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James R. Devine

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I. INTRODUCTION

Curt Flood was not a Show Me State native.[1] Born in Houston, Texas, in January 1938, the last of six children, Flood moved as a child with his family to Oakland, California.[2] From early on, Flood "was precociously coordinated."[3] He was able to run, catch, and throw a ball better than much older children.[4] He began playing organized baseball at the age of nine in a police league and knew by the time he was a teen that he might make a living at baseball.[5] Although he was shorter and lighter than most professional ball players, at the age of eighteen, fresh out of high school, in 1956, Flood signed a $4000 yearly contract with the Cincinnati Reds.[6]

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* This Article represents the final scholarly work of James R. Devine, who passed away at the age of 62 on May 12, 2010.

At the time of his death, James R. Devine was an Associate Dean and the David Ross Hardy Professor of Trial Practice at the University of Missouri-Columbia School of Law. Jim graduated from Red Bank (New Jersey) High School in 1966, where he was Class President. He later earned his BA from Franklin & Marshall College in Lancaster, PA, and his JD from Seton Hall University, where he was named to the Order of the Coif. Following law school, Jim clerked for the Honorable Patrick J. McGann and the Honorable John P. Arnone, both of the Superior Court of New Jersey. He practiced law in New Jersey from 1976 until he joined the faculty at the University of Missouri-Columbia in 1980. Jim became well-known in the legal community for his scholarly work in Trial Practice, Professional Responsibility, Sports Law, and Civil Procedure.

Jim loved baseball, the students he served for nearly 30 years, and most of all, his family. This article would not be possible without the unconditional love given to him by his mother and father, Lucy and Dick; his one and only true love, Sharon; and his children, Zach, Josh, and Noah. This article would also not be possible without the substantial assistance of his current and former students and his beloved friends and colleagues at the Law School. Substantial gratitude is owed to Professor Douglas Abrams, Dean Larry Dessem, and Assistant Dean Bob Bailey who discovered this article and pushed for its publication.

Jim is deeply missed by the many people whose lives he touched.

1. CURT FLOOD WITH RICHARD CARTER, THE WAY IT IS 19 (1971).
2. *Id.*
3. *Id.* at 25.
4. *Id.*
5. *Id.* at 25-26, 31.
6. *Id.* at 31-32. Regarding Flood's youth in Oakland, California, see *id.* 19-33. For a discussion of Flood's understanding of race relations while a youth in Oakland,

In 1956 and 1957, Reds management assigned Flood to play minor league baseball first at Class B High Point-Thomasville in the Carolina League and then at Savannah, Georgia, in the Class A South Atlantic League.[7] Flood endured extreme racial hatred.[8] His teammates and fans called him names, and his team prohibited him from eating in regular dining rooms and from lodging with the rest of the players.[9] Although this treatment made play almost impossible, Flood led the Carolina League in all offensive categories except home runs in 1956 and was named an all star in the South Atlantic League in 1957.[10] He also received brief call-ups to the Reds at the end of each season.[11]

On December 5, 1957, the Reds traded Flood and Joe Taylor to the St. Louis Cardinals for Marty Kutyna, Ted Wieand, and Willard Schmidt.[12] As the United States Supreme Court would later write in his case: "Flood rose to fame as a center fielder with the Cardinals during the years 1958-1969. . . . He played errorless ball in the field in 1966, and once enjoyed 223 consecutive errorless games."[13] Most commentators consider him one of the best center fielders of his time.[14] Offensively, he led the league in at-bats in 1963 and 1964, in hits in 1964, and in singles in 1963, 1964, and 1968.[15] He played on winning World Series teams in 1964 against the Yankees and in 1967 against the Red Sox.[16] He also played on the 1968 Cardinals team that lost the World Series to the Tigers.[17]

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see *id.* at 25. In addition to sports, Flood was also very good at art. *See id.* at 21, 27, 32. Regarding his signing with Cincinnati, see *id.* at 32-33. Playing at McClymonds High School in Oakland, California, Flood was coached by "Oakland's Coach," the legendary George Powles. *See id.* at 26; *Museum Opens "Baseball As America" September 17*, OAKLAND MUSEUM CAL. (Aug. 25, 2005), http://www.museum-ca.org/press/pdf/OMCA_Baseball_companion.pdf.

7. FLOOD, *supra* note 1, at 37, 42.

8. *Id.* at 37-39.

9. *Id.*

10. *See id.* at 38-39, 44.

11. *Id.* at 40, 44. Regarding the racism that Flood faced when he reported to the Reds spring training facility in Tampa and the consternation it caused him, see *id.* at 34-35.

12. *Curt Flood Statistics and History*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/players/f/floodcu01.shtml (last updated Oct. 28, 2011, 12:03 AM). Flood believed the Reds did not want to field the all-black outfield of Frank Robinson, Curt Flood, and Vada Pinson. *See* FLOOD, *supra* note 1, at 47.

13. Flood v. Kuhn, 407 U.S. 258, 264 (1972).

14. *See id.*; MARVIN MILLER, A WHOLE DIFFERENT BALL GAME 172 (Ivan R. Dee 2004) (1991).

15. *Curt Flood Statistics and History*, *supra* note 12.

16. *Id.*

17. *Id.* Being the center fielder of the St. Louis Cardinals, however, did not stop the racism directed at Flood, even in his own town. FLOOD, *supra* note 1, at 76-79.

In light of the racism Flood faced as he progressed through the Reds minor league system, he thought the 1967-68 Cardinals team was "the most remarkable team in the history of baseball," and not merely because of its performance on the field.[18] The team was, in Flood's view, a culturally enlightened group.[19] "The men of that team were as close to being free of racist poison as a diverse group of twentieth-century Americans could possibly be."[20] Flood, along with Tim McCarver, who was white, captained the team.[21] This biracial leadership united the team without forcing race on any culture.[22] The desire to win, so that each team member could make more money, bound together the group.[23] The team believed that it was "the envy of the league," not just because of the play of its members on the field, "but because [they] were the warmest and closest."[24]

High team morale, however, deteriorated in 1969 following negotiations between the Baseball Players' Association and baseball owners over pensions and other issues.[25] In 1966, the Baseball Players' Association appointed former steelworker's union official Marvin Miller as its executive director.[26] Led by Miller, the Players' Association entered into professional sport's first collective bargaining agreement in1968.[27] One of the labor issues between players and owners was the players' pension fund due to expire just prior to the start of the 1969 season.[28] When Miller learned that owners were not planning on continuing to fund the pension plan, he suggested players not report for spring training in 1969, and only one player reported on February 13th, the reporting date for pitchers and catchers.[29] Player/owner negotiations extended the plan through 1971, and most players showed up for training by February 25th.[30]

Holding out for two days in response to Miller's called-for labor action, Curt Flood garnered a pay raise from $72,500 to $90,000.[31] Other players on

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18. FLOOD, *supra* note 1, at 86.

19. *Id.* at 86-90, 94.

20. *Id.* at 86.

21. *Id.* at 88.

22. *Id.* at 87-88.

23. *Id.* at 87.

24. *Id.* at 86-90, 94; PETER GOLENBOCK, THE SPIRIT OF ST. LOUIS 484-86 (2000).

25. FLOOD, *supra* note 1, at 171-74, 181.

26. *History of the Major League Baseball Players Association*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N, http://mlbplayers.mlb.com/pa/info/history.jsp (last visited Oct. 28, 2011).

27. *Id.*; *see also* MILLER, *supra* note 14, at 97. The agreement covered both the 1968 and 1969 season. *Id.*

28. MILLER, *supra* note 14, at 166.

29. *Id.*

30. *Id.* at 166-67.

31. FLOOD, *supra* note 1, at 172. Flood's salary by year is set out by the Supreme Court in *Flood v. Kuhn*, 407 U.S. 258, 265 (1972).

the team, including hall of famers Bob Gibson and Lou Brock, along with Tim McCarver, also received substantial raises.[32] Those raises, however, carried a price. Player hold-outs made a number of owners angry, including beer-brewing magnate August A. Busch, Jr., who had purchased the St. Louis Cardinals franchise in 1953 for $3.75 million.[33] Following settlement of the labor dispute, Busch, the owner whose team had appeared in back-to-back World Series, dressed down his players at a meeting held at the Cardinals' St. Petersburg spring training camp.[34] On March 22, 1969, he brought other Cardinal executives and the St. Louis baseball press with him to the meeting and charged that the talk of union activities, not baseball, had dominated the off-season.[35] He complained that players had arrived late for spring training and that some players were not in condition.[36] Busch suggested that baseball was in danger of losing out on entertainment dollars to other sports.[37] He emphasized the sacrifices that he and other city leaders had made in putting up the new Busch Stadium.[38] Finally, Busch told his team that players had the best pension plan anywhere and warned them that if they intended to benefit from that pension plan when they were older, they had better make the fans happy.[39] Apparently making reference to some of Marvin Miller's unionist tactics, Busch told the team that he did not "react well to ultimatums."[40] At the end, Busch asked if there were questions.[41] None of the players spoke.[42]

From Curt Flood's perspective, Busch's speech "questioned the integrity of our attitudes."[43] The speech demoralized the team.[44] Regardless of the Cardinals' two World Series appearances, Flood wrote, "[W]e were still livestock."[45] While the players on the team remained close to each other, they no longer believed that the Cardinals were the best baseball organization.[46] In fact, according to Flood, "The 1969 Cardinals were a sorrowful and embit-

32. FLOOD, *supra* note 1, at 172.

33. JOHN HELYAR, LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL 96, 98 (1994).

34. FLOOD, *supra* note 1, at 172.

35. HELYAR, *supra* note 33, at 98-99.

36. *Id.* at 99-100.

37. *Id.* at 99.

38. *Id.*

39. *Id.* at 100-01.

40. *See id.* at 100.

41. *Id.* at 101.

42. *Id.* At least one source indicated that "[p]rofanity [from Busch] rattled the windows and turned the air blue." FLOOD, *supra* note 1, at 172.

43. FLOOD, *supra* note 1, at 172.

44. *Id.* at 174.

45. *Id.*

46. *Id.* at 181.

tered group, and showed it on the field."[47] Their enemy was no longer the next team on the schedule, but rather was their own bosses.[48] The players were left "in a constant state of terrified insecurity."[49] According to some reports, a few days after Busch's speech, the Cardinals traded their most popular player, Orlando "Cha Cha" Cepeda, "underlin[ing] the message" to the players.[50] The team's management was breaking apart the team, and the players knew it.[51] Flood told St. Louis newspapers that team management had given up on the 1969 season, particularly after management put two younger hitters into the batting order behind Flood and hall of fame player Lou Brock.[52] Flood protested what he considered were injustices, including the questioning of some of his and other team members' outside financial interests.[53] He called 1969 "that horrible season. Each complaint became another nail in my coffin. I was not speaking well of the boss."[54] Flood knew his days in a Cardinal uniform "were numbered."[55]

On October 7, 1969, the Cardinals traded Flood, Tim McCarver, Joe Hoerner, and Byron Browne to the Philadelphia Phillies.[56] In return, the Cardinals received Dick Allen, Cookie Rojas, and Jerry Johnson.[57] Flood learned of the trade the next day when Jim Toomey, assistant to the Cardinals' general manager Bing Devine, called him.[58] "'Good luck, Curt,'" was the reported substance of the conversation.[59]

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47. *Id.* at 86. The text of Mr. Busch's remarks appear in the appendix of *The Way It Is*. *Id.* app. B at 228-36.

48. *See id.* at 181.

49. *Id.*

50. *Id.* at 175. Other sources note that Cepeda was traded to the Braves for Joe Torre on March 17, 1969, five days before Mr. Busch addressed the team. *Orlando Cepeda Statistics and History*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/c/cepedor01.shtml (last updated Oct. 28, 2011, 12:03 AM).

51. FLOOD, *supra* note 1, at 181.

52. *Id.* at 183-84.

53. *Id.* at 181-82.

54. *Id.* at 86.

55. *Id.* During the 1969 season, Flood played with a substantial thigh injury, the result of an accidental spiking by the Mets' Bud Harrelson. *Id.* With stitches, a tetanus shot and general tiredness, Flood slept through a Cardinal promotional event and was fined $250. *Id.*

56. *Curt Flood Statistics and History*, *supra* note 12.

57. *See id.*; *Dick Allen Statistics and History*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/a/allendi01.shtml (last updated Oct. 28, 2011, 12:03 AM).

58. FLOOD, *supra* note 1, at 184-85.

59. *Id.* at 185. Marvin Miller's account notes that Flood found out in a telephone call from a newspaper reporter, not from the Cardinals. MILLER, *supra* note 14, at 172.

II. THE RESERVE RULE'S JUDICIAL CHALLENGE

A. Curt Flood's "Free" Agency

Prior to his trade from the Cardinals, Curt Flood believed in the American dream.[60] Following the trade, however, he "felt unjustly cast out" and considered retirement.[61] Flood was limited in his baseball options because of baseball's long-standing reserve rule.[62] Under that rule, Flood could either play for the team that owned his contract, the Phillies, or he could leave the game.[63] He did not have the right to shop his baseball talents to other teams.[64] As a result, Flood believed that the Cardinals had taken away his rights.[65] A friend suggested he sue.[66] Flood liked St. Louis.[67] It was his home and the locale of his business interests.[68] Flood did, however, meet with Phillies personnel.[69] Following that meeting, Flood was not disturbed so much about moving to Philadelphia as he was about the reserve rule's mandate that he do so if he wanted to continue to play baseball.[70] In a meeting with a lawyer for one of his businesses, the idea of a lawsuit again arose.[71] At that point Flood called Marvin Miller at the Players' Association.[72]

Flood visited with Miller in New York.[73] Flood knew that baseball's reserve rule was a combination of agreements whereby major league teams refused to play any team that signed a player reserved by any other team and which forbade a player from signing with any team other than the team that owned the player's reserve.[74] As a result, the collection of private employers who played each other in baseball games was engaged in a series of agreements that restrained their employees from moving within the industry, in

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60. FLOOD, *supra* note 1, at 187. Flood's parents, despite working multiple jobs, harbored the same American dream, but for their children. *Id.* at 19, 23. "Their goal was to raise children upright and industrious enough to qualify for the good life." *Id.* at 23. The dream was not wealth, but "a decent job[, a] loving family[, and a] nicer home on a nicer street." *Id.*

61. *Id.* at 188.

62. *See id.* at 190-91.

63. *See id.* at 188.

64. *See id.* at 190-91.

65. *See id.* at 193.

66. *Id.* at 189.

67. *Id.* at 190.

68. *Id.*

69. *Id.* at 189.

70. *Id.* at 190.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.* at 134.

Flood's view, a violation of the federal antitrust laws.[75] Flood wanted to sue to overturn the reserve rule.[76] Miller attempted to make Flood aware of the hardship he would face if he sued.[77] Flood likely would be out of baseball, he would never get to be a coach, and his personal life would be an open book and the subject of inquiry.[78] If he wanted to live in St. Louis, his business interests would be subject to disruption by August A. Busch, Jr., whom Flood also would be attacking.[79] Most important, Miller told Flood what he already knew: Flood was making $90,000 playing baseball at age thirty-one.[80] If he did not challenge major league baseball, he had a number of years in front of him in which that salary would increase.[81] Indeed, after his meeting with Miller, the Phillies offered Flood a salary in excess of $100,000 per year.[82] Miller told him to think about it.[83] Flood returned to St. Louis but called Miller about two weeks later: "'Marvin, I'm going ahead with it. Can you help?'"[84] Flood appeared in front of the executive committee of the Players' Association and, after questioning Flood and his motives, the union agreed unanimously to fund his legal fees.[85] Through Marvin Miller, the Players' Association hired Arthur Goldberg to represent Flood.[86] Goldberg was a former general counsel for Miller's Steelworkers Union, a former Secretary of Labor in the Kennedy Administration, a former United States Supreme Court Justice, and a former ambassador to the United Nations.[87]

B. Flood v. Kuhn*: The Supreme Court Revisits the Reserve Rule*

Legal maneuvering in the case began with a letter from Curt Flood to baseball commissioner Bowie Kuhn in which Flood asked that the league declare him a free agent.[88] When the commissioner denied Flood's request, the subsequent lawsuit moved through the courts rapidly.[89] Filed in January

75. *See id.* at 134, 195.
76. *Id.* at 190.
77. *Id.* at 190-91.
78. *Id.* at 191.
79. *See* MILLER, *supra* note 14, at 181.
80. FLOOD, *supra* note 1, at 191.
81. *See id.*
82. *Id.* at 192.
83. *Id.* at 191; MILLER, *supra* note 14, at 181.
84. FLOOD, *supra* note 1, at 193; MILLER, *supra* note 14, at 184.
85. FLOOD, *supra* note 1, at 193; MILLER, *supra* note 14, at 185-87.
86. FLOOD, *supra* note 1, at 194.
87. *Arthur J. Goldberg: Biographical Note*, PRITZKER LEGAL RES. CENTER, http://goldberg.law.northwestern.edu/mainpages/bio.htm (last visited Oct. 28, 2011); *see also* MILLER, *supra* note 14 at 187-88. Flood thought he had "the most famous lawyer in the world." FLOOD, *supra* note 1, at 194.
88. FLOOD, *supra* note 1, at 194-95; MILLER, *supra* note 14, at 190-91.
89. MILLER, *supra* note 14, at 192.

1970, the case took place in the home of major league baseball, New York City,[90] in the federal district court for the Southern District of New York in May 1970.[91] At trial, Curt Flood testified that he wanted the reserve system struck down.[92] Flood's other witnesses, including former stars Jackie Robinson and Hank Greenberg, however, agreed that some type of modified reserve system was necessary to maintain competitive balance on the field.[93] The press agreed, and at least one reporter indicated that a victory for Flood would destroy baseball.[94] The trial court ruled against Flood in August 1970, finding that a 1922 precedent of the United States Supreme Court had determined that federal antitrust laws did not cover baseball.[95] The Second Circuit Court of Appeals upheld the trial court in April 1971.[96] The United States Supreme Court heard the case on March 20, 1972.[97]

In affirming the opinions of the lower courts, the Supreme Court upheld its own precedent but did so with reasoning acknowledging the modern flaws of the prior cases.[98] Associate Justice Harry Blackmun, an avowed baseball fan, wrote the opinion for the Court.[99] Indeed, his office enshrined the game and contained, among other baseball memorabilia, Wheaties cereal boxes to commemorate the two World Series championships of Blackmun's beloved Minnesota Twins.[100] Justice Blackmun's opinion deferred to the 1922 Supreme Court decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[101] In *Federal Baseball*, Justice Oliver Wendell Holmes, Jr. set out his understanding of baseball's relationship

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90. *See MLB Official Info*, MLB.COM, http://mlb.mlb.com/mlb/official_info/about_mlb/ (last visited Nov. 3, 2011) (noting that the Office of the Commissioner of Baseball is located in New York City).

91. GOLENBOCK, *supra* note 24, at 508.

92. *See* Flood v. Kuhn, 316 F. Supp. 271, 276 n.14 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

93. *See id.* at 275-76.

94. GOLENBOCK, *supra* note 24, at 508.

95. *See Flood*, 316 F. Supp. at 276, 284-85 (citing Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922)).

96. Flood v. Kuhn, 443 F.2d 264, 266 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972). The court of appeals did, however, note that the 1922 ruling in *Federal Baseball* did not constitute a strong precedent in contemporary times. *See id.*

97. Flood v. Kuhn, 407 U.S. 258, 258 (1972). The Supreme Court agreed to review the case in 1971. *See* Flood v. Kuhn, 404 U.S. 880, 880 (1971) (granting certiorari).

98. *See Flood*, 407 U.S. at 269-82.

99. *See id.* at 259-64.

100. Edward Lazarus, *Blackmun, Baseball, and the Mel Ott Bat: A Justice with a Passion for the Game and the Country That Invented It*, FINDLAW (Nov. 15, 2001), http://writ.news.findlaw.com/lazarus/20011115.html.

101. *Flood*, 407 U.S. at 283-85 (citing Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922)).

to interstate commerce, a necessary element for antitrust law coverage.[102] In analyzing baseball under federal antitrust laws, Justice Holmes recognized that: (1) the various major league baseball teams were located in different cities; (2) the teams played against each other in games that generated revenue; (3) often, one team crossed a state line to play another; (4) when two teams won the respective championships of their league, these two teams met in a World Series; (5) the game itself required constant traveling among league cities; and (6) this traveling was controlled and regulated by the game itself.[103] Despite these attributes of interstate commerce, however, Justice Holmes found that the exhibition of baseball itself was not "trade or commerce" under the then-existing standards of antitrust analysis.[104] Additionally, the teams traveling from one league city to another league city was not interstate commerce because it was incidental to the non-commercial exhibitions the teams gave.[105]

By 1972, however, the restricted definition of interstate commerce the Court adopted in *Federal Baseball* did not apply to industry generally and certainly not to other professional sports. With a decision dealing with professional boxing in 1955, the Supreme Court began to enlarge its conception of interstate commerce.[106] In subsequent cases, the Court either decided or denied review of cases that placed the following sports within the umbrella of the antitrust laws: professional football, professional basketball, and professional golf.[107]

More to the point, the logic of Justice Blackmun's opinion in *Flood* was inconsistent. The essence of *Federal Baseball* was that conducting professional baseball exhibitions through interlocking agreements between teams and players and between the teams themselves did not constitute interstate

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102. *See Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 208.

103. *See id.*

104. *Id.* at 208-09.

105. *Id.*

106. *See* United States v. Int'l Boxing Club of N.Y., 348 U.S. 236 (1955). Beginning in 1955 with a non-baseball case, *United States v. Shubert*, 348 U.S. 222 (1955), the Court's rhetoric began to change. The Court held that neither *Federal Baseball* nor *Toolson* granted immunity from antitrust to any business that presented local exhibitions. *Id.* at 227. Rather, the Court indicated that the extent of interstate connection had to be considered. *See id.* at 230. The same day as the Court decided *Schubert*, the Court also found that individuals promoting professional boxing contests were also subject to the antitrust laws. *See Int'l Boxing Club*, 348 U.S. at 244-45. Separating boxing from baseball produced a vigorous dissent by Justice Frankfurter, who noted the incongruity in the Court's apparent separation of baseball from other sports. *See id.* at 248 (Frankfurter, J., dissenting). Justice Blackmun, in *Flood*, makes reference to this dissent. *Flood*, 407 U.S. at 277.

107. *See Flood*, 407 U.S. at 282-83; *see also* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205 (1971) (basketball); Radovich v. Nat'l Football League, 352 U.S. 445, 451-52 (1957) (football); Deesen v. Prof'l Golfers' Ass'n, 358 F.2d 165 (9th Cir 1966) (golf), *cert. denied*, 385 U.S. 846 (1966).

commerce.[108] Therefore this set of arrangements, including the rules that empowered teams to maintain a hold on their players, was not subject to the antitrust laws.[109] Justice Blackmun acknowledged that, in a modern world, "[p]rofessional baseball is a business and it is engaged in interstate commerce."[110] He then declared that, by virtue of the Court's holding in *Federal Baseball* and another decision in 1953 involving New York Yankee minor-leaguer George Toolson,[111] major league baseball was not subject to federal antitrust law.[112] He reaffirmed those decisions with the words "we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball."[113] But *Federal Baseball* held that the sport was exempt from antitrust law in large part because it was not an activity involved in interstate commerce.[114]

Justice Blackmun observed that at various times between *Federal Baseball* and *Flood* Congress had investigated the status of baseball under the nation's antitrust laws.[115] At no time during those investigations had Congress enacted legislation subjecting baseball to those laws.[116] According to Justice Blackmun, Congress's inaction constituted a decision to affirm an exemption for baseball from the antitrust laws.[117]

C. Flood v. Kuhn*'s Internal Inconsistencies and Historical Ignorance*

While Justice Blackmun's theory that Congress's legislative silence created a major league baseball exemption under federal antitrust law[118] sounds appealing, it missed the point of antitrust law. Under the applicable statute, all "combination[s] . . . in restraint of trade or commerce [are] illegal."[119] Thus, according to the statute, antitrust law covered baseball unless it was

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108. *See supra* notes 101-05 and accompanying text.

109. *See Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 207-09; *see also Flood*, 407 U.S. at 269-270.

110. *Flood*, 407 U.S. at 282.

111. *See* Toolson v. N.Y. Yankees, 346 U.S. 356 (1953) (per curiam). In *Toolson*, the Supreme Court simply reaffirmed its *Federal Baseball* precedent, indicating that Congress could change whether baseball is covered by the antitrust laws. *See id.* at 357. Two justices vigorously dissented, arguing that whatever had been true about "interstate commerce" when *Federal Baseball* was decided, baseball was now an activity in "interstate commerce." *Id.* at 357-58 (Burton, J., dissenting).

112. *Flood*, 407 U.S. at 283-85.

113. *Id.* at 284.

114. *See supra* notes 101-05 and accompanying text.

115. *See Flood*, 407 U.S. at 283.

116. *Id.*

117. *See id.* at 283-84. Justice Blackmun calls Congress's activity "positive inaction." *Id.* Legislative proposals concerning baseball are discussed *id.* at 280-82.

118. *See id.* at 283-84.

119. 15 U.S.C. § 1 (2006).

exempt. *Federal Baseball* exempted baseball on the theory that baseball was not interstate trade or commerce.[120] The Supreme Court's holding in *Flood* that baseball was an activity in interstate commerce eliminated the exemption.[121] If Congress did nothing, baseball would be subject to the antitrust laws, not the other way around.[122]

The internal inconsistencies in *Flood* were not the only problem in the opinion. There were signs, in other parts of the opinion, that Justice Blackmun had either forgotten or dismissed prior attempts by major league baseball players to make the most of their talent and earning power. Part I of *Flood* was labeled "The Game."[123] In this portion of the opinion, Justice Blackmun traced the history of professional baseball.[124] He mentioned, but did not discuss, professional baseball players' prior attempts to enhance their status as "laborers" for baseball's management.[125] He described the Brotherhood of Professional Ball Players, the rise of the American League from the former Western Association, and the Federal League.[126] He also alluded to *Metropolitan Exhibition Co. v. Ewing*,[127] a case handed down prior to *Federal Baseball*, but used it only to set out the common understanding of baseball's reserve rule.[128] He did not discuss the specifics of the case or, more importantly, its holding.[129] Justice Blackmun also mentioned a number of players, reportedly a list of his favorites, with Ty Cobb heading the roster.[130] However, Justice Blackmun did not reference Cobb's attempts, from 1906 through the early 1920's to garner a higher salary from the Detroit Tigers.[131] Justice Blackmun noted the supremacy of the Chicago White Stockings under

120. *See supra* notes 101-05 and accompanying text.

121. *Flood*, 407 U.S. at 282.

122. As Justice Douglas, dissenting in *Flood*, points out: *Federal Baseball*, in 1922, was decided when "the Court had a narrow, parochial view of commerce." *Id.* at 286 (Douglas, J., dissenting). From about 1930 through the 1960's, that view changed. *See id.* at 286-87. By the time of the decision in *Flood*, with baseball's dependence on radio and television and with national advertisers, baseball could hardly be called a local exhibition. *Id.* at 287. Congress, according to Justice Douglas, has the power to "to reach all phases of the vast operations of our national industrial system." *Id.* at 286.

123. *Id.* at 260 (majority opinion).

124. *Id.* at 260-64.

125. *See id.* at 261-62.

126. *Id.* at 261.

127. 42 F. 198 (S.D.N.Y. 1890).

128. *Flood*, 407 U.S. at 259 n.1.

129. *See id.*

130. *Id.* at 262-63. Regarding Justice Blackmun's accidental omission of one of his favorites, Hall-of-Famer Mel Ott, see Lazarus, *supra* note 100.

131. *See* James R. Devine, *The Legacy of Albert Spalding, the Holdouts of Ty Cobb, Joe DiMaggio, and Sandy Koufax/Don Drysdale, and the 1994-95 Strike: Baseball's Labor Disputes are as Linear as the Game*, 31 AKRON L. REV. 1, 5-14 (1997) [hereinafter *The Legacy*].

the playing leadership of Albert G. Spalding and Adrian "Cap" Anson.[132] He did not, however, mention that Spalding shared Curt Flood's desire to be a baseball "free agent."[133]

Without such references, Justice Blackmun's opinion was flawed. It ignored the historical development of the reserve rule and related legal precedents that would have shown the reasonableness of Curt Flood's request of the Court. Given his fondness for baseball's storied history, it is a little surprising that Justice Blackmun began the segment of his opinion entitled "Legal Background" with *Federal Baseball*.[134] By doing so, the prior precedents that Justice Blackmun did not cite became more important than those precedents he did cite. He failed to mention most of the baseball cases prior to *Federal Baseball*.[135] In virtually all of them, players were able to keep or obtain their free agency.[136] Only when one reviews these cases can one appreciate the extent of the missed opportunity that the decision in *Flood* represents.[137]

III. THE RESERVE RULE'S HISTORICAL CONTEXT

The owners' need to control players' professional services became a prime concern early in the history of professional baseball.[138] In 1871, the amateur National Association gave way to a new organization, the National Association of Professional Baseball Players, a "professional" league.[139] The owners soon saw the futility of relying on their mutual good faith not to try to outbid one another for talented players.[140] Indeed, Albert G. Spalding was proof.[141] He and three other players bolted from their Boston team in 1875 and headed for Chicago, along with one of the league's best hitters, Cap An-

132. *Flood*, 407 U.S. at 261.

133. *The Legacy*, *supra* note 131, at 41.

134. *See Flood*, 407 U.S. at 269. The Legal Background is Part IV of the opinion. *Id.* Following his discussion of baseball history, Justice Blackmun discusses Curt Flood and his career (Part II) and the litigation leading up to the Supreme Court case (Part III). *See id.* at 264-69.

135. *See Flood*, 407 U.S. at 269.

136. *See infra* Part III.

137. Even Marvin Miller was taken in. He thought early cases were all against the players. "'[C]ourts have always backed the owners . . . .'" GOLENBOCK, *supra* note 24, at 510.

138. *See* James R. Devine, *Baseball's Labor Wars in Historical Context: The 1919 Chicago White Sox as a Case-Study in Owner-Player Relations*, 5 MARQ. SPORTS L.J. 1, 6-8 (1994) [hereinafter *Baseball's Labor Wars*].

139. *Id.* at 8.

140. *See id.* at 8-9.

141. *See id.*

son, from a Philadelphia team.[142] Fearing repercussions from the free-agent signings of Spalding, his colleagues, and Anson, Chicago owner William Hulbert and Spalding set out to form a new league, and did so, creating the modern National League prior to the 1876 season.[143]

More than other observers at the time, Albert G. Spalding conceptualized baseball in a way that dictated restraints on players.[144] Spalding took the view that producing a baseball game was no different from producing a baseball bat.[145] He disagreed with the players' contention that the public wanted to see the players, not the owners.[146] He indicated that this logic was not based on "'safe or sane business theory.'"[147] Anticipating the formation of an activist players' association almost 100 years later, Spalding recognized that the relationship between owners and players in major league baseball constituted the traditional labor conflict between management and worker.[148] Later he would expand on his view of this relationship: "Base Ball depends for results upon two interdependent divisions, the one to have absolute control and direction of the system, and the other to engage – always under the executive branch – in the actual work of production."[149] The original owners of the National League, then, saw themselves as monopolists.[150]

Competition among National League owners for premium players generated the earliest policies restricting the free agency of players.[151] Because almost all baseball contracts were for one season, owners, willing to outbid each other to garner a more competitive team, continued to provide pay raises to players who would leave one team for another.[152] This practice, of course, raised baseball's labor costs and led, in 1879, to the first reserve rule.[153]

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142. *Id.* at 9 & n.33; *see also* DAVID PIETRUSZA, MAJOR LEAGUES: THE FORMATION, SOMETIMES ABSORPTION AND MOSTLY INEVITABLE DEMISE OF 18 PROFESSIONAL BASEBALL ORGANIZATIONS, 1871 TO PRESENT 23-25 (1991).

143. *Baseball's Labor Wars*, *supra* note 138 at 10.

144. *Id.* at 9-11.

145. *Id.* at 10 n.35.

146. *Id.*

147. *Id.*

148. *Id.* at 10 nn.35 & 37.

149. ALBERT G. SPALDING, BASE BALL: AMERICA'S NATIONAL GAME 169-70 (Samm Coombs & Bob West eds., Halo Books 1991) (1911).

150. *See Baseball's Labor Wars*, *supra* note 138 at 14.

151. *Id.* at 12-13.

152. *Id.*

153. *Id.* at 13. The "reserve rule" was actually, a series of agreements by owners: 1) Each team was permitted to "reserve" a certain number of players, originally five and, by 1903, all of the players; 2) No other team would attempt to sign a player "reserved" by one of its competitors; and 3) No team would play a team that signed a previously "reserved" player. *Id.* Eventually, these rules were augmented by another provision, one that prohibited a team from entering into a contract with any player that did not contain a right to reserve that player. *See id.* at 47.

The National League owners' perception that a reserve rule would resolve problems of free agency was indicative of the extent to which they were able to focus on other problems affecting the popularity of their productions.[154] Owner perception was, in part, reflective of the players' view that a reserve rule was not particularly objectionable because many players were pleased to be designated as the "franchise" players of their era.[155] What created problems for the National League were morality issues: gambling, Sunday baseball, and alcohol.[156] In 1880, the league adopted a resolution preventing liquor sales at ballparks.[157] When the Cincinnati Red Stockings club protested, because it made a substantial portion of its revenue from the sale of beer, the club was ousted from the league.[158]

Other clubs, however, were not as concerned about alcohol sales at baseball games. Indeed, profits from the sale of ardent spirits and beer helped spur the rise of another league that sought to challenge the monopoly that the National League owners enjoyed.[159] German immigrant Christian Friedrich Wilhelm von der Ahe, settled in St. Louis and initially worked as a grocery clerk.[160] Eventually, von der Ahe bought the store from his employer and added a tavern to the enterprise.[161] While operating the tavern, he noticed that many of his late-afternoon patrons arrived fresh from watching a baseball game.[162] For $1800, von der Ahe purchased the American Association St. Louis team, nicknamed the "Browns" because that was the color of their uniforms.[163] Along with his friend, Alfred H. Spink, von de Ahe put together a corporation to purchase Sportsman's Park as a place for the team to play.[164] Von der Ahe became part of a reorganized American Association, a league that sought to challenge the National League.[165] The league itself was known as the "Beer and Whiskey League" because four of the league's owners had ties to the liquor industry.[166] The American Association's policies, rather than those of the National League, generated the first judicial decision in the

154. *See* PIETRUSZA, *supra* note 142, at 43-46.

155. *Id.* at 43.

156. *Id.* at 36-37, 42-46.

157. *Id.* at 44.

158. *Id.*

159. *See Baseball's Labor Wars*, *supra* note 138, at 14.

160. PIETRUSZA, *supra* note 142, at 67.

161. *Chris von der Ahe*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/bullpen/Chris_von_der_Ahe (last updated June 3, 2007, 7:07 AM).

162. GOLENBOCK, *supra* note 24, at 12.

163. *See id.* at 13.

164. PIETRUSZA, *supra* note 142, at 67.

165. *See* GOLENBOCK, *supra* note 24, at 15-16.

166. PIETRUSZA, *supra* note 142, at 67. The league was inspired by a former player turned bartender. *Id.* at 62, 67. Additionally, the league was willing to sell alcohol at league games. *Id.* at 67. This latter fact was fine with von der Ahe, who saw baseball as a way to increase beer sales. *Id.*

United States dealing with the movement of baseball players from team to team.[167] Charles Bennett, called by one of his managers the best catcher to ever live, played with the National League's Detroit team during 1882.[168] In August 1882, however, Bennett signed an option to play with Allegheny of the American Association for the 1883 season, agreeing that he would sign a contract with Allegheny by the end of October 1882.[169] Bennett did not sign that contract.[170] Instead, he threatened to sign again with Detroit.[171] Allegheny sued, seeking to enjoin Bennett from signing with Detroit.[172] The federal court refused to aid Allegheny, denying the team all relief, although the court was not clear on the exact reason for its decision.[173]

The import of *Bennett* was not the legal rationale the court employed to deny relief. Its significance lay in the result of the case; like Curt Flood, Charlie Bennett wanted to play for the team of his choice. A full ninety years before the United States Supreme Court told Flood that he could not do so, a Pennsylvania federal court told Charlie Bennett he could.[174]

In February 1883, a Tripartite Agreement brought labor stability to baseball.[175] Owners in the American Association, the National League, and the Northwestern League agreed to respect the contract rights of each league.[176] When one league banned a player, all the other leagues agreed that they too would ban that player.[177] As a result, on issues of "player control, territoriality and outside rivals," the three leagues, though separately operated, were united.[178] With labor peace came financial success. Professional baseball enjoyed its most profitable season in 1883.[179]

The Tripartite Agreement did not, however, change players' desire for free agency. The Union Association, for example, was formed in 1883.[180] A St. Louis team, the Maroons, was the class of the league.[181] The team won its first twenty games in a row,[182] on its way to amassing a record of 94-19 dur-

167. *See id.* at 74.
168. *Id.* at 73-74.
169. Allegheny Base-Ball Club v. Bennett, 14 F. 257, 257 (C.C.W.D. Pa. 1882).
170. *Id.* at 258.
171. *See id.*
172. *Id.* at 257.
173. *See id.* at 259-60.
174. *Id.* at 259.
175. *See* PIETRUSZA, *supra* note 142, at 78-79.
176. *See id.* at 78.
177. *Id.* at 78-79.
178. *Id.*
179. *Id.* at 80; *Baseball's Labor Wars*, *supra* note 138, at 17.
180. PIETRUSZA, *supra* note 142, at 81-82.
181. Richard Leech, *The Evolution of Baseball in St. Louis*, SPORTSMAN'S PARK, http://www.collectsportsonline.com/earlystl.htm (last visited Oct. 29, 2011).
182. PIETRUSZA, *supra* note 142, at 88.

ing the regular season.[183] It won the league championship by twenty-one games.[184] How was it that the St. Louis Maroons became the "New York Yankees" of the Union Association? The same way that the Yankee team of the late-twentieth- and early-twenty-first centuries maintained its success; St. Louis bought all the best players as free agents.[185] The Union Association did not have, or respect, any reserve of players by league teams.[186]

Following the demise of the Union Association, teams did not compete for players in the major leagues.[187] In 1885, like true monopolists, major league owners imposed a salary cap of $2000.[188] Its imposition produced action by the players. Several New York Giants players, led by Columbia Law School graduate and Giants player John Montgomery Ward, organized the Brotherhood of Professional Base Ball Players.[189] The organization increased its membership as the Giants traveled throughout the league during the 1886 season.[190] While Ward and other players in the Brotherhood were on a team traveling outside the United States at the end of that season, owners placed greater restrictions on players by putting them into one of five salary classifications.[191]

Instead of staging what would have been baseball's first strike, the players responded by organizing the Players' League in 1889.[192] The teams in this league played in eight cities for one season in 1890.[193] The real import of the Players' League was the number of litigated cases it generated. In each of these suits, the player won relief from management.[194] Surprisingly, in *Flood*, the Supreme Court mentioned only one of these cases.[195]

One of the Players' League cases, *Metropolitan Exhibition Co. v. Ward*, stemmed from a suit that the New York Giants filed against Players' League

183. Leech, *supra* note 181.

184. *See 1884 Union Association Team Statistics and Standings*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/leagues/UA/1884.shtml (last visited Nov. 5, 2011) (showing the nearest team in the standings 21 games behind the St. Louis Maroons).

185. *See* PIETRUSZA, *supra* note 142, at 88.

186. *Id.* at 81-82.

187. *See id.* at 99.

188. *Id.*

189. *Id.* at 99-100.

190. *Id.* at 100; *see also Baseball's Labor Wars*, *supra* note 138, at 19.

191. *Baseball's Labor Wars*, *supra* note 138, at 20.

192. *Id.*; *see* PIETRUSZA, *supra* note 142, at 104-05.

193. *See* PIETRUSZA, *supra* note 142, at 121.

194. *See infra* notes 196-219, 262, 267-69, 281-99 and accompanying text.

195. *See* Flood v. Kuhn, 407 U.S. 258, 259 n.1 (1972). The court mentions *Metropolitan Exhibition Co. v. Ewing*, discussed *infra* notes 221-32 and accompanying text, only to show the contents of the reserve rule. *See Flood*, 407 U.S. at 259 n.1. There is no mention of the fact that Ewing won his case. *See id.*

organizer John Montgomery Ward.[196] He was under contract with the Giants from April 1, 1889, through October 31, 1889, presumably the length of the 1889 season.[197] Ward's contract with the Giants had provisions providing as follows: First, if Ward attempted to play for any other team during the term of his contract with the Giants, the team could expel him.[198] Second, if Ward attempted to play for any other team, the Giants could bring an action against him seeking damages for Ward's breach or an injunction preventing Ward from playing for another team.[199] Third, the Giants could terminate the contract at any time by giving Ward ten days notice.[200] If the Giants did so, Ward was entitled to his pay for the ten day period only if there was no cause for termination.[201] Finally, at the conclusion of the contract, the Giants could "reserve" Ward, at which point he would be obligated to his existing contract for another season.[202]

Ward played for the Giants for the contract year of 1889 but then proposed to play for Brooklyn of the Players' League for the 1890 season.[203] The Giants filed suit seeking to enjoin Ward from playing for another team.[204] The Giants claimed that after they reserved Ward, their prior contract with him renewed under the same terms and conditions.[205] Ward attempted to show the court the absence of logic in the Giants' argument. The court noted that if it enforced the Giants' reading of the agreement, "we have the spectacle presented of a contract which binds one party for a series of years, and the other party for 10 days."[206] The court noted that this situation occurred because when a player signed a contract, he was bound for the current season and, through the reserve clause, bound for the next season.[207] At the conclusion of that next season, the player would then be bound to a new reserve rule by the prior, reserved contract "and so on as long as [the Giants]

196. 24 Abb. N. Cas. 393, 394-95 (N.Y. Sup. Ct. 1890); *see* ROGER I. ABRAMS, BASEBALL AND THE LAW 18-19 (1998); *see also* Robert M. Jarvis & Phyllis Coleman, *Early Baseball Law*, 45 AM. J. LEGAL HIST. 117, 126 n.58 (The footnote describes a publishing quirk as to the opinion written by Justice Morgan Joseph O'Brien in *Ward*. Due to this quirk, the opinion was not published in West's NEW YORK SUPPLEMENT, therefore this Article will cite to the case as found in Diossy's ABBOTT'S NEW CASES on Westlaw.).

197. *Ward*, 24 Abb. N. Cas. at 407.

198. *Id.* at 395 n.a1 (detailing the provisions of the contract).

199. *Id.*

200. *Id.* at 415.

201. *See id.*

202. *Id.* at 412.

203. *See id.* at 397-98.

204. *See* PIETRUSZA, *supra* note 142, at 116.

205. *See Baseball's Labor Wars*, *supra* note 138, at 22. Ward called the blacklisting of players who violated the reserve rule "tyrannical." *Id.* at 19 n.78.

206. *Ward*, 24 Abb. N. Cas. at 415.

207. *See id.* at 414-15.

elect."[208] At the same time, the team could discharge the player at any time, with or without cause, by providing ten days notice.[209]

In *Metropolitan Exhibition Co. v. Ward*, the New York Supreme Court provided the first detailed discussion of baseball's reserve rule, the same rule that Curt Flood would later challenge.[210] First, the court did not agree with Ward's assumption that his 1890 contract, through the reserve rule, renewed all of the terms of the 1889 contract.[211] But, if the 1890 contract did not contain the same terms as the 1889 contract, the court did not know what terms the new contract would contain and would not, therefore, enforce such an uncertain agreement.[212] On the other hand, if the 1890 contract did incorporate all of the terms of the 1889 contract, then, the court noted, that contract would include the reserve rule.[213] If this reasoning were true, the court agreed with Ward; the Giants would hold the right to his services in perpetuity while the team would have the right to dismiss Ward with ten days notice.[214] At this point, the contract would lack fairness, each side could not equally enforce it, and, as a result, the Giants could not enforce it.[215] The court thus denied injunctive relief to the Giants[216] and dismissed the case.[217] John M. Ward was able to win what Curt Flood later sought. At the conclusion of his 1889 contract, Ward's obligations to the Giants were completed.[218] He was free to negotiate with another team for the 1890 season.[219] Two other Players' League cases that the Supreme Court did not mention or examine in *Flood* also were resolved in favor of the players' right to free agency.[220]

One of them was *Metropolitan Exhibition Co. v. Ewing*.[221] In *Ewing*, which also involved the New York Giants, the federal court acknowledged

208. *Id.*

209. *Id.* at 415.

210. *See id.* at 414-19.

211. *See id.* at 414-15.

212. *See id.* at 417.

213. *Id.* at 414.

214. *See id.* at 414-15. In 1970, former Yankee pitcher Jim Bouton pointed out both the severity and the absurdity of this reading of the reserve clause during negotiations toward a Collective Bargaining Agreement. *See* MILLER, *supra* note 14, at 193.

215. *Ward*, 24 Abb. N. Cas. at 414-16.

216. *Id.* at 418-19.

217. *Ward*, 24 Abb. N. Cas. at 419 n.a1; *see* Jarvis & Coleman, *supra* note 196, at 126 n.58.

218. *See Ward*, 24 Abb. N. Cas. at 416, 418-19.

219. *See id.*

220. The first case involved Bill Hallman, a utility infielder, who signed an agreement in October 1888 with Philadelphia of the National League to play for the 1889 season. Phila. Ball Club v. Hallman, 8 Pa. C. C. 57, 58, 61 (Pa. Ct. C.P. 1890). Regardless of the reserve rule, he signed a contract with Philadelphia of the Players' League for the following season. *Id.* at 61-63.

221. 42 F. 198 (S.D.N.Y. 1890).

that the court in *Ward* had found player contracts so indefinite as to be unenforceable.[222] The court attempted to determine if the totality of the agreements among the parties would add definiteness.[223] In so doing, *Ewing*'s importance comes in unraveling the various agreements that caused a player to be bound to one team under the reserve rule.[224] First, the National Agreement among all the major league teams allowed teams to reserve up to fourteen players by October 10th of each year while forbidding another team from signing a player so reserved.[225] Additionally, the National Agreement required all player contracts to run from April 1st through October 31st of the current year.[226] Finally, the National Agreement prevented a team from making an agreement for the subsequent year with any player until after October 20th of the year.[227] As a result of these agreements, when the Giants elected to reserve Ewing on October 10, 1889, the National Agreement prevented him from negotiating with another team.[228] The "reserve," however, could not set out the terms of Ewing's 1890 contract because, under the National Agreement, teams and players could not enter into new contracts until after October 20th.[229] The reserve rule, according to the court, coerced the player into negotiating only with his existing club for the period between October 10th and the end of the contract on October 31st.[230] The "reserve" served as no more than an option for that three week period.[231] If that negotiation failed, and other teams had filled their rosters for the upcoming year, the player could be left without a team.[232] An assumption can be made that the ruling compelled Ewing to negotiate with the Giants under the terms of his contract, a valuable consideration.[233] But if those negotiations failed, the contract would not support injunctive relief against Ewing if he elected to pursue free agency and sign with another team.

After the Player's League ceased operation at the conclusion of the 1890 season, professional baseball at the major league level was free of labor un-

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222. *Id.* at 201.

223. *Id.* at 202.

224. *See id.* at 202-05. William "Buck" Ewing was considered the premiere catcher of the early 20th century. *See Buck Ewing Statistics & History*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/e/ewingbu01.shtml (last updated Oct. 28, 2011, 12:03 AM).

225. *See Ewing*, 42 F. at 202-03.

226. *See id.* at 204.

227. *See id.*

228. *See id.* at 203-04.

229. *Id.* at 204.

230. *Id.*

231. *See id.* In legal terms, the option was "merely a contract to make a contract if the parties can agree." *Id.*

232. *Id.*

233. *See* PIETRUSZA, *supra* note 142, at 117.

rest, at least as far as the courts were concerned, for about ten years.[234] But this situation changed when the current American League grew into major league status shortly after the beginning of the twentieth century – the result of an expansion and reorganization of the former minor Western League.[235] A player-jumping dispute involving the Philadelphia Athletics of this new league spurred the legal action. In five seasons beginning in 1896, Napoleon Lajoie of the Philadelphia National League team never batted below .324 and was in the top three in the National League in slugging percentage in 1897, 1898, and 1900.[236] Following the 1900 season, Philadelphia American League owner Clark Griffith, "under cover of darkness . . . stole into Philadelphia" and signed Lajoie away from Philadelphia of the National League to Philadelphia of the American League.[237] The National League Phillies sought to prevent Lajoie from playing for the cross-town American League A's.[238] The trial court refused to grant injunctive relief prior to the 1901 season.[239]

Because Lajoie played for the A's during 1901, his case was different from those previously decided in which players sought to act as free agents; these cases had been resolved prior to a full baseball season.[240] Part of the difference resulted from Lajoie's 1901 on-the-field performance. During that season, he batted .426 with an on-base percentage of .463 and a slugging percentage of .643.[241] He won the Triple Crown, leading the league in batting average, slugging percentage, runs, hits, total bases, singles, doubles, home runs, runs batted in, runs created, extra base hits, and times on base.[242] When the Pennsylvania Supreme Court heard his appeal form the trial court after the 1901 season, Lajoie's own performance, one that distinguished him among his peers, made it impossible for him to succeed in court.[243] What the National League team sought to do was to hold Lajoie to his existing contract.[244] Under the law at the time, it could do so only if Lajoie was considered "unique."[245] After leading in virtually all offensive statistical categories, La-

234. *See id.* at 124-26.

235. *See id.* at 145-65; *see also Baseball's Labor Wars*, *supra* note 138, at 30-33.

236. *Nap Lajoie Statistics & History*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/l/lajoina01.shtml (last updated Oct. 28, 2011, 12:03 AM).

237. *Baseball's Labor Wars*, *supra* note 138, at 34.

238. *Id.*

239. *See id.* The court denied relief for the same "mutuality" reasons addressed by earlier courts and because the court found that Lajoie was not so extraordinary as to justify equitable relief. *See* Phila. Ball Club v. Lajoie, 51 A. 973, 973 (Pa. 1902).

240. *See, e.g.*, Metro. Exhibition Co. v. Ewing, 42 F. 198 (S.D.N.Y. 1890); Metro. Exhibition Co. v. Ward, 24 Abb. N. Cas. 393 (N.Y. Sup. Ct. 1890).

241. *Nap Lajoie Statistics & History*, *supra* note 236.

242. *Id.*

243. *See Lajoie*, 51 A. at 973.

244. *Id.*

245. *Id.* at 974.

joie's 1901 performance prevented him from arguing that he was not a "unique" player.[246]

From a legal perspective, Lajoie's case also differed from previous cases in which players had sought to sever contractual ties to their employers.[247] In earlier cases, the player signed with a team in a new league after the contract with his existing team had ended.[248] In those cases, the only thing binding the player to the team he sought to abandon was the reserve rule.[249] It was this rule, which allowed a team to keep a player indefinitely, coupled with a team's ability to discharge a player on ten days notice that created the inequity the courts had refused to support.[250] Napolean Lajoie, however, did not finish his stated contractual obligation with the National League Phillies at the end of 1900.[251] In fact, Lajoie had signed a three-year contract.[252] Without reference to the reserve clause, the Phillies had a right to renew Lajoie's contract for "six months, beginning April 15, 1901, and for a similar period in two successive years thereafter."[253] This feature made the contract different from other baseball contracts earlier courts considered. Lajoie had sold his services for a "stipulated period" of time.[254] Indeed, the court acted equitably when it prevented Lajoie from selling those same services again to another buyer during the term of his existing contract. As a result, the court could and did enjoin Lajoie from playing for the A's during the term of his Phillies' contract.[255]

The National League described the Pennsylvania Supreme Court decision as a "great legal victory" and predicted that Lajoie would land in jail if he played for the rival A's.[256] This victory, however, proved hollow, for two reasons. First, American League Philadelphia owner Connie Mack sold Lajoie to Cleveland.[257] When Lajoie's new Cleveland team came to Philadelphia to play Mack's team, police officers were unable to find Lajoie on the team train and could not, therefore, arrest him for violating the Pennsylvania court

246. *Id.* at 973-74. The Pennsylvania Supreme Court found that the trial court had been too restrictive in considering "uniqueness." *Id.* Today, all professional athletes are considered unique. *See* Cent. N.Y. Basketball, Inc. v. Barnett, 181 N.E.2d 506, 517 (Ohio Ct. C.P. 1961).

247. *See, e.g.*, Metro. Exhibition Co. v. Ewing, 42 F. 198 (S.D.N.Y. 1890); Metro. Exhibition Co. v. Ward, 24 Abb. N. Cas. 393 (N.Y. Sup. Ct. 1890).

248. *See, e.g.*, *Ewing*, 42 F. at 200; *Ward*, 24 Abb. N. Cas. at 394-400.

249. *See, e.g.*, *Ewing*, 42 F. at 200-01; *Ward*, 24 Abb. N. Cas. at 407-08.

250. *See, e.g.*, *Ewing*, 42 F. at 203-04; *Ward*, 24 Abb. N. Cas. at 415-18.

251. *See Lajoie*, 51 A. at 973.

252. *Id.* at 974-75.

253. *Id.* at 974.

254. *Id.* at 975.

255. *Id.* at 975-76.

256. PIETRUSZA, *supra* note 142, at 164 (internal quotation marks omitted).

257. *Id.*

order.[258] Apparently, Lajoie vacationed in Atlantic City while his team was in Philadelphia.[259] An attempt to enforce the Pennsylvania order in an Ohio court was unsuccessful.[260] Second, other courts ruled that the decision in *Lajoie* was not binding on them.[261] For example, in *American Base Ball and Athletic Exhibition Co. v. Harper*, a case involving a St. Louis player, the court refused to find pitcher Jack Harper unique and thereby denied injunctive relief.[262]

Ultimately, talks between the National League and the American League led to an agreement between the two early in 1903.[263] With the two leagues unified, player free agency stopped for about ten years.[264] Following the formation of the Federal League in 1914 – a league that had started in 1912 as the Columbian League with franchises in St. Louis, Cleveland, and Chicago – players the league employed scored another string of reserve rule legal victories.[265] During its brief three years, the Federal League employed eighty-one players from the American and National League, eighteen of whom breached major league reserve rules to play for the Federals.[266] The Federal League produced three cases involving players challenging the rule. These cases generated precedents similar to those produced by earlier leagues. In *Weegham v. Killefer*[267] and *American League Baseball Club of Chicago v.*

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258. *Id.* at 165.

259. *Id.*

260. *See id.* at 164-65.

261. *Id.* at 165.

262. *See* Am. Base Ball & Athletic Exhibition Co. v. Harper, 54 Cent. L.J. 449 (St. Louis Cir. Ct. 1902). The National League lost another case as well. *See* Brooklyn Baseball Club v. McGuire, 116 F. 782, 783 (C.C.E.D. Pa. 1902). James Thomas "Deacon" McGuire was primarily a catcher, who started play with Toledo in the American Association in 1884, later moving to Brooklyn of the National League. *See Deacon McGuire Statistics & History*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/m/mcguide01.shtml (last updated Oct. 28, 2011, 12:03 AM). McGuire then "jumped . . . to the Detroit Tigers" prior to the 1902 season. *Id.* Brooklyn sought an injunction to prevent McGuire from playing for Detroit. *See McGuire*, 116 F. at 782-83; *Deacon McGuire Statistics & History*, *supra*. Because the team could terminate the contract with ten days notice, specific performance was unavailable to McGuire. *See McGuire*, 116 F. at 782-83. The court therefore rendered it unavailable to the team and denied an injunction. *Id.* at 783.

263. PIETRUSZA, *supra* note 142, at 178-81.

264. *Baseball's Labor Wars*, *supra* note 138, at 41.

265. *Id.* at 41-49.

266. *Id.* at 42 n.185. The Federal League declared itself a major league in 1914. *Id.* at 42. It then competed directly with major league teams in Brooklyn, Pittsburgh, Chicago, and St. Louis. *Id.*

267. 215 F. 168 (W.D. Mich. 1914). Bill Killefer, a catcher, played the 1913 season with Philadelphia of the National League. *Bill Killefer Statistics & History*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/players/k/killebi01.shtml (last updated Oct. 28, 2011, 12:03 AM). At the end of the contract, Philadelph-

Chase,[268] the courts refused to enjoin a player from choosing the team for which he wanted to play, thereby allowing him to choose a team willing to pay for his services.[269]

Major League owners, however, ostensibly did win one Federal League case.[270] Armando Marsans began his baseball career with Cincinnati of the National League in 1911.[271] He batted .261, .317, and .297 over the 1911, 1912, and 1913 seasons, primarily playing in the outfield.[272] In 1914, he played thirty-six games with Cincinnati and then jumped to the St. Louis Terriers of the Federal League.[273] He played nine games with the Terriers.[274] At that point, Cincinnati obtained an injunction against further play by Marsans with the Terriers.[275] The court indicated that Marsans had received salary for part of the term of his contract, thereby providing consideration for it.[276] The court found that Marsans' absence would harm Cincinnati, thereby justifying an injunction.[277] Thus the court was willing to enjoin Marsans but required Cincinnati to provide a $13,000 bond as "security to pay any damages that

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ia sought to reserve Killefer for the 1914 season. *Killefer* 215 F. at 170. Instead, Killefer signed with the Chicago Federal League team for the three seasons of 1914, 1915, and 1916 for a salary of $5,833.33 per year. *Id.* Apparently using this salary as leverage, Killefer then again signed with Philadelphia for the same three years for $6,500 per year. *Id.* The court refused injunctive relief to all of the parties, thereby allowing Killefer to select his team. *Id.* at 173.

268. 149 N.Y.S. 6 (N.Y. Special Term 1914). Known as "Prince Hal," Chase was regarded as one of the preeminent first basemen of his era. *Id.* at 8; *see Hal Chase Statistics & History*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/players/c/chaseha01.shtml (last updated Oct. 28, 2011, 12:03 AM). Already under contract with Chicago of the American League in June, 1914, Chase gave his team ten days written notice that he was leaving. *Chase*, 149 N.Y.S. at 7-8. So happy was Buffalo of the Federal League to have Chase that they sponsored "Hal Chase Day" upon his arrival. *Baseball's Labor Wars*, *supra* note 138, at 44-45. The New York court refused Chicago's request for an injunction to prevent Chase from playing for Buffalo, thereby allowing Chase to be a free agent. *Chase*, 149 N.Y.S. at 20. For the first time the court in *Chase* raised a new issue: whether equity could be used to enforce "an agreement which is a part of a general plan having for its object the maintenance of a monopoly." *Id.* The court said that it would "not extend its aid to further the purposes and practices of an unlawful combination." *Id.* at 17.

269. *See supra* note 268.

270. *See* Cincinnati Exhibition Co. v. Marsans, 216 F. 269, 270 (E.D. Mo. 1914).

271. *Armando Marsans Statistics & History*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/m/marsaar01.shtml (last updated Oct. 28, 2011, 12:03 AM).

272. *Id.*

273. *Id.*

274. *Id.*

275. *See Marsans*, 216 F. at 269.

276. *Id.*

277. *Id.* at 269-70.

may result to" Marsans as a result of the injunction.[278] While major league baseball won the court case, Cincinnati did not keep its outfielder. Records indicate that Marsans played the 1915 season with the St. Louis Federals.[279] Legal records also indicate that the court dismissed the injunction against Marsans in 1915.[280]

By any scorekeeping mechanism, the players were consistent winners before 1915. In all but two cases the courts ruled in favor of the players who sought employment with a new team. Even in the remaining two, however, the owners did not win. In *Marsans*, the court ruled in favor of Cincinnati, but Marsans still was able to play for his chosen team. In *Lajoie*, while the owners won, the case was not about the traditional reserve rule. Rather, it was a very straightforward breach of an ongoing contract case. Even if the reserve rule was involved in the case, Lajoie was able to choose his league when the courts refused to enforce Philadelphia's injunction.

The first suit to claim that the reserve rule violated federal antitrust law, rather than state contract law, arose from the Federal League in 1915 but did not feature a player as the plaintiff.[281] It followed on the heels of *American League Baseball Club of Chicago v. Chase*, a New York State case in which the court called baseball a common law monopoly.[282] Perhaps as a result, the Federal League sued the National and American Leagues in January 1915.[283] The Federals alleged that the major leagues maintained an illegal monopoly violating federal antitrust law.[284] The case was filed in the Northern District of Illinois and assigned to federal trial judge Kennesaw Mountain Landis.[285] Landis was well-known for his "trust-busting" decisions, including one in which he had fined Standard Oil $29 million dollars.[286]

Landis, however, was a baseball fan.[287] At a hearing on January 20, 1915, he asked the parties if they wanted him to prevent the players from going to spring training.[288] He indicated that he did not think that baseball

278. *Id.* This injunction was issued on July 1, 1914, obviously in the middle of the baseball season. *Id.* at 269. This is thus consistent with the actions of Hal Chase in giving Chicago notice in mid-season. *See supra* note 268.

279. *Armando Marsans Statistics & History*, *supra* note 271.

280. *See Baseball's Labor Wars*, *supra* note 138, at 48; *see also* Eric Enders, *Armando Marsans*, THE BASEBALL BIOGRAPHY PROJECT, http://bioproj.sabr.org/bioproj.cfm?a=v&v=1&pid=8838&bid=971 (last visited Oct. 30, 2011).

281. *Baseball's Labor Wars*, *supra* note 138, at 48-49.

282. 149 N.Y.S. 6 (N.Y. Special Term 1914). In the lawsuit by Chicago, Chase was represented by Federal League lawyers. *See Baseball's Labor Wars*, *supra* note 138, at 44.

283. *See* PIETRUSZA, *supra* note 142, at 235.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

players were laborers.[289] He asserted that any threat to major league baseball was, in his opinion, a threat to an American institution.[290] On the other hand, Landis knew that any decision he rendered would go against the major leagues, and he appears to have been unwilling to do that.[291] He therefore did the next best thing: he did nothing, refusing to render a decision.[292] Teams from the Federal, American and National leagues all went to spring training, and the 1915 season came and went, with significant financial losses.[293] For example, the attendance total for the 1900 St. Louis Cardinals was approximately 380,000 fans, and the team made a profit.[294] The 1914 Cardinals, however, drew 600,000 fans and had no profit to show.[295] Throughout the 1915 season, talks continued between the two factions.[296] Ultimately, the Chicago Federal League owner purchased Chicago's American League team and St. Louis' Federal League owner purchased the American League Browns.[297] After that, the Federal League collapsed, and by December 1915, it no longer existed.[298] At that point, Judge Landis acted, dismissing the antitrust case.[299]

The *Federal Baseball* decision upon which Justice Blackmun relied in *Flood*, however, is a different case from the one Judge Landis dismissed. The decision the Court relied on in *Flood* stemmed from a lawsuit filed after the Federal League had gone out of business.[300] The Baltimore Federals were excluded from the settlement between the Federal League and the major leagues in 1915.[301] As the sole remaining Federal League team, it stopped operating because there were no teams to play.[302] As a result, approximately a month after Judge Landis dismissed the Federal League's antitrust case, and three months after the Federal League had ceased to exist, the Baltimore Federals filed a second antitrust action.[303] That case was tried and resulted in a

289. *Baseball's Labor Wars*, *supra* note 138, at 49.

290. *Id.* at 49; PIETRUSZA, *supra* note 142, at 235.

291. PIETRUSZA, *supra* note 142, at 236.

292. *See id.*; *Baseball's Labor Wars*, *supra* note 138, at 49.

293. *Baseball's Labor Wars*, *supra* note 138, at 49.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 49 n.228.

298. *Id.* at 49.

299. *Id.*

300. *See* Flood v. Kuhn, 407 U.S. 258, 269 (1972); Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922); PIETRUSZA, *supra* note 142, at 252.

301. PIETRUSZA, *supra* note 142, at 248-49.

302. *See* Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc., 269 F. 681, 682 (D.C. Cir. 1921), *aff'd*, 259 U.S. 200.

303. *See Baseball's Labor Wars*, *supra* note 138, at 49 & n.229.

verdict in favor of Baltimore's owner for $80,000, which was trebled under the antitrust laws to $240,000.[304]

Reversing the trial court, the District of Columbia Court of Appeals formulated the reasoning that Justice Holmes and the United States Supreme Court would later embrace.[305] First, the court of appeals found that baseball was not trade or commerce as was necessary for protection under the antitrust statute.[306] Trade or commerce required "the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another."[307] While baseball players and teams moved from one place to another for games, the games themselves all took place in one location and were thus "local," with no transfer of anything to fans who watched, other than enjoyment.[308] Second, even assuming that baseball involved some trade or commerce, the court found that interstate travel was not involved.[309] Under then existing interpretations of antitrust law, the statute only covered activity that had a "direct," not "indirect" affect on interstate commerce.[310] The court found the reserve rule worked more to "'foster the trade and increase the business of those who make and operate'" baseball and thus did not directly affect the interstate movement of players or teams.[311] As a result, the court overturned the trial court in a decision published almost five years after the league had collapsed.[312]

When the case reached the United States Supreme Court, Justice Holmes agreed with the court of appeals, noting that the lower court's decision went "to the root of the case."[313] The Supreme Court then affirmed the court of appeals' judgment.[314]

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304. *Nat'l League of Prof'l Baseball Clubs*, 269 F. at 682.

305. *Compare id. with Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 208-09.

306. *Nat'l League of Prof'l Baseball Clubs*, 269 F. at 685.

307. *Id.* at 684.

308. *Id.* at 684-85. Further, the travel of the players from one venue to another, even across state lines, was merely incidental to the otherwise local game. *See id.* This was consistent with the opinion of the court in *Chase*. *See id.* at 686 (citing Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6 (N.Y. Special Term 1914)). In *Chase*, the court reviewed the status of baseball under the antitrust laws, finding that baseball players were not commodities but rather offered a service. *Id.*; *Chase*, 149 N.Y.S. at 16. The court also found that interstate "commerce" required the sale of a commodity: "Baseball is an amusement, a sport, a game . . . and it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce." *Chase*, 149 N.Y.S. at 1617. The court also noted, however, that baseball was clearly a common law combination in restraint of trade. *See id.*

309. *Nat'l League of Prof'l Baseball Clubs*, 269 F. at 684-85.

310. *Id.* at 686-87.

311. *Id.* at 686-88.

312. *Id.* at 688.

313. Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922).

314. *Id.* at 209.

IV. *FLOOD V. KUHN*: A JUDICIAL SHORTCOMING BUT PRACTICAL SUCCESS

It is the precedent then, of a decision decided six and one half years following the demise of the Federal League that serves as the forefront of Justice Blackmun's "Legal Background" in *Flood*.[315] In using this focal point, Justice Blackmun omitted any reference to the numerous decisions, stretching back almost ninety years, in which players had been allowed to select their own teams.[316] He glossed over the fact that *Federal Baseball* was not a suit one league brought against other leagues for exercising unlawful monopoly control over their players via the reserve rule – that Judge Landis had dismissed.[317] Instead, one disgruntled owner filed the case after all of the other owners with whom he had enjoyed a contractual relationship had abandoned their common agreement.[318] Finally, Justice Blackmun failed to explore the implications of the fact that *Federal Baseball* was not about the claims of a single player, as was *Flood*.[319] Consequently, any discussion of the reserve rule by the court of appeals, or by Justice Holmes, was only to reference the common agreements among the owners and the teams. Because it involved an owner, *Federal Baseball* could not have had any bearing on the rights of a player within the league. Thus, the facts of *Federal Baseball* were not precedential to *Flood*.

The victory of major league owners in *Flood* might appear to have constituted a complete vindication for the reserve system, then almost 100 years old. The Supreme Court told both owners and players that they could not challenge the system under federal antitrust laws.[320] The decision, however, did little to solidify the position of the owners. At the time of the decision, there was already a collective bargaining agreement in place between the owners and the players making the players' union the exclusive bargaining agent for them.[321] Consequently, any issue related to wages, hours, or working conditions were mandatory subjects of collective bargaining between the owners and the union.[322] Thus, Curt Flood or any other individual player likely could not negotiate any dispute over the reserve rule.[323] The owners pointed this fact out in *Flood*, but the Supreme Court ignored the issue be-

315. Flood v. Kuhn, 407 U.S. 258, 269-70 (1972).

316. *See id.*

317. *Id.* at 269.

318. Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt. Inc., 269 F. 681, 682 (D.C. Cir. 1921), *aff'd*, 259 U.S. 200.

319. *Flood*, 407 U.S. at 269.

320. *See id.* at 285.

321. *See* MILLER, *supra* note 14, at 94-98 (describing the first collective bargaining agreement that covered the 1968-69 major league baseball seasons and the 1970 agreement that was in place when Flood brought his case).

322. *See* ABRAMS, *supra* note 196, at 81-83; MILLER, *supra* note 14, at 214.

323. *See* ABRAMS, *supra* note 196, at 82-83.

cause none of the parties had raised it in the courts below – by virtue of an agreement not to do so pending the disposition of the case itself.[324] After the conclusion of *Flood,* a collective bargaining agreement adopted in 1973 once more opened discussion on the issue of the reserve rule.[325]

If Curt Flood lost and if the reserve rule were not on the table when he tried his case, why, more than thirty-five years after the fact, do we care about one St. Louis Cardinal center fielder and his losing battle with major league baseball? Curt Flood did not compare himself to Dred Scott, the slave whose case for freedom was tried in the federal courthouse near Flood's Busch Stadium workplace.[326] The comparison nonetheless remains.[327] John Montgomery Ward, the hall of fame lawyer-organizer of the Players' League, first made the comparison of the professional baseball player to slaves like Dred Scott: "'Like a fugitive slave law, the reserve rule denies [the player] a harbor or a livelihood, and carries him back, bound and shackled, to the club from which he attempted to escape . . . .'"[328] Dissenting in *Flood* years later, Justice Thurgood Marshall also noted the similarity: "To non-athletes it might appear that [Flood] was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services."[329]

The comparison does not end with a reference to slavery. "The Dred Scott decision served as an eye-opener to Northerners who believed that slavery was tolerable . . . ."[330] The decision solidified the position of the North and of the South "to the point where both were willing to fight over the issue."[331] During Curt Flood's trial challenging the reserve rule, no active major league player was willing to testify on his behalf.[332] Flood's case, however, heightened awareness among his fellow players to the point that they too were willing to fight over the issue.[333] As one of Flood's teammates, Tim McCarver expressed it, "there's no doubt in my mind that Curt's action got

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324. *See Flood*, 407 U.S. at 295 (Marshall, J., dissenting). This is not quite true. The issue of the reserve clause being a mandatory subject of collective bargaining was initially raised as a defense to Flood's antitrust claim, but, by agreement between owners and players, the issue was removed from the suit. *See* Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 624-26 (8th Cir. 1976); MILLER, *supra* note 14, at 97-98.

325. *See Kansas City Royals Baseball Corp.*, 532 F.2d at 618-19.

326. *See* FLOOD, *supra* note 1, at 14.

327. Flood mentions that the St. Louis Arch is not far from where Dred Scott's case was tried. *Id.*

328. PIETRUSZA, *supra* note 142, at 102.

329. *See Flood*, 407 U.S. at 289.

330. *Impact of Dred Scott*, WATSON.ORG, http://www.watson.org/~lisa/black history/scott/impact.html (last updated Oct. 31, 1999).

331. *See id.*; *The Dred Scott Decision*, HISTORY PLACE, http://www.historyplace.com/lincoln/dred.htm (last visited Oct. 30, 2011).

332. *See Flood*, 407 U.S. at 275-76.

333. GOLENBOCK, *supra* note 24, at 511.

the ball rolling toward freeing players from the shackles of the ninety-year clause that could tie them to a team against their wills."[334]

The *Flood* decision brought to light the antagonism between owners and players that had remained invisible for decades behind the facade of baseball as America's national pastime. Curt Flood's resolve in filing suit thus "raised the consciousness" of fans and players alike.[335] And the players who reassessed their complacency toward the reserve rule included not just the players who were in charge of the Players' Association but all players.[336] The lawsuit also forced the hand of owners. The owners wanted baseball's governing structure to appear impartial.[337] When Commissioner Bowie Kuhn denied Flood's request to become a free agent, the owners wanted this denial to appear to be the act of a neutral arbitrator.[338] This appearance could not happen through a commissioner who was an employee of the owners.[339] As a result, it may have been major league lawyers who said to the owners: "'[I]f we're going to make this argument that we don't need antitrust law, we've got to at least be able to say we have impartial arbitration of what the contracts mean . . . .'"[340] Curt Flood's case prompted owners, during negotiations on a 1970 Collective Bargaining Agreement, to agree to neutral grievance arbitration.[341]

From the perspective of the players, neutral grievance arbitration may have been their most important labor victory.[342] After playing out the option year of their written contract with the Los Angeles Dodgers and Baltimore Orioles in 1975, Andy Messersmith and Dave McNally filed a grievance under the collective bargaining agreement to become free agents.[343] In December of that year, the league's neutral arbitrator declared Messersmith and McNally free agents.[344] These two players won the right to choose their own team – a right denied to Curt Flood but also one that an increasing number of players would enjoy and make the most of in years to come.[345]

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334. *Id.* at 508-09.

335. *Id.* at 510.

336. *Id.* at 510-11.

337. *Id.* at 512.

338. *See* MILLER, *supra* note 14, at 214.

339. *Id.*

340. GOLENBOCK, *supra* note 24, at 512.

341. *Id.*

342. *See* MILLER, *supra* note 14, at 215.

343. *See* Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 618 (8th Cir. 1976); MILLER, *supra* note 14, at 243. The reasons these two players were the ones to make the challenge is detailed in the chapter bearing their name in MILLER, *supra* note 14, at 238-53.

344. *See* Nat'l & Am. League Prof'l Baseball Clubs v. Major League Baseball Players Ass'n, 66 Lab. Arb. Rep. (BNA) 101, 118 (1976).

345. MILLER, *supra* note 14, at 214.

V. CONCLUSION

While Curt Flood did not make Missouri his home until he joined the St. Louis Cardinals in 1958,[346] his career there and his challenge to the reserve rule were emblematic of the "Show Me State" spirit. The exact origin of the nickname "Show Me State" is disputed.[347] The most prevalent of stories involves Congressman Willard Duncan Vandiver who, in response to the eloquent speech of another, reportedly said: "'[F]rothy eloquence neither convinces nor satisfies me. I am from Missouri. You have got to show me.'"[348] Today, of course, the Missouri state motto has a different meaning. It refers to the people, who are said to be "stalwart, perhaps somewhat stubborn and with a dedication to common sense."[349]

No better phraseology describes Curt Flood; "stalwart, – having physical strength, sturdy, robust."[350] From 1958 through the fall of 1969, Curt Flood proved his strength, patrolling center field for the Cardinals.[351] In many seasons during those years, he was the Cardinals lead-off hitter, setting the table for his colleagues.[352] He was a member of three all-star teams and won seven Gold Gloves in a row from 1963 through 1969.[353] With his trade to the Phillies in the fall of 1969, [354] Flood's "Show Me" stubbornness took over. When Flood used the word "slave" to refer to himself, many commentators criticized him and pointed out that no slave had ever earned the five-figure income that he received that year.[355] Flood responded: "'Only the totalitarian-minded will believe that high pay excuses virtual slavery.'"[356] He knew he likely would lose his lawsuit. "'And he went ahead anyway, because he was a very principled man. You could not shake him.'"[357] And the reason Flood went ahead: being bound to one team for life did not make "Show Me" com-

346. *Curt Flood Statistics and History*, *supra* note 12.

347. *Missouri: The State of Missouri*, NETSTATE.COM, http://www.netstate.com/states/intro/mo_intro.htm (last visited Oct. 30, 2011).

348. *Id.*

349. *Id.*; *see also Why is Missouri Called the "Show Me State?"*, MO. SECRETARY ST., ROBIN CARNAHAN, http://www.sos.mo.gov/archives/history /slogan.asp (last visited Oct. 30, 2011).

350. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1256 (ed. 1978).

351. *See All Star Game Player Index*, BASEBALL ALMANAC, http://www.baseball-almanac.com/asgbox/asgpl-f.shtml (last visited Oct. 30, 2011).

352. *Curt Flood – A Hero for the Ages*, BASEBALL'S BLACK HERITAGE, http://www.baseballsblackheritage.com/?p=79 (last visited Oct. 30, 2011).

353. *All Star Game Player Index*, *supra* note 351; *see also Curt Flood Statistics & History*, *supra* note 12.

354. *Curt Flood Statistics & History*, *supra* note 12.

355. FLOOD, *supra* note 1, at 139.

356. *Id.*

357. GOLENBOCK, *supra* note 24, at 510.

mon sense. Curt Flood did not believe that baseball should be a business exempt from the normal operation of labor law. "After the courts rule that the present reserve system is unlawful, the employers will be obligated to do what they should have done years ago. They will sit down with the players and negotiate reasonable conditions of employment."[358]

Curt Flood was right. And he was not just right in his own case. Players like Andy Messersmith and Dave McNally would have to show that what Flood wanted really did make common sense. After a neutral arbitrator told the owners in 1976 that the reserve rule was wrong, the owners did have to sit down and meaningfully negotiate with players.[359]

Curt Flood died in 1997, twenty-five years after he lost his suit against major league baseball.[360] He did not get to see the Congressional adoption of the Curt Flood Act, which declared that major league baseball was, indeed, subject to the antitrust laws, at least in the absence of a collective bargaining agreement.[361] But, he did get to see the Major League Baseball Players' Association rise as the preeminent union in professional sports. Hopefully, the players in that organization knew that it was Curt Flood's "Show Me" spirit of stalwart stubbornness and dedication to common sense that got them started.

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358. FLOOD, *supra* note 1, at 206.

359. *See* MILLER, *supra* note 14, at 267.

360. *Curt Flood Statistics & History*, *supra* note 12. Flood's baseball career ended in 1971. *Id.* He was traded by the Phillies to the Washington Senators in November, 1970 and played 13 games in 1971 for the Senators. *Id.*

361. Adopted in 1998, "The Curt Flood Act" is set forth in 15 U.S.C. § 27a-c (2000); *see also* Brown v. Prof'l Football, Inc., 518 U.S. 231, 231 (1996). The Curt Flood Act provides that "the conduct, acts, practices, or agreements of . . . major league baseball . . . are subject to the antitrust laws . . . ." 15 U.S.C. § 27a(a). It gives only major league baseball players standing to sue for a violation of the Act. *Id.* § 27a(c).

Under Federal labor law, however, even in an action by a player, antitrust law is inapplicable whenever there exists a collective bargaining agreement relationship between the baseball owners and players. *See, e.g.*, *Brown*, 518 U.S. at 237. As a result, the only time a player could actually sue under the Curt Flood Act would be when a union does not exist as the exclusive bargaining agent for the players, either because the collective bargaining relationship has truly ended or because there is no union. *See id.*