirded this transition in legal stricture. Edward Chamberlin’s seminal work on monopolistic competition and oligopoly theory, already in its sixth edition by 1948, as well as works by other academics, formed the bedrock of postclassical economics. Chamberlin wrote, “It has, in the main, been assumed that the price system is like this – that all the phenomena to be explained are *either* competitive *or* monopolistic, and therefore that the expedient of two purified and extreme types of theory is adequate.”³⁷ These new theories recognized that *all* businesses possessed elements of monopoly, and that the blanket application of measures aimed at decentralization created problems as it solved others.³⁸ Herein the importance of baseball’s purported uniqueness became apparent. In the context of workable competition, the reserve clause ostensibly did more good than ill by equalizing competition on the field. If the reserve clause possessed an ambiguous legal status under the rule of reason standard, it certainly could pass the weaker workable competition test. In this way, perhaps the general antitrust environment in which the *Toolson* case took place can provide a partial explanation for the Court’s decision. Within this context, the argumentation of the case was slated to begin.

³⁶ Rudolph Peritz, *Competition Policy*, 186.

³⁷ Edward Chamberlin, *The Theory of Monopolistic Competition*, 3.

³⁸ Quoting Knight “in view of the fact that practically every business is a partial monopoly, it is remarkable that the theoretical treatment of economics has related so exclusively to complete monopoly and perfect competition.” *Ibid*, 5.

The “Legal World Series”

The case in *Toolson*, like *Federal Baseball*, revolved around the question of jurisdiction – *did* the antitrust laws apply to baseball in 1953? However, astute observers knew that the case was not that straightforward. Emanuel Celler, in a letter to *The Sporting News*, wrote that the Supreme Court could rule baseball subject to the antitrust laws “in which event all the restrictive covenants among the owners, as well as the reserve clause, would be illegal.”³⁹ Thus the first question implicitly included another: *Should* the antitrust laws apply to baseball? The attorneys for the litigants recognized this well, and consequently included normative arguments in their briefs in order to answer that question. All of the litigants employed different aspects of the Celler Report to provide evidence for their claims. Congress had established that baseball most certainly constituted interstate commerce, the Petitioners argued. Yet they had also refrained from passing legislation on the grounds that baseball was a unique industry, the Defendants countered. What Congress *said* became an important question for the litigants to answer.

The idea that the general principle set down in the great antitrust laws needed to be mitigated by the wisdom of justices who could decide if a restraint of trade could be rationalized as good or bad, helpful or detrimental, reasonable or unreasonable, undergirded the rule of reason standard. As the *Report of the Subcommittee* made clear, the Courts constituted the most appropriate place for judging the reasonableness of baseball’s labor practices. Yet in an adversarial system, one set of arguments must be privileged over the other. In this way the briefs address both the jurisdictional and reasonableness questions. Thus, a line of rhetoric extending back to the Hearings, and consequently through *Gardella* and all the way back to Holmes, Evers, and Ward. Although the linguistic aspects of the argument were circumscribed by the legal setting, the essential elements of the reserve clause debate remained.

The arguments heard before the Judiciary Committee thus extended into the briefs. Plaintiffs are known as petitioners before the Supreme Court, and procedurally the petitioners brief is filed first so that defendants, called respondents, have the opportunity to read the brief and respond to specific charges. The

³⁹ Letter from Emanuel Celler to Mr. Spink, September 2, 1953, “Correspondence April – December 1953,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

attorneys for the petitioners relied heavily on the authority of the *Subcommittee Report* in order to establish the interstate nature of the baseball business – this was, after all, the only question presented.

“The single question presented by the case at bar is whether the United States District Court has jurisdiction of the subject matter of this action. In direct application are the activities and organization of professional baseball subject to the Federal Anti-Trust Laws? In other words, are these activities and this organization within the scope and meaning of the Anti-Trust Laws?” attorneys for the petitioners wrote.⁴⁰

The brief for petitioners, filed on September 15, 1953, cited many of the cases already discussed and alleged that the definition of interstate trade and commerce had changed so drastically since 1922 as to suggest overruling the *Federal Baseball* precedent.⁴¹

The Petitioners quoted from the Celler Report for whole pages brief in order to impart authority to their contentions that (1) Organize baseball could not be effectively regulated by the states; (2) baseball was analogous to the movie industry which *was* governed by the antitrust laws; and (3) the broadcasting of baseball games via radio and television undoubtedly placed baseball within the scope of the antitrust laws.⁴² By appropriating the words of a Congressional report, the Petitioners tapped into the perceived truth of the account therein presented; not only did they employ the arguments but also incorporated the attendant facts and assumptions as well as, it should be added, the shortcomings of the antitrust hearings on baseball. Quoting from the report, the Petitioners wrote, ““Organized Baseball” is a combination of approximately 380 separate baseball clubs, operating in 42 different States, the District of Columbia, Canada, Cuba, and Mexico...Inherently, professional baseball is intercity, intersectional, and interstate.”⁴³ Given the extent of Organized Baseball, the report argued, state regulation could not solve the monopoly problem. Peter S. Craig, a researcher for the Judiciary Committee in law school in 1953,

⁴⁰ Frederic Johnson for Kowalski; Howard Parke for Toolson; and Seymour Martinson for Corbett. *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Brief for Petitioners, 13

⁴¹ *United States v. South-Eastern Underwriters Association et al.* 322 U.S. 533 (1944).

⁴² The third point here was essentially the same argument made by Judge Frank in his *Gardella* decision.

⁴³ *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Brief for Petitioners, 22 quoting from *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power*, Emanuel Celler, chairman, 3-4.

reasoned in a similar manner; baseball, he wrote, unquestionably was interstate commerce.⁴⁴ The petitioners argued that the baseball and movie industries were analogous, and cited the report verbatim.⁴⁵ “The moving picture industry has been held subject to the Anti-Trust Laws,” the petitioners argued, “Baseball is essentially the same and no distinction should be made.”⁴⁶ Most observers predicted that the obvious strength of these arguments would be enough to win the case.

The petitioners themselves, however, included a section on “Policy Arguments” in order to shore up their position from attack on the grounds that baseball constituted a natural monopoly. The petitioners argue that the “uniqueness” claim did not foreclose the use of the rule of reason standard.

It is argued that baseball requires special consideration under the Anti-Trust Laws, because such a team sport cannot exist in completely free economic competition. That may be true but it is no argument whatsoever that baseball is not within federal jurisdiction. To uphold the Federal Baseball case on such grounds would give organized baseball a carte blanche immunity to all otherwise illegal restraints on competition in the baseball industry whether they are necessary to the unique character of the industry or not.⁴⁷

Here, the attorneys attempted to preempt the policy discussion by claiming that considerations of economic uniqueness did not have a place before the court. The petitioners had to walk a tightrope: they simultaneously hoped to appropriate facts from the Celler Hearings without following those facts to the conclusions reached by the Representatives. The attorney’s reasoning echoed the language of Justice Frank when he wrote that “no Court” could predict the outcome of a ruling, but had to proceed through law regardless.⁴⁸ As it turned out, the petitioners used the actual *Gardella* decision in order to make their

⁴⁴ The cases upon which the petitioners relied were many, but the main precedents were *Mandeville Island Farms v. American Crystal Sugar Co.*, 324 US 219 and *United States v. South-Eastern Underwriters Assn.*, 322 US 533. Peter S. Craig, the author of the law review “Monopsony in Manpower,” was a historian who had written a dissertation on baseball economics before being employed by the Celler committee. Peter Craig, “Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws,” pp. 576-639.

⁴⁵ “Like motion pictures, the actual baseball exhibitions are local affairs. But essential to the giving of these exhibitions are numerous interstate activities.” *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power*, Emanuel Celler, chairman, 3.

⁴⁶ The Supreme Court had held the Anti-Trust laws applicable to a number of different areas of the film industry. In *Binderup v. Pathe Exchange, Inc.* (1923) 263 US 291 the court held that the distribution of films constituted interstate commerce. In *Paramount Famous Lasky Corp v. United States* (1930) 282 US 30, the court held a combination of some 25,000 producers and distributors liable under the Sherman Act. In *Bigelow v. R.K.O. Radio Pictures* (1946) 327 US 251, the court applied the antitrust statutes to exhibitors of films. *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Brief for Petitioners, 34

⁴⁷ *Ibid*, 44.

⁴⁸ *Gardella v. Chandler* 172 Fed 2d (1949).

most extreme policy argument that the reserve clause was akin to slavery. They used the last four pages of the brief to quote verbatim from the earlier opinion. ““There is no difference in principle between the system of servitude built up by the operation of this National Agreement, which provides for the purchase, sale, barter, and exchange of the services of baseball plyers...and the system of peonage brought into the United States from Mexico,”” petitioners wrote, quoting from Judge Frank’s ruling.⁴⁹ Here, the influence of *Gardella* proved multiple. First, the US Supreme Court had to reconcile that ruling with the more recent rulings of the 6th and 9th Circuit Courts of Appeal, so the case was germane. Second, the moralist rhetoric employed by Frank found purchase in the language the litigants used, both directly, through quotations, and indirectly, through similar logic. The Petitioners’ brief, represented the most conservative of the three arguments insofar as they largely framed the issue as one of jurisdiction. This was, after all, where they had the stronger case.

By necessity, the respondents attempted to make the argument that Organized Baseball did not constitute interstate commerce – this was after all the basis of the games’ exemption – but also pushed the argument much farther than the petitioners. They more or less threw in every argument they could possibly contrive. *South-Eastern Underwriters* (1944), *Mandeville Island Farms* (1948), and *Lorain Journal Co* (1951), all cases that purportedly undermined *Federal Baseball*, “do not overrule and of the underlying principles of the *Federal Baseball* case.”⁵⁰ These arguments proved decidedly weak. For example, they argued that although *South-Eastern Underwriters* had overruled the rationale of *Hooper v. California* (1895) and *Paul v. Virginia* (1868) “*Federal Baseball* case did not cite the *Hooper* case...in support of its decision that the exhibition of professional baseball games *is a sport and not trade or commerce and is purely local.*”⁵¹ This and other exceedingly technical arguments illustrated the true weakness of the respondents’ position.

⁴⁹ *Gardella v. Chandler* 172 Fed 2d (1949) quoted in *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Brief for Petitioners, 47.

⁵⁰ *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Brief for Respondents, 9, 20-28.

⁵¹ *Ibid*, 20.

Norman Sterry, baseball's attorney, had more convincing arguments up his sleeve, however. The respondents' consistently framed the role of antitrust as tied to the public welfare rather than the welfare of the business or players. The attorneys for Organized Baseball correctly assessed that the court, and economists, were turning to the concept of consumer welfare as the main criterion of America's competition policy.⁵² Recall Justice Chase's position in *Gardella v. Chandler*.⁵³ Even if the Supreme Court had jurisdiction over the case, and they by no means conceded this point, the reserve clause did not violate the Sherman Act because the petitioners did not allege or seek to allege that these restrictions harmed the public in any way.⁵⁴ "Petitioner was in no way injured or damaged by the interstate activities of Defendants," Sterry wrote.⁵⁵ The public, in this way, became a third party to the labor dispute at hand – a party whose welfare superseded that of any other party. "The basic assumption underlying our antitrust laws," the Celler Report wrote, "is that free competition is the best possible guaranty of an industry's progress...and that the *general public* will be best served thereby [emphasis mine]."⁵⁶ By miming this rhetoric Organized Baseball tapped into a reservoir of dominant ideas and ascendant values. The conflation of competition on the playing field with competition off the playing field provided baseball's barons with another inversion of economic thought employed to their own ends.

Perhaps aware that they would not win the jurisdictional argument, the respondents turned to arguments about baseball's uniqueness. The line between the strictly jurisprudential and the normative was not a firm one, as we have seen. Ideas concerning the correct application of the antitrust laws in society undergirded the arguments about the exact commercial nature of the baseball industry. The attorneys for the respondents attempted to tie in the reasonableness question, where *they* had a stronger case, with the jurisdictional question. They wrote:

⁵² As Peritz writes concerning the New Deal, "In these debates, an abstract economic body called the 'consumer' emerged as the unifying image of 'the public interest'...The 'consumer,' personifying an economic form of equality, became the rhetorical term for mediating conflicts between competition policy and private property rights." Rudolph Peritz, *Competition Policy*, 157.

⁵³ See above, 52.

⁵⁴ *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Brief for Respondents, 71.

⁵⁵ *Ibid*, 10, 32.

⁵⁶ *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power*, Emanuel Celler, chairman, 228.

The reserve clause and player regulations cannot be considered apart from the unique nature of baseball as a sport based on team competition... The reserve clause is one of the rules dealing with the eligibility of players. The public interest and patronage upon which professional baseball depends, demands (1) the unquestionable integrity and honesty of the game and its participants, and (2) a good contest on the field and good competition among the clubs in a league.⁵⁷

In this way, the respondents inserted arguments about economic uniqueness and player integrity into the record.⁵⁸ “This problem of player loyalty is peculiar to sport based on team competition,” Sterry wrote, pressing this point further. “Obviously public confidence in player loyalty... can not be maintained if the player, while playing for one club, may seek a job with another... [Sic].⁵⁹ The logical endpoint of this reasoning was obvious: baseball would not survive the removal of the reserve clause. The defendants’ attorney continued to say that the probable effects on the game were “obvious” and “easily imaginable” if the court did not stick to *Federal Baseball*.⁶⁰ Hoping to introduce these arguments without straying too far from the essential question, Sterry concluded: “We repeat, however, that the reasonableness of the player regulations is not an issue now before this Court.”⁶¹ Why would baseball’s lawyers speak to a question not at bar? Perhaps they simply wanted to pursue a “kitchen sink” strategy. More likely however, they saw the benefit in linking together the jurisdictional claim, where they had virtually no case, with the reasonableness claim, where their case was strong. The narrative advanced by organized baseball in 1951 thus extended into the *Toolson* case through this mechanism. In one of many subtle twists, the defendants relied on the rhetoric and facts produced by the Celler Hearings, but denied that it was appropriate for the petitioners to do so: “Petitioner’s argument is based largely, not upon the facts alleged in his complaint as amended, but instead upon facts, conclusions and opinions which are allegedly stated in a Report of a Subcommittee of the House of Representatives.”⁶² The Celler Report had contained such a multitude of narratives that both sides used the work to advance their case.

⁵⁷ *Toolson v. New York Yankees, Inc., et al.* 346 U. S. 356 (1953), Brief for Respondents, 57.

⁵⁸ The exact outcome the petitioners had hoped to preempt in their policy arguments section.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 57, 58.

⁶¹ *Ibid.*, 58.

⁶² *Ibid.*, 7, 29.

An amicus brief filed on behalf of the Red Sox expanded upon the ideas built up in the lengthy respondents' brief, and because of the nature of the amicus brief as an informative tool, the lawyers for Boston could afford to make broader arguments. This strategy paid dividends for Organized Baseball. An *Amicus Curaie* or "friend of the court" brief can be filed on behalf of any number of parties and can be accepted or rejected, or if accepted not read, by the Justices.⁶³ As Senator Bruce Ennis wrote in a law review, "The first [misconception] is that amicus briefs are not very important; that they are at best only icing on the cake. In reality, they are often the cake itself."⁶⁴ In the *Toolson* case, the Boston Red Sox hired Harvard Law Professor Thomas Reed Powell, a personal friend of a number of the justices, to write an *amicus* brief on behalf of the club.⁶⁵ Powell's complicated treatise encompassed several threads of argumentation, which expand upon the arguments in the Respondents' brief as well as introduced new ones. The bulk of the brief concerned technical questions concerning the definition of commerce and trade extending back to *Gibbons v. Ogden*.⁶⁶ Yet Powell did not shy from taking a larger stand. "It must be apparent to this Court," he argued, "as it was to Mr. Justice Holmes and his colleagues more than thirty years ago, that baseball is a unique enterprise."⁶⁷ Powell continued:

The question is whether this Court shall overrule or distinguish the earlier baseball case and now hold that these rules and regulations are subject to the restrictions of the Sherman Act notwithstanding the peculiar and anomalous characteristics of the enterprise of organized baseball and of the injuries to the game and to the public if there were a requirement of unbridled competition.⁶⁸

⁶³ Bruce Ennis, "Effective Amicus Briefs," *Catholic University Law Review* 33 (1984), 603-611.

⁶⁴ *Ibid.*, 603.

⁶⁵ Stuart Banner suggests that the Red Sox knew this and selected Powell because of his friendship with the justices, and I do not think this can be ruled out. Stuart Banner, *The Baseball Trust*, 116-117.

⁶⁶ Indeed the vast majority of the brief is a treatise on the exact nature of interstate commerce in which Powell variously compares athletic competitions with preachers, lecturers, "proprietors of areas of natural beauty," movie houses, the theater, insurers, and NCAA football. "This established line of demarcation between the ending of local commerce or local activity not commerce at all and the beginning of interstate commerce is not abolished or blurred by cases involving commercial trade restraints which, though arising in the course of intrastate or local activities, were found to have a direct and substantial effect upon interstate commerce itself," Powell wrote. *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Amicus Brief, 7.

⁶⁷ *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Amicus Brief, 2.

⁶⁸ *Ibid.*

In this way, Powell had the freedom to shift change the battlefield from the interstate commerce question to the reasonableness question due to the nature of the amicus brief. Powell, predictably, used the Celler Report to establish these facts. The argument he saved for last proved to be the whole cake – leaving the precedent in place “is especially the way of wisdom since Congress...has itself failed to modify the situation.”⁶⁹ Only here did the positive inaction doctrine enter the record. This proved to be a winning argument.

In making these arguments, Powell, like the respondents, employed the New Deal rhetoric of the consumer and of free and fair competition to illustrate the unique position of baseball in the marketplace. Powell explicitly built upon the work produced by Celler’s Judiciary Committee. “The Celler Committee,” Powell wrote, “after giving prolonged consideration to the problem of possible Congressional control of various features of organized baseball, concluded that baseball is ‘a unique industry’ and that it ‘could not operate successfully’ without some form of agreement regulating competition for players’ services.”⁷⁰ Powell used the language of the Celler Report to buttress his arguments. Indeed, if Congress had, after careful and public deliberation, decided that the restrictions in baseball were reasonable and necessary why should the Court overrule them? This argument falls into place with the workable competition rhetoric in Clark’s article. Allowance for peculiarities across industries represented one hallmark of “modern” antitrust, as well as the postclassical economic models on which it was based. This argument also seemed especially tailored to Justice Black who by this time had developed a jurisprudential philosophy largely without substantive due process.⁷¹ In plain terms, he did not believe the Court had a role in contradicting Congress in matters of legislative function. Baseball’s regulations, Powell wrote, though in some instances *prima facie* illegal, served to strengthen competition rather than weaken it. “The element that must predominate in the game is competition on the

⁶⁹ *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Amicus Brief, 16.

⁷⁰ *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Amicus Brief, quoting from the *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power*, Emanuel Celler, chairman, 228, 229.

⁷¹ Howard Ball and Phillip J. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America’s Constitutional Revolution* (Oxford: Oxford University Press, 1992), 3-11. See also, John P. Frank, *Mr. Justice Black, the man and his opinions* (New York: Knopf, 1949).

playing field and not in the market place,” Powell wrote.⁷² The owners had “agreed to abide by a code of fair competition for players’ services in order to preserve and to promote competition in the contests between the competing teams on the playing field.”⁷³ Given these precepts, the reserve clause, as well as the attendant blacklist provisions, organized boycotts, etc., preserved competition *even though* the terms violated the strict *ideals* of pure competition.⁷⁴

In order to invigorate the normally weak positive inaction doctrine, Powell gave examples from recent history. Concerning various pieces of positive legislation under the New Deal – the National Labor Relations Act, the Fair Labor Standards Act, and the Federal Employers’ Liability Act – Powell wrote, “By no similar legislation has Congress sought to expand the scope of the Sherman Act to make it applicable to organized baseball.”⁷⁵ The point would be difficult to miss, not only had Congress neglected to modify the situation in the abstract but had dramatically declined to modify the situation in 1951. The very public nature of the hearings underscored this point. The Court adopted Powell’s line of reasoning almost whole cloth, even employing similar language.⁷⁶ Powell employed this failure to act by Congress as *evidence* that the practices of baseball were above board and useful. “This unique and anomalous characteristic of the baseball enterprise is therefore in itself a reason for not applying to the full extent” the antitrust laws.⁷⁷ Powell did not confine his argument to baseball. He argued that all professional team sports could not survive under the conditions of “unrestricted” competition because they were unique industries. In the case of English football, Powell wrote, the English league had set up regulations similar to baseball as early as 1888.⁷⁸

⁷² *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Amicus Brief, 14.

⁷³ *Ibid.*, 2.

⁷⁴ “The laws of supply and demand are not the inexorable masters of [the baseball] market place.” *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power*, Emanuel Celler, chairman, 228.

⁷⁵ *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Amicus Brief, 10.

⁷⁶ “Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation,” *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Opinion of the Court.

⁷⁷ *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Amicus Brief, 16.

⁷⁸ “Thus it is fully recognized by this Committee that professional football in England like baseball here is a unique enterprise whose objectives cannot be attained under a system of unrestricted competition.” *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Amicus Brief, 15. Based on *Ministry of Labour and National Service, Report of*

The Powell brief, in this way, comprised a set of rigid, legal arguments but also integrated more policy-oriented, normative criterion based on a number of sources. The Powell brief complemented and expanded upon the work done by Organized Baseball's counsel in the respondents' brief, and thereby created a much more convincing argument in relation to the attorneys for Toolson et al. The extent to which these briefs had shifted the field of battle would become evident during oral arguments and the Justices' closed conference.

The content of oral arguments and the justices' private conference provided evidence of the persuasive strength of the two briefs for Organized Baseball. Though an incomplete record for a number of reasons, William O. Douglas' conference notes still survive as do some news accounts of the oral arguments.⁷⁹ According to the *Washington Post* account, during oral arguments in *Toolson v. New York Yankees* on October 14, 1953, attorney Frederic Johnson, representing co-defendant and former Brooklyn Dodger "farmhand" Walter Kowalski, posited that baseball had grown to such an extent that the sport now constituted big business. Johnson then stood firm on the petitioners' line of argument. Justice Felix Frankfurter stopped the attorney to ask if baseball was still a game of "nine men playing at one time against nine other men."⁸⁰ Johnson, unruffled by the jibe, went on to describe the immense growth in the number of players reserved to each individual ball club.⁸¹ The fact that baseball was still played by nine men was about the only thing the litigants could agree on.

Luther Huston, the *New York Times* reporter covering the story, reported that Warren Sterry, the Yankees' attorney said, "Baseball cannot exist in an entirely free economy. To apply to it the full rigors of the Sherman Act would destroy it."⁸² This point, obviously, had nothing at all to do with the question

a Committee of Investigation into a Difference Regarding the Terms and Conditions of Association Football Players (1952). I find it interesting that the Ministry of Labour conducted their inquiry into football only a year after their American counterparts had investigated baseball.

⁷⁹ Hugo Black burned all his conference notes in an act his children called "operation frustrate the historians," and Felix Frankfurters were famously stolen from the Library of Congress.

⁸⁰ Herb Heft, "Frankfurter Asks Probing Questions in Baseball Case," *The Washington Post* Oct 15 1953.

⁸¹ The number had increased from 22 to hundreds of players during the period from 1922, when *Federal Baseball* was decided, to 1953. The creation of the vertically integrated farm systems was the main culprit.

⁸² Luther Huston, "Baseball Called Illegal Monopoly as Supreme Court Hearings Start," *New York Times*, Oct 13, 1953.

presented by the petitioners. The respondents had chosen to accentuate their best argument in the, notably freer, setting of oral arguments. “On the other hand,” Huston wrote, “Howard C. Parke, lawyer for George Earl Toolson...said that the agreements that are challenged ‘go far beyond what is necessary for baseball’s existence.’”⁸³ While Parke’s riposte may have had merit, this was exactly what Organized Baseball wanted to argue about. Thus the argument concerned both jurisdiction and reasonableness questions simultaneously. In a blatant attempt at influencing the newly appointed Chief Justice Earl Warren, the attorney for Jack Corbett pointed to California’s difficulty in securing a major league circuit during Warren’s governorship.⁸⁴ “Some signs of amusement were visible on the faces of those in the court room,” Huston wrote, “when Justice Stanley F. Reed asked what would be the effect if the reserve clause were abolished...Speaking for a club that had just won its fifth consecutive world series, Sterry said that there would be chaos...*No one disputed his argument* [emphasis mine].”⁸⁵

Given the tenor of the justices’ conference, most seemed inclined to follow the lines of reasoning put forward by Powell on behalf of the Red Sox.⁸⁶ Stuart Banner argued that the conference debate hinged on the question of whether *Federal Baseball* interpreted the antitrust statutes or the Constitution. This interpretation is undoubtedly correct, and given the paucity of a written record on these discussions a better analysis may not arise. My contention in this chapter has been that the uniqueness of baseball constituted the underlying reason behind the *Toolson* decision, and while some justices, like Stanley Reed, spoke on this point, the reasoning of the justices is difficult to assess at a level deeper than the textual. I mention this in order to illustrate the difficulty inherent in dissecting intentionality in this case.

Hugo Black, speaking first based on seniority, favored upholding the *Federal Baseball* ruling “on the arguments made by Thomas Reed Powell on behalf of the Red Sox.”⁸⁷ Like Judge Chase in *Gardella*,

⁸³ Luther Huston, “Baseball Called Illegal Monopoly as Supreme Court Hearings Start,” *New York Times*, Oct 13, 1953,

⁸⁴ “Supreme Court Hearings Finish in Suits Charging Baseball ‘Trust,’” *New York Times*, Oct 15, 1953.

⁸⁵ Luther Huston, “Baseball Called Illegal Monopoly as Supreme Court Hearings Start,” *New York Times*, Oct 13, 1953.

⁸⁶ Stuart Banners’ account, based on William O. Douglas’ conference notes forms the basis of this account. It can be found in *The Baseball Trust*, 117-119.

⁸⁷ *Ibid*, 118.

Black indicated that without the *Federal Baseball* precedent he would find for the petitioners. Justice Robert Jackson wrote a similar line in his notes.⁸⁸ Black argued that the court issue a *per curium*, “by the court,” opinion.⁸⁹ Felix Frankfurter, Robert Jackson, William O. Douglas, Tom Clark, Sherman Minton, and Earl Warren all agreed with Black’s reasoning – if the *Federal Baseball* precedent needed to be reversed, Congress provided the proper forum. The fact that baseball *could* be regulated by Congress undergirded these arguments and this potentially represented a divergence from *Federal Baseball*.⁹⁰ If *Federal Baseball* hinged on statutory interpretation then Congress could act to amend the statute; however, if the Holmes decision rested on Constitutional interpretation Congress did not have the power to act. Hence Banner’s focus on this angle. Stanley Reed argued that *Federal Baseball* hinged on the Commerce Clause not the language of the Sherman Act. Felix Frankfurter argued the opposite.⁹¹ The source of baseball’s exemption would thereafter rest with the legislature rather than the judiciary, even though *Federal Baseball* nominally stayed on the books. Harold Burton and Stanley Reed provided the only dissenting voices. Reed spoke at some length, and like Justice Frank in the *Gardella* case, concluded by saying that “the reserve clause violates the anti-trust laws.”⁹² Justice Black drafted the *per curium* for the 7-2 majority and Burton, joined by Reed, penned a separate dissent.

The “Impotent Zombie” Lives On

“Today for the first time in a couple of decades,” Shirley Povich wrote, “organized baseball is taking an easy breath. The 7-2 decision of the United States Supreme Court is equivalent, at least, to the sanctity of an umpire’s decision.”⁹³ Povich, like most commentators, reported that the Court had ruled

⁸⁸ Stuart Banner, *The Baseball Trust*, 118

⁸⁹ *Ibid.*

⁹⁰ For a concise (and witty) analysis of how *Toolson* changed the settled interpretation of *Federal Baseball* see Kevin McDonald, “Stealing Holmes,” *Journal of Supreme Court History* (2), 1998.

⁹¹ As I am totally out of my league on this issue, I will confine my comments to the footnotes. In my view, *Federal Baseball* hinged very clearly on the Constitution. When designing the Sherman Act, Congress pushed its prerogatives to the Constitutional limit by tying together the jurisdiction of the statute *with* the ultimate governor of jurisdiction, the Commerce Clause. Hence the extended debate about what exactly constituted interstate commerce. Obviously, more intelligent minds than mine differed on this point. It seems that Chief Justice Warren was on my side, however, as we will see below.

⁹² Stuart Banner, *The Baseball Trust*, 118.

⁹³ Shirley Povich, “This Morning,” *The Washington Post*, Nov 10, 1953.

baseball a sport, not a business. The Supreme Court had not said anything of the sort. What the decision *did* say proved much more complicated.

The Supreme Court's decision in *Toolson v. New York Yankees Inc.*, handed down in late autumn of 1953 during the first session under the stewardship of Chief Justice Earl Warren, possessed a number of odd qualities. In order for a full understanding of the case, I want to go through the decision line by line. The decision began: "In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws."⁹⁴ Here, Justice Black established the earlier case as one of jurisdiction. The Holmes case decided only that the Court could not rule on the subject.

"Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect."⁹⁵ Black began to explain the reasoning of the Court with this sentence. Congress had the ruling "under consideration" in the abstract for the intervening thirty years – this is known as the positive inaction doctrine. However, Black was also referring to the 1951 Hearings as a *specific* instance in which Congress ventured to legislate on *Federal Baseball*. This established a direct connection between the two events.

"The business has thus been left for thirty years to develop, on the understanding that it was not subject to antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable." In this sentence the Court's anxiety over retroactivity was manifest. As Stuart Banner argued, "[a] more likely... motive was the reluctance to subject baseball to the possibility of retroactive liability. This is always a concern when a court is asked to change the law, and it is one of the primary reasons courts generally adhere to precedent."⁹⁶ Thus the justices expressed concerns over the fairness of such a decision.

⁹⁴ *Toolson v. New York Yankees, Inc. Et Al.* 346 U.S. 356 (1953), Opinion of the Court.

⁹⁵ *Ibid.*

⁹⁶ Stuart Banner, *The Baseball Trust*, 121.

“We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.”⁹⁷ The invocation of “evils” in this sentence reflected Brandeis’ *Chicago Board of Trade* decision.⁹⁸ Yet this earlier case clearly saw a role for the Court in deciding such questions, whereas the Warren Court had simply handed the problem back to Congress. This sentiment reflected the inverse of the attitude of the Subcommittee which demurred from passing legislation partly in deference to the judiciary.

“Without re-examination of the underlying issues, the judgements below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, *supra*.”⁹⁹ Here Black asserted that the Court had not ruled explicitly on rule of reason grounds, and summed up the decision by affirming the 1922 precedent. What follows was appended by Chief Justice Warren: “so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”¹⁰⁰ Though this interpretation more or less directly conflicted with the first sentence of the decision, the seven affirming justices kept the language. Warren had reinterpreted *Federal Baseball* to include the “intention” of Congress in 1890, something the Holmes decision said nothing about. What then ultimately moved the Court to decide this way? As Warren made absolutely clear in his memo to Black:

I believe the interstate character of organized baseball has gone far beyond that described by Mr. Justice Holmes’ decision, and that in the light of that change and the more recent decisions in similar situations (insurance, musical comedy, etc.), the Court should give recognition to this fact. . . This, it seems to me, the Per Curiam does not do. It bases its conclusion on “the authority of Federal Baseball Club,” etc., which was premised on the concept that organized baseball was not ‘trade or commerce in the commonly accepted use of those words;’ namely in the constitutional sense. It then leaves the matter to Congress. To me, that is not clear and might be misunderstood by others [sic].¹⁰¹

⁹⁷ *Toolson v. New York Yankees, Inc. Et Al.* 346 U.S. 356 (1953), Opinion of the Court.

⁹⁸ *Board of Trade of the City of Chicago Et Al. v. United States* 246 U.S. 231 (1918).

⁹⁹ *Toolson v. New York Yankees, Inc. Et Al.* 346 U.S. 356 (1953), Opinion of the Court.

¹⁰⁰ “Memo from Chief Justice Earl Warren to Associate Justice Hugo Black, October 23, 1953,” “231 Toolson 1953,” The Hugo Black Papers, Library of Congress, Manuscript Division, Washington D. C.

¹⁰¹ *Ibid.*

In this way the Warren Court simultaneously held to the precedent in the first sentence of the decision and changed the interpretation of that precedent in the last sentence. As Warren made clear in the memo, he believed that baseball now constituted interstate commerce. The petitioners had clearly made their case. In this way, the last clause represented a compromise of sorts. Rather than rest the authority of *Toolson* on *Federal Baseball*, thereby barring Congress from action, the Court attempted to make clear that Congress could change the anti-trust “status” of baseball but had declined to do so. The Court thus followed Powell’s “way of wisdom.”¹⁰²

Herein lay the major confusion surrounding the *Toolson* case. How did the Court decide that baseball *was* interstate commerce but also uphold the *Federal Baseball* decision in favor of Organized Baseball? Clearly, the questions in the case had eclipsed the strict legal interpretation of precedent. This may have been Banner’s point in saying that *Toolson* represented “a willingness to justify decisions on explicit policy grounds.”¹⁰³ But what policy was that? Banner leaned toward retroactivity and fairness. I would gesture towards legal ambiguity. The reserve clause had always troubled those trying to square its manifest illegality with its clear necessity. This incredibly unclear decision refrained from even examining this question, and, in shifting control of the question to Congress, the Celler Report became the *de facto* dominant narrative. *Toolson* thus succeeded in, to use William Rehnquist’s words, couching baseball’s uniqueness “in judicial language.”¹⁰⁴

A further clue as to the Court’s intention may be found in the form of the decision itself. The majority decision was issued as an opinion by the court, and therefore was unsigned by any justice. This is known, in legalese, as a *per curiam* opinion.¹⁰⁵ Though initially intended as a device to impart institutional consensus, or more colorfully “monolithic solidarity”, the nature of the *per curiam* began to

¹⁰² *Toolson v. New York Yankees et al.* 346 U. S. 356 (1953), Amicus Brief, 16.

¹⁰³ Stuart Banner, *The Baseball Trust*, 122.

¹⁰⁴ From the Robert Jackson papers in Stuart Banner, *The Baseball Trust*, 114.

¹⁰⁵ Laura Krugman Ray writes about the *per curiam*, “The Subtext of a *per curiam* was clear: this case is so easily resolvable, so lacking in complexity or disagreement among the Justices, that it requires only a brief, forthright opinion that any member of the Court could draft and that no member of the Court need sign.” Laura Krugman Ray, “A history of the *Per Curiam* Opinion: Consensus and Individual Expression on the Supreme Court,” *Journal of Supreme Court History* 27.2 (July 2000), 176.

change during the 1930s.¹⁰⁶ In 1938, in a case involving Indiana's regulation of utility rates, the Court issued a short, four page *per curiam* affirming the appeals court decision. Breaking with institutional precedent, Justice Hugo Black, only three months into his first term, issued an eighteen-page dissent to an opinion ostensibly by the entire court.¹⁰⁷ Though not the first to do this act led to the development of, to borrow legal historian Laura Krugman Ray's phrase, the "oxymoronic" *per curiam* which "simultaneously insisted on both institutional consensus and individual disagreement."¹⁰⁸ In the 1950s the court began to use the *per curiam* as a jurisprudential tool to fix various difficult cases. One of these was *Toolson*. Why did the Court use a strategic device heretofore reserved for extreme cases like *Ex Parte Quirin* and afterwards reserved for explosive civil rights cases?¹⁰⁹ By issuing a *per curiam* opinion, the Court resolved an intricate and complicated case, one which Congress had very extensively and very publically dealt with only two years earlier and concerned a very ambiguous restraint of trade, without dealing with the underlying issues involved. In this way, the form of the opinion tells us something about it; by issuing a *per curiam* opinion the Court sought to duck a controversial issue by hiding behind bureaucratic anonymity. The baseball monopoly case, then, may be read as a controversial case.

Toolson represented one of the first iterations of the *per curiam* opinion as a technical tool. "Since the *per curiam* traditionally carried a message of clear-cut resolution and consensus," Ray wrote, "the Court increasingly found that packaging a case in *per curiam* form allowed it to communicate that comfortable message while engaging in more complicated acts of decision-making."¹¹⁰ In analyzing the use of the *per curiam* in *Toolson*, ray wrote, "In *Toolson*, then, the *per curiam* appears to do no more than reaffirm a precedent in fact modifies that precedent, making new law at the very moment that it apparently disclaims any intention of addressing the merits."¹¹¹ After all, as discussed briefly above, the

¹⁰⁶ Laura Krugman Ray, "A history of the Per Curiam Opinion," 176.

¹⁰⁷ *Ibid*, 180.

¹⁰⁸ *Ibid*.

¹⁰⁹ The WWII trial of eight captured German saboteurs who thereafter demanded habeas corpus. The court also issued a *per curiam* in the explosive *Bush v. Gore* (2000) the case which stopped the Florida recount and almost led to the resignation of Associate Justice David Souter.

¹¹⁰ Laura Krugman Ray, "A history of the Per Curiam Opinion," 186.

¹¹¹ *Ibid*, 187.

1922 court had *not* established that “Congress had no intention” of encompassing baseball into the regulatory state, but rather held that the structure of baseball itself foreclosed its regulation.¹¹² Ray’s analysis suggests that *Toolson* was a case of high interest with little clarity. The form of the *Toolson* opinion, then, provides some evidence for the conclusion that it derived from the essential ambiguity of the reserve system, a problem dating back to the early 20th century.

Questions remain: Why did the Court worry about retroactivity in this case, but not in others like insurance? Eliminating the reserve clause would be extremely disruptive, Banner argued, and therefore an unfair *ex post facto* burden on the industry.¹¹³ This is one answer. Perhaps the stature of baseball as the National Pastime contributed to this result as well. One argument might synthesize these thoughts; namely, that almost everyone inside or outside of baseball agreed that the reserve clause was a necessary, if regrettable, feature of the baseball business, and therefore the Justices were loath to destroy the business.

The dissenting opinion lends some substance to this view. Burton’s dissent mainly attacked the majority opinion on the grounds that *Federal Baseball* had become, to borrow Judge Frank’s phrase, an “impotent zombie.”¹¹⁴ Citing the Hearings in his dissent, Burton elaborated on his position that to uphold *Federal Baseball*, and in effect affirm that baseball was still not interstate commerce, would be at best inconsistent and at worst idiotic. “It is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act,” Burton wrote.¹¹⁵ The unique cultural status of baseball, he argued, made the fair and even application of antitrust law paramount. He wrote:

Conceding the major asset which baseball is to our Nation, the high place it enjoys in the hearts of our people and the possible justification of special treatment for organized sports which are engaged in interstate trade or commerce, the authorization of such treatment is a matter within the discretion of Congress. Congress, however, has enacted no express exemption of organized

¹¹² “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.” *Federal Baseball v. National League* 259 US 200.

¹¹³ Stuart Banner, *The Baseball Trust*, 121-122.

¹¹⁴ *Gardella v. Chandler*, 172 F.2d 402 (1949).

¹¹⁵ *Toolson v. New York Yankees, Inc., et al.* 346 U.S. 356 (1952), Dissenting Opinion.

baseball from the Sherman Act. . . In the absence of such an exemption, the present popularity of organized baseball increases, rather than diminishes, the importance of its compliance with standards of reasonableness comparable with those now required by law of interstate trade or commerce.¹¹⁶

Burton recognized an important aspect of the Celler Hearings: the Judiciary Committee did not report out either of the bills designed to exempt Organized Baseball from the antitrust statutes. Rather than merely passing the issue back to Congress, he argued, it was the Court's duty to remand the case to trial on the merits. This section of the dissent illustrated, once again, that the *Toolson* case existed in the same larger debate as the Celler Hearings. In refusing to examine the "underlying issues," i.e. facts, the Court, in effect, accepted the narrative set forth by the Subcommittee. The Court, tacitly or otherwise, upheld the status quo – the reserve clause would continue to rule.

Though the Supreme Court had left open the door to Congress for prescriptive action, the noise created by the 1951 Hearings and baseball's cultural and political capital made any legislation unlikely, at least for the time being. The new Chairman of the Judiciary Committee, Representative Keating (R. NY), seemed ill disposed to reconsider the baseball question. He commented, "I always have felt that baseball is primarily a sport and not a business. I think that is the way the fans feel."¹¹⁷ The now largely powerless Emanuel Celler responded by proposing a set of regulations, primarily concerned with the expansion of baseball west of Milwaukee, which, if not adopted by baseball, would prompt "repressive legislation."¹¹⁸ Gordon Cobbledick of the *Cleveland Plain Dealer* editorialized: "In a statement which for sheer presumptuousness surpassed anything since Herr Hitler published his plan to remodel the world, Mr. Celler laid down a set of rules the other day which he said baseball must follow."¹¹⁹ Given the tenor of public sentiment, a censure of baseball did not seem forthcoming, and therefore baseball's sacred reserve

¹¹⁶ *Toolson v. New York Yankees Inc., Et Al.* 346 U.S. 356 (1953).

¹¹⁷ Quoted in Jack Walsh, "Historic Holmes Ruling of '22 Upheld: Game Still Sport, Not Interstate Business," Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.;

¹¹⁸ "The present imbalance of the major league clubs must be remedied. The Browns might well be shifted to some western city such as Los Angeles or San Francisco." From "New Look at Baseball," Press release (undated), "Correspondence April – December 1953," Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.; Gordon Cobbledick, "Presumptuous Rep. Celler Tells Baseball to Commit Suicide or Face 'Repressive Legislation,'" *Cleveland Plain Dealer*, November 12, 1953.

¹¹⁹ I wish I was making that one up. Ibid.

clause remained intact. The court had effectively inoculated baseball against antitrust action, but the reserve clause debate was far from over.

Unrealistic, Inconsistent, and Illogical

The Supreme Court may have declared baseball safe from antitrust law, but the theater, boxing, and football industries would all be called “out” by the end of 1957. Two years after *Toolson*, both *United States v. Shubert* (1955) and *United States v. International Boxing Club of New York, Inc. Et al.* (1955) reached the Supreme Court. The former decided the case against the Shubert Theatre Company, discussed above, while the latter dealt with an alleged monopoly of boxing exhibitions in New York. In both cases the Court refrained from extending the *Toolson* precedent to these cases despite their manifest similarities. While both of these events extend beyond the temporal scope of this paper, they are instructive in understanding how the various Supreme Court Justices reflected back upon their *Toolson* ruling.¹²⁰ Without diving too deeply into these rather complicated cases, the Court essentially decided that any antitrust exemption for boxing or the theater had to be bestowed by Congress: “With respect to baseball, the Subcommittee [on the study of Monopoly Power in 1951] recommended a postponement of any legislation until the status of Federal baseball was clarified in the courts. No further action was taken on any of the bills; Congress thus left intact the then-existing coverage of the antitrust laws.”¹²¹ These cases represented the divergence of baseball from industries *de meme famille*. The attorneys representing the International Boxing Club contended that *Toolson* extended an antitrust exemption to all “businesses built around the live presentation of local exhibitions.”¹²² The Court rejected this reasoning. In Frankfurter’s dissent (one of several), the justice wrote: “It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions...and baseball.”¹²³ The government made

¹²⁰ Stuart Banner does an excellent job of covering this era in baseball antitrust history in, Stuart Banner, “Baseball Becomes Unique,” *The Baseball Trust*, 123-144.

¹²¹ For a full account of the IBC case see Stuart Banner, *The Baseball Trust*, 126-134; *United States v. International Boxing Club of New York, Inc. Et al* 348 US 236 (1955).

¹²² Stuart Banner, *The Baseball Trust*, 128.

¹²³ *United States v. International Boxing Club of New York, Inc. Et al* 348 US 236 (1955), Dissenting Opinion.

several distinctions, one of which contended that the 1951 Hearings clearly illustrated that baseball should be exempt from the antitrust laws, and no similar investigation had looked into the boxing business.¹²⁴

The difference in the character of boxing and baseball also appeared to influence the outcome in *International Boxing*. One leagist observed: “It would seem that the boxing decision is basically one of ‘policy.’ It appears the Court felt baseball was a clean and honest sport, capable of carrying on unhampered; whereas boxing, scandal-ridden and degenerate, needed to be subject to close scrutiny.”¹²⁵ The witnesses before Celler’s committee alongside Powell and Sterry all emphasized the role of the reserve clause in keeping baseball clean. Often, they framed the system as protecting the public from greedy players. Moreover, the league would fold quickly if players could offer themselves to multiple suitors. Baseball had always presented itself as a clean game. Boxing, in contrast, was seen as a haven for gamblers, and had no corresponding narrative to support restraints of trade. Other jurists echoed the claim that the distinction was moral, not legal. Even in Frankfurter’s dissent there were hints. “Whatever unsavory elements there be in boxing contests is quite beside the mark,” he wrote.¹²⁶ The mechanism of this moral narrative, and its probable impact remains outside the scope of this paper, but the comparison raises interesting questions.

By 1957 when the Court ruled on the Rozelle Rule – professional football’s reserve clause – they chose to limit the effects of Toolson to the facts involved, i.e. only to the business of baseball. Justice Clark wrote in *Radovich v. National Football League et al.* (1957), “If this ruling [in the football case] is unrealistic, inconsistent, or illogical, it is sufficient to answer...that were we considering the question of baseball for the first time upon a clean slate we would have no doubts” that we would find baseball subject to the antitrust laws like football.¹²⁷ Here, Clark seemed to be asserting that the baseball ruling hinged entirely on historical contingency. More, of course, operated on this ruling, but in the main it

¹²⁴ Stuart Banner, *The Baseball Trust*, 127.

¹²⁵ Charles Gromley, “Baseball and the Anti-Trust Laws,” *Nebraska Law Review* 34 (1955), 609, from Stuart Banner, *The Baseball Trust*, 131.

¹²⁶ *United States v. International Boxing Club of New York, Inc. Et al* 348 US 236 (1955), Dissenting Opinion.

¹²⁷ *Radovich v. National Football League et al.* 352 US 445 (1957).

represented an attempt by the Court to limit the disruption caused by *Toolson*. Upon winning his case Bill Radovich, a former lineman for the Detroit Lions, said, “[this ruling] vindicates my feeling that a player shouldn’t be treated like a piece of furniture.”¹²⁸ The use of slavery rhetoric transcended the bounds of baseball. By the end of these cases baseball had become not only an oddity among businesses but a unique case adrift even amongst its closest fellows. By what principle could anyone distinguish baseball from other sports?

All the Congressional wrangling to follow did little to clarify the situation. The last major attempt to crack baseball’s antitrust dam came in 1972. Much had happened in the interim. Under the leadership of Marvin Miller, the fledgling Major League Baseball Players Association had won the right to arbitration, secured the pension system, established an independent source of revenue, held a successful strike, and inked a collective bargaining agreement. Free agency, however, still seemed far off. Curt Flood, the star center fielder for the St. Louis Cardinals, stepped into the breach. Unlike Toolson and Kowalski, minor leaguers with little hope of a major league future, Flood was in his prime. The case would destroy his career. Also unlike his predecessors, Flood was an African-American. The moral position of the players had always been vivid, but in the race-conscious environment of the late 1960s Flood’s decision to bring an antitrust suit stood out all the more. Despite retaining the services of former Associate Justice Arthur Goldberg, Flood lost the case. Yet he knew what he did it for – the professional liberty of his fellows. In a letter to Bowie Kuhn, then Commissioner of Baseball, he wrote the following:

After twelve years in the Major Leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several States.¹²⁹

The specter of slavery always possessed a racial element, but Flood’s letter accentuated the plight of the players. Many fought back against this story – Flood made \$90,000 a year. The same tensions between stardom and slavery thus played out in another courtroom in another time.

¹²⁸ *Los Angeles Times*, February 26, 1957 from Stuart Banner, *The Baseball Trust*, 140.

¹²⁹ Quoted in Stuart Banner, *The Baseball Trust*, 189.

As we have seen, the rhetoric of the Hearings, and to a lesser extent the Gardella Case, provided much of the context and the content of the Toolson debates and decision. The events of 1949, 1951, and 1953 are not simply related temporally, but textually as well. Of the many narratives imbedded in the Celler Report, one did emerge as the dominant voice – that of uniqueness and necessity. Whether the arguments advanced by baseball in 1951 directly lead to the Supreme Court outcome is difficult to determine. What I will say is this: this story has illustrated the mechanism, rhetoric, by which cultural and economic narratives affect antitrust law and its application. Whether this constituted the primary mover of policy overall is also difficult to assess. Some narratives clearly had greater sway in some institutional settings than others. Yet, this story of debate has at the very least textured and complicated the argument of Banner’s groundbreaking work. The history of baseball’s antitrust exemption is not only one of leverage, shrewd legal advice, and historical contingency, but also of the uses of values, economic ideas, and history in antitrust debate.

If baseball’s exemption represented, in the words of Justice Douglas, “a derelict in the stream of the law,” why did it take so long to dislodge?¹³⁰ The language of the reserve clause debate had built up like so much sediment, one court battle at a time, and the same lexicon created during the first debates of the late 19th century lasted well into the 20th. The defenders of the reserve clause cemented that special legal status midstream through reason and logic, through cajoling and argument, through evidence and assertion. Perhaps the 1919 World Series finally tipped the scales towards the owners. The overt focus on gambling and dishonest play constituted the principle difference between the rhetoric of the Mexican League war and the rhetoric of the Players’ League war. That the special status of baseball should appear illogical after these long intervening years makes sense – we have seen that the introduction of free agency did not destroy baseball, but made it stronger. The actors in these decisions could only look back

¹³⁰ *Flood v. Kuhn et al.* 407 U.S. 258 (1972), Dissenting Opinion.

through the distorted mirror of history and listen to the advice of sports “luminaries” like Ty Cobb and Red Smith, experts of a peculiar kind, in order to resolve debates that had little room for error.

In the end, of course, there was no smoking gun. No irrefutable evidence that the Court resolved the case on *x* grounds. Yet the circumstantial evidence does pile up: Rehnquist’s “*sui generis*” memo, both briefs for the respondents, the petitioners’ “Policy” section, Sterry’s comments during oral arguments, Reed’s stray comment in conference, the language of subsequent decisions in the boxing and football cases, the shifting and inchoate antitrust context, the form of the decision, the language of the decision, etc. all gesture towards the conclusion that, even though they lost the argument, Organized Baseball won the case because of the strength of their position forged in the debates that had come before. Whether the Court resolved *Toolson* because of the fundamental ambiguity of the reserve system or because the Justices were swayed by the dominant narrative in favor of baseball may, however, remain an open question.

I will close with an anecdote from the great Shirley Povitch. He likened the *Toolson* case to the “Lefty Gomez story.” “The one about the time Gomez fielded a bunt with runners on second and third. Seeing it was too late to throw either to the plate or to third, he eventually tossed the ball to Tony Lazzeri at second base where there was no play. When Lazzeri stormed in with the ball asking what was the idea, Gomez said, ‘You have the reputation for being the smartest player on the team, so I threw it to you. I didn’t know what to do with it.’”¹³¹ Perhaps that conclusion is the most we can say – the US Supreme Court simply “didn’t know what to do with it.”¹³²

¹³¹ Shirley Povitch, “This Morning,” *The Washington Post*, Nov 10, 1953.

¹³² *Ibid.*

Conclusion: Being Comfortable with “Mottled Gray”

“If the correct answer to a statutory question is ‘black,’ but a court wrongly reads it as ‘white,’ the legislature will inevitably cure the mistake by enacting some shade of mottled gray.”— Kevin McDonald, “Antitrust and Baseball: Stealing Holmes,” 2011¹

By the time of the *Toolson* decision in 1953, the comedic duo of William Abbott and Lou Costello had polished and performed one of their most famous bits, “Who’s on First,” many times before many audiences. In the skit, the taciturn Abbott, with his precise mustache, played the straight man. Costello acted as the increasingly frustrated dupe.² The bit revolved – and revolved and revolved – around a hypothetical baseball team with peculiar last names – “Who” was the name of first baseman, “What” the name of the second baseman, “I don’t know” played third, and so on through the outfield. The conflation of the question “who’s on first?” with the statement “Who’s on first” provided the backbone of the joke.

A representative dialogue went as follows:

Costello: When you pay off the first baseman every month, who gets the money?

Abbott: Every dollar of it. And why not, the man’s entitled to it.

Costello: Who is?

Abbott: Yes.³

The popularity and endurance of the sketch in popular culture underscores the prominence of baseball in the American zeitgeist.⁴ I have offered this sketch to illustrate another point, however, and that is the similarity between the wordplay of Abbot and Costello and the chimerical, tumultuous, and confusing debate over the reserve clause. “Who gets the money?” indeed. The cacophony of the discourse has left the author feeling like Lou Costello yelling, “I don’t even know what I’m talking about!” and this is perhaps the point. If the reserve system did not have serious consequences for the livelihood of thousands, the debate might even be funny.

¹ Kevin McDonald, “Antitrust and Baseball: Stealing Holmes,” 125.

² Script from “Who’s on First,” <http://www.baseball-almanac.com/humor4.shtml>, accessed April 6, 2015.

³ I have almost certainly not done this bit justice. Video can be readily found online and I would direct the reader there.

⁴ The Baseball Hall of Fame in Cooperstown New York, the town sized ode to the greatness of baseball’s past, has the skit playing on a loop as one of its exhibits.

Paragraph 10(a) of the uniform player contract, commonly known as the reserve clause, caused consternation since Rutherford B. Hayes sat in the Oval Office, and continued to do so until Gerald Ford's administration nearly a century later. Kurt Flood's last charge against the reserve system at the Supreme Court in 1972 ended ignominiously with one of the most oddball Supreme Court rulings on record.⁵ Justice Blackmun's decision began with a paean to baseball that included amateur history, poetry, and a list of some of baseball's greats before burying the case under *stare decisis*.⁶ Peter Seitz, a little-known labor arbiter, unraveled the whole system with the stroke of the pen in 1975. The reserve clause was finally undone only to be partially reestablished by collective bargaining the following year.⁷ The decision proved decidedly simple: the reserve clause plainly gave the owners a one year right to renew, Seitz argued, not a perpetual right.⁸

The period under particular study in this thesis, 1949-1953, represented the high-water mark of ownership power. Historians, however, have never been comfortable with this course of events. One particularly acerbic law review branded the Supreme Court's *Toolson* decision "indefensible."⁹ Stuart Banner's brilliant work largely dismissed the 1951 hearings as "Glorified Wind-Jamming Sessions," designed for the publicity of the Congressmen involved.¹⁰ In regards to *Toolson*, Banner never managed to provide more than a tepid explanation involving retroactivity and the pragmatism of the Warren court. Likewise, Duquette's structural argument used context to explain a decision almost wholly *out* of context with the dominant antitrust paradigm. The loose notion, put forth by Larry Bumgardner and others, that the decisions of this period *must* be attributable to culture by some indeterminate mechanism cannot be seriously considered as a thorough explanation.

⁵ Flood v. Kuhn et al. 407 U.S. 258 (1972), Opinion of the Court.

⁶ Ibid.

⁷ Many excellent books and law reviews cover this decision – really the outcome of 7 years of work by the Players' Union. See: Ed Edmonds, "At the Brink of Free Agency: Creating the Foundation for the Messersmith-McNally Decision – 1968-1975," *Southern Illinois Law Journal* 34 (2009-2010), pp. 565-619; Stuart Banner, "The End of the Reserve Clause," *The Baseball Trust*, pp. 219-236;

⁸ Stuart Banner, *The Baseball Trust*, 228-229.

⁹ Roger I. Abrams, *Legal Bases: Baseball and the Law* (Philadelphia: Temple University Press, 1998), 62 cited in Stuart Banner, *The Baseball Trust*, 91.

¹⁰ Quote from the *New York Times*, August 5, 1951 cited in Stuart Banner, *The Baseball Trust*, 108.

I have endeavored here to provide a more expansive reading of baseball's antitrust debate within a smaller time frame. Methodologically, this work provides a different perspective by examining *Gardella*, the Celler Hearings, and *Toolson* not simply side-by-side but in conversation. Only in this way do the rhetorical contours of this long debate become clearer. I have argued that this extended dialectical process attempted to find reason in an increasingly unreasonable debate. Ultimately, the belief that the reserve clause protected the public from the misbehavior of the players and was thus economically necessary emerged as the dominant narrative. The main nexus of evidence undergirding this view came from baseball history, or at least the dominant view of that history. The arguments, factions, and contexts shifted radically from 1887 to 1953. Some aspects of the debate remained remarkably consistent, for example, the focus on competitive balance and the rhetoric of servitude. Other aspects of these multitudinous narratives proved flexible. In the long shadow cast by the Black Sox scandal, owners made new claims for the reserve clause. I argue that the cultural importance of baseball became important through the 1949 *Gardella* case and the 1951 Hearings, and in this way build on previous scholarship which has been vague on this point. The grey answer provided by the Court and Congress in the case of the reserve clause was not the most cogent thread in antitrust policy, but situated in the proper context can be *understood*, if not *justified*.¹¹

I close with a quote from Dale Berra, a former player and the son of the legendary Yankee catcher Yogi Berra, "Basically, all our similarities are different."¹²

And thus unreason reigned.

¹¹ But then when had antitrust policy been particularly cogent?

¹² Quoted in Andrew Zimbalist, *Baseball and Billions*, 75

Appendix:

Figure 1: The *Toolson* decision called the reserve clause safe at home. The artist did not draw hands very well. "Decision of the Year," *The St. Louis Post Dispatch*, reprinted in *The Sporting News*, November 18, 1953 "Sporting News Clippings 1950-1953," Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

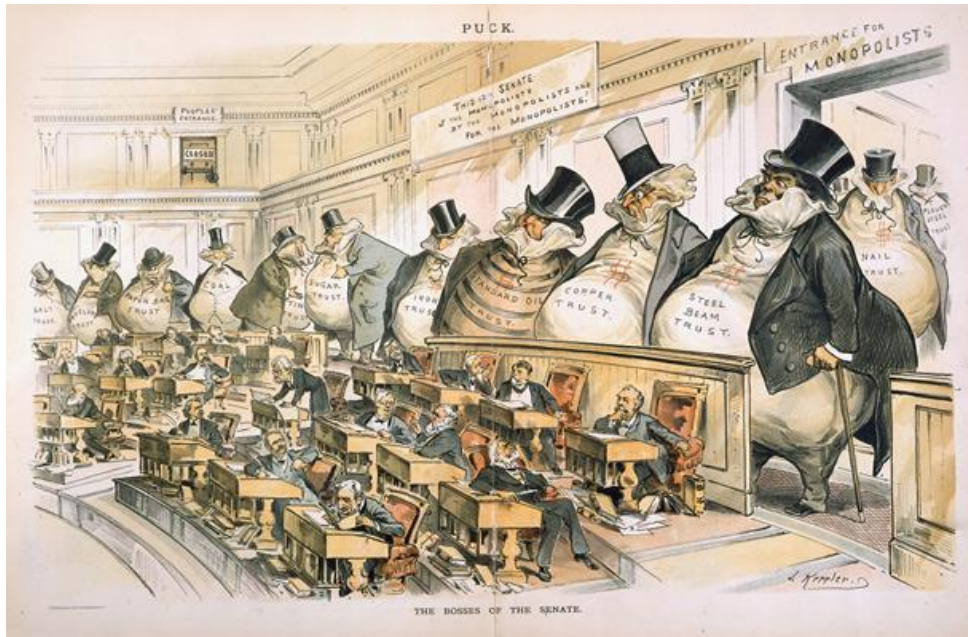


Figure 2: The baseball trust would have fit right in. Joseph Keppler, "The Bosses of the Senate," *Puck*, 1889 from Robert Caro, *Master of the Senate*, 200.



Figure 3: Cartoon depicting Emanuel Celler performing surgery on “Organized Baseball.” The little boy in the background asks, “Why don’t they leave it alone?” Darvas, “Now for the Verdict,” *The Sporting News*, October 31, 1951, “Sporting News Clippings 1950-1953,” Box 1, Emanuel Celler Papers, Library of Congress, Manuscript Division, Washington D. C.

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