

**The Sports Law Casebook**  
Milestones in the Economic Regulation of Sports

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## PREFACE

This is a casebook not a textbook. Within these pages the written opinions in (thirty) cases involving professional and amateur sports are presented. The cases have been chosen based upon their importance in the development of spectator sports into the multi-billion dollar industry it is today, and each of the decisions in the book has had a significant impact on the way that college and professional sports have developed in the United States. Each decision has set a precedent that has shaped the way sports businesses are conducted.

The cases are divided into one of several broad topics and presented in roughly chronological order within each section. A brief commentary about each case precedes each topic. Dissenting opinions are included where they impart knowledge about the reasoning of the court and where they highlight the important issues that faced the court in their decision making process. Discussion questions are provided at the end of each case.

Typically, court opinions are filled with technical issues regarding the appeals process, court jurisdiction, and descriptions of the lawyers involved in trying the case. Much of this minutia of the legal process is of interest only to the legal scholar. The cases as presented in the book, therefore, are stripped down in order to make the decisions more easily accessible to the non-legal expert and in a way that the reasoning of the court can be more plainly seen. For those who wish to view the entire decision, the case reference number is provided in each decision and any number of libraries or Internet legal reference services will allow access to the full text.

This book is designed as a reference book for any student of sports law, sports economics, sports marketing and management, or simply the interested casual reader who wonders why collegiate and professional sports are organized in the fashion in which they are. It may not seem to the average sports fan that the Supreme Court has anything to do with their enjoyment of the game they watch on television on Sunday afternoon, but nothing could be further from the truth.

High school basketball stars who jumped straight to the NBA like Kevin Garnett and Tracy McGrady, can thank Spencer Haywood and Court for their decision in his favor, opening the door for non-college graduates to enter the league. The stunning success of the U.S. Women's National Soccer team in the 1999 World Cup is a direct result of court enforcement of the provisions of Title IX of the Education Amendments of 1972 which barred gender discrimination in athletic programs at college institutions. When the local baseball team signs new stars or loses talent to big-spending clubs, this can be traced directly back to the decision in *Flood v. Kuhn* that ushered in the era of free agency in Major League Baseball. Tiger Woods' spectacular golf career hinged on his ability to play on public golf courses as a child, a privilege denied to African Americans only a few years before his birth. Indeed, the courts have examined everything from ticket scalping to television contracts to the use of golf carts in professional tournaments touching nearly every aspect of modern spectator sports.

# Table of Contents

## **PREFACE**

## **PART ONE**

### **SPORTS, ANTITRUST, AND LABOR**

#### **Baseball's Antitrust Exemption**

*Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs et al*, (1922) PAGE 9

*Toolson v. New York Yankees*, (1953) PAGE 11

*United States v. International Boxing Club*, (1955) PAGE 14

*Radovich v. National Football League*, (1957) PAGE 18

*Flood v. Kuhn*, (1972) PAGE 22

#### **Players' rights and contracts**

*Haywood v. National Basketball Association*, (1971) PAGE 33

*Mackey v. National Football League* (1976) PAGE 35

*Smith v. Pro Football, Inc.* (1978)

*Brown, et al. v. Pro Football, Inc., dba Washington Redskins, et al.*, (1996)

*Fraser, et al v. Major League Soccer* (2000) PAGE 47

*NOTE: Several other cases here. Powell v. NFL, etc. Clarrett ruling here*

## **PART TWO**

### **SPORTS AND OTHER ANTITRUST CONSIDERATIONS**

*International Boxing Club v. United States*, (1959) PAGE 58

*National Hockey League v. Met. Hockey Club*, 427 U.S. 639 (1976)

*National Football League et al. v. North American Soccer League* (1982) PAGE 63

*National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* (1984) PAGE 171

*NOTE: Al Davis, Raiders stuff here. NCAA preseason tournament ruling here.*

## **PART THREE**

### **SPORTS AND DISCRIMINATION**

#### **Discrimination by Race**

*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)

*Dawson v. Baltimore* (1955) PAGE 70

*Holmes v. City of Atlanta*, 350 U.S. 879 (1955)

*Daniel v. Paul*, 395 U.S. 298 (1969) PAGE 73

*Evans v. Newton*, 382 U.S. 296 (1966)

*Wolfe v. North Carolina*, 364 U.S. 177 (1960)

**Discrimination by Gender**

*O'Connor v. Board of Education of School District 23*, 449 U.S. 1301 (1980)

*Grove City College v. Bell*, 465 U.S. 555 (1984) PAGE 79

*Cohen v. Brown* (1997)

*Miami University Wrestling Club; Miami University Soccer Club; Miami University Tennis Club; Michael Ambrose; Nathan Studney; Christopher Tangen; Terrence Wright; Ryan Pallinger; Shaun Soucie; Jason Murphy; Nicholas Binge; Steven Mario Contardi; William S. Bloom, Plaintiffs-Appellants, v. Miami University* (2002)

**Discrimination by Disability**

*PGA Tour, inc. v. Martin* (2001) PAGE 86

**PART FOUR****MISCELLANEOUS**

*Tyson and Brothers - United Theatre Ticket Offices v. Banton*, 273 U.S. 418 (1927)

*NCAA v. Tarkanian* (1988)

*Brentwood Academy v. Tennessee Secondary School Athletic Association et al.* (2001)

**APPENDICES**

PAGE 96

1. An explanation of the federal case law numbering system.
2. A glossary of legal terms.
3. A listing of additional cases and resources.
4. THE ESSENTIAL ANTITRUST AND SPORTS REGULATION STATUTES: Sherman Act, Clayton Act, Federal Trade Commission Act, Civil Rights Act, Title IX

## PART ONE

### SPORTS, ANTITRUST, AND LABOR

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.” - Adam Smith, *The Wealth of Nations*.

That competition among competing firms promotes general welfare is one of the central tenants of economics. A cartel is a group of firms which, though officially independent, make decisions as a group. The Sherman Act of 1890 and subsequent federal antitrust laws prohibit firms from conspiring with one another to prevent competition, and the very first decisions made by the Court regarding the antitrust statutes took steps to eliminate the formation of cartels.

Sporting events and leagues present an usual problem to the Court and to economists, however. For a game to take place, the two competitors must agree to compete with each other, and in order for a sports league to run smoothly, a great deal of cooperation between teams, who are nominally competitors, must occur. While economists would undoubtedly condemn a situation where the primary providers of a commodity like steel or oil in separate cities around the country got together to decide how their product was to be distributed among the consumers in each of the cities, in the case of a national sports league, without such agreements the league would cease to function. The questions that face the Court in this section are to what extent are leagues' agreements with one another “ancillary” in nature, that is a necessary part of producing the final product in an efficient manner, and what agreements are “naked” restraints designed only to reduce competition at the expense of consumers and labor.

The Supreme Court first addressed the issue of antitrust in relation to sports leagues in *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs et al.*, (1922). The Federal League was formed in 1914 as an attempt to compete with the established National and American Leagues as a third major baseball league, and in a novel attempt to break into the market sued the two established leagues for antitrust violations. The Federal League's first lawsuit was filed in the District Court of Northern Illinois under Judge Kenesaw Mountain Landis who stated that attacks on baseball “would be regarded by this court as a blow to a national institution.” By the time Landis issued a ruling, the major leagues had reached agreements with all but one of the Federal League teams driving the league out of business following the 1915 season. Five years later, Landis went on to become the first commissioner of Major League Baseball.

Following Landis' ruling, the remaining team, the Baltimore Terrapins, filed suit separately. While the Supreme Court acknowledged baseball engages in commerce and that the commerce consists of teams traveling across state lines to play opposing teams, nevertheless baseball the court decided that baseball did not qualify as interstate commerce as the interstate travel was a “mere incident, not the essential thing.” Since the federal antitrust statutes only apply to interstate commerce, as opposed to “purely state affairs,” this ruling established the infamous “antitrust exemption” enjoyed by Major League Baseball since that time.

This decision has been widely criticized by legal and economic scholars as well as by future members of the court. “Subsequent court decisions made baseball’s exemption increasingly difficult to justify. The Supreme Court consistently denied other industries, particularly other sports, the right to use the Federal Baseball ruling as a precedent. Somehow the Court was able to see that other sports were commerce while it maintained the fiction that baseball was not.” (Leeds and von Allmen, 2002).

The court had its next chance to address the antitrust issue in *Toolson v. New York Yankees*, (1953). Toolson was a relatively unknown minor league player for the New York Yankees who objected to baseball’s reserve clause that indefinitely bound players to specific teams. The majority argued that, as set forth the *Federal Club* decision, in enacting the antitrust laws Congress intended professional baseball to be exempt. In addition, Congress had plenty of time since *Federal Club* to change the law and by not doing so gave tacit approval to the previous decision. Justices Burton and Reed broke from the majority arguing that even if baseball in the 1910s did not constitute interstate trade, the tremendous growth in the popularity of the sport over the intervening forty years, and in particular the growth of radio and television revenues, certainly placed the leagues within the purview of federal antitrust statutes by the 1950s. While not commenting on the legality of Major League Baseball’s reserve system, they called upon the court to reverse the *Federal Club* decision and lift the league’s antitrust exemption.

Over the next several years, the court’s logic became increasingly strained. In *United States v. International Boxing Club*, (1955), the U.S. antitrust division brought suit against the great heavyweight boxer Joe Louis and a group of boxing promoters charging an attempt to monopolize the boxing business. The defendants argued that as a sports organization it should be exempt from the antitrust laws due to the court’s previous rulings in *Federal Club* and *Toolson*. The Court divided into three factions. Chief Justice Warren, writing for the majority, stated that the court should not extend this exemption to boxing. While the Court passed on another opportunity to overturn its previous decision, Warren went so far as to suggest that if the current court had the duty to hear *Federal Club* for the first time, it likely would not have granted the original exemption. Still, the majority concluded that legal concept of *stare decisis*, that is “let the old decision stand,” took precedence over correcting a mistake of a previous Court.

The Court’s second faction, Justices Burton and Reed, while concurring with the majority that boxing should not be granted an exemption to the nation’s antitrust laws, expressed that they would also have overturned the *Federal Club* decision and eliminated baseball’s exemption at the same time.

The third prevailing opinion, summed up best by Justice Frankfurter (and joined by Justice Minton) in the first sentence of his dissent is that, “It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a ‘trade or commerce.’” In their opinion, baseball and other sports should be treated identically, and given the fact that the Court had already granted immunity to baseball would extend that immunity to boxing as well.

In *Radovich v. National Football League*, (1957), the court concluded that baseball was not only different from individual sports such as boxing but also other team sports such as football. Bill Radovich, an all-Pro offensive lineman from

This ruling had an immediate impact on the relation

The NFL Player's Association was formed within a year of the ruling, a league-wide minimum wage was

The case of *Flood v. Kuhn* brought to an end any hopes that the Supreme Court would overturn its decisions in either *Federal Baseball Club v. National League* (1922) or *Toolson v. New York Yankees* (1953) that established major league baseball's antitrust exemption. While three of the justices would have overturned those cases, five others voted to continue the exemption and leave the next move in the hands of Congress. In this decision, Justice Blackmun gives a thorough summary of the cases that sprang from *Federal Baseball* and *Toolson* explaining how the Court arrived at an antitrust exemption for baseball alone and why the Court felt it appropriate that Congress and not the Judiciary should remove the exemption.

Since this case was decided, Congress has acted to limit the antitrust exemption enjoyed by major league baseball. Twenty-six years after *Flood v. Kuhn* – a year after Mr. Flood's death from cancer – Congress passed the "Curt Flood Act of 1998" guaranteeing major league players protection under the federal antitrust statutes in their labor dealings with baseball owners.

The Haywood ruling not only ushered in the era of underclassmen and, more recently, high school students entering the NBA draft but also led indirectly to free agency for NBA players. In 1967, the American Basketball Association (ABA) was formed to compete with the NBA. Competition for players between the leagues led to sharply higher player salaries so that, starting from roughly equal levels in 1967, by 1972, the average professional basketball player earned nearly three times that of his NFL or MLB counterpart. In 1976, the NBA merged with the rival ABA absorbing four of that league's teams. The NBA player's association, fearing the loss of the competing league would bring an end to escalating pay scales, brought an antitrust suit against the NBA to block the merger. The merger of the only two significant providers of professional basketball certainly seemed anti-competitive on its face, and in the wake of the Haywood ruling, the writing was on the wall. The NBA granted its players free agency in exchange for the players dropping the suit.

Discussion questions:

Do you agree with the original court in the *Federal Baseball* decision that interstate travel is "mere incident, not the essential thing" in professional baseball?

On the same day that the Court delivered the Toolson decision, the court also decided *FTC v. Shubert Theater*, a company that produced dramatic plays in Chicago was accused of anti-competitive behavior. Citing the precedent set in *Federal Baseball*, the Shubert argued that as a company that produces live entertainment for local viewing, they should be exempt from federal antitrust laws. Based on the Court's decisions in *Federal Baseball*, *International Boxing*, how do you suppose the court ruled in this case?

In 2004, Maurice Clarrett, a running back from the Ohio State University sued the NFL to enter the amateur draft after his freshman year. Based on

## FEDERAL BASE BALL CLUB OF BALTIMORE, Inc., v. NATIONAL LEAGUE OF PROFESSIONAL BASE BALL CLUBS et al.

259 U.S. 200

Argued April 19, 1922.

Decided May 29, 1922.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit for threefold damages brought by the plaintiff in error under the Anti-Trust Acts of July 2, 1890 (the Sherman Act) and October 15, 1914 (the Clayton Act). The defendants are the National League of Professional Base Ball Clubs and the American League of Professional Base Ball Clubs, unincorporated associations, composed respectively of groups of eight incorporated base ball clubs, joined as defendants; the presidents of the two Leagues and a third person, constituting what is known as the National Commission, having considerable powers in carrying out an agreement between the two Leagues; and three other persons having powers in the Federal League of Professional Base Ball Clubs, the relation of which to this case will be explained. It is alleged that these defendants conspired to monopolize the base ball business, the means adopted being set forth with a detail which, in the view that we take, it is unnecessary to repeat.

The plaintiff is a base ball club incorporated in Maryland, and with seven other corporations was a member of the Federal League of Professional Base Ball Players, a corporation under the laws of Indiana, that attempted to compete with the combined defendants. It alleges that the defendants destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League, and that the three persons connected with the Federal League and named as defendants, one of them being the President of the League, took part in the conspiracy. Great damage to the plaintiff is alleged. The plaintiff obtained a verdict for \$80,000 in the Supreme Court and a judgment for treble the amount was entered, but the Court of Appeals, after an elaborate discussion, held that the defendants were not within the Sherman Act. The appellee, the plaintiff, elected to stand on the record in order to bring the case to this Court at once, and thereupon judgment was ordered for the defendants.

The decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery. A summary statement of the nature of the business involved will be enough to present the point. The clubs composing the Leagues are in different cities and for the most part in different States. The end of the elaborate organizations and sub- organizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club crossing a state line in order to make the meeting possible. When as the result of these contests one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition for the world's championship between these two. Of course the scheme requires constantly repeated traveling on the part of the clubs,

which is provided for, controlled and disciplined by the organizations, and this it is said means commerce among the States. But we are of opinion that the Court of Appeals was right.

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*, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words. As it is put by defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

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

Judgment affirmed.

TOOLSON  
v.  
NEW YORK YANKEES, INC. ET AL.

346 U.S. 356

Argued October 13, 1953.  
Decided November 9, 1953.

PER CURIAM.

In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, (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. 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. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 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.

Affirmed.

MR. JUSTICE BURTON, with whom MR. JUSTICE REED concurs, dissenting.

Whatever may have been the situation when the *Federal Baseball Club* was decided in 1922, I am not able to join today's decision which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce. In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines<sup>1</sup>, its sponsorship of interstate

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<sup>1</sup>The fastest-growing source of revenue for major league clubs is radio and television. Receipts from these media of interstate commerce were nonexistent in 1929. In 1939, 7.3 percent of the clubs' revenue came from this source; and in 1950, this share rose to 10.5 percent.

advertising, and its highly organized “farm system” of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, 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.

In 1952 the Subcommittee on Study of Monopoly Power, of the House of Representatives Committee on the Judiciary, after extended hearings, issued a report dealing with organized baseball in relation to the Sherman Act. In that report it said:

“‘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. At the beginning of the 1951 season, the clubs within organized baseball were divided among 52 different leagues. Each league is an unincorporated association of from 6 to 10 clubs which play championship baseball games among themselves according to a prearranged schedule. Such a league organization is essential for the successful operation of baseball as a business. . .”

“Of the 52 leagues associated within organized baseball in 1951, 39 were interstate in nature.”

In the Federal Baseball Club case the Court did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt from the Sherman Act. The Court acted on its determination that the activities before it did not amount to interstate commerce. The Court of Appeals for the District of Columbia, in that case, in 1920, described a major league baseball game as “local in its beginning and in its end.” This Court stated that “The business is giving exhibitions of base ball, which are purely state affairs,” and the transportation of players and equipment between states “is a mere incident . . .” “The main thrust of the argument of counsel for organized baseball, both in the Court of Appeals and in this Court, was in support of that proposition.

The plaintiffs here allege that they are professional baseball players who have been damaged by enforcement of the standard “reserve clause” in their contracts pursuant to nationwide agreements among the defendants. In effect they charge that in violation of the Sherman Act, organized baseball, through its illegal monopoly and unreasonable restraints of trade, exploits the players who attract the profits for the benefit of the clubs and leagues. Similarly, the plaintiffs allege that because of illegal and inequitable agreements of interstate scope between organized baseball and the Mexican League binding each to respect the other’s “reserve clauses” they have lost the services of and contract rights to certain baseball players. The plaintiffs also allege that the defendants have entered into a combination, conspiracy and monopoly or an attempt to monopolize professional baseball in the United States to the substantial damage of the plaintiffs.

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 baseball from the Sherman Act, and no court has demonstrated the existence of an implied exemption from that Act of any sport that is so highly organized as to amount to an interstate monopoly or which restrains interstate trade or commerce. 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. It is interstate trade or commerce and, as such, it is subject to the Sherman Act until exempted. Accordingly, I would reverse the judgments in the instant cases and remand the causes to the respective District Courts for a consideration of the merits of the alleged violations of the Sherman Act.

## UNITED STATES v. INTERNATIONAL BOXING CLUB OF NEW YORK, INC. ET AL.

348 U.S. 236

Argued November 10, 1954.

Decided January 31, 1955.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This is a civil antitrust action brought by the Government in the United States District Court for the Southern District of New York. The defendants - three corporations and two individuals - are engaged in the business of promoting professional championship boxing contests. The Government's complaint charges that the defendants, in the course of this business, have violated 1 and 2 of the Sherman Act. After this Court's decision in *Toolson v. New York Yankees*, the defendants moved to dismiss the complaint. The District Court granted the motion in reliance upon the *Toolson* decision and *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*.

The Government's complaint alleges that promoters of professional championship boxing contests "make a substantial utilization of the channels of interstate trade and commerce to:

- "(a) negotiate contracts with boxers, advertising agencies, seconds, referees, judges, announcers, and other personnel living in states other than those in which the promoters reside;
- "(b) arrange and maintain training quarters in states other than those in which the promoters reside;
- "(c) lease suitable arenas, and arrange other details for boxing contests, particularly when the contests are held in states other than those in which the promoters reside;
- "(d) sell tickets to contests across state lines;
- "(e) negotiate for the sale of and sell rights to make and distribute motion pictures of boxing contests to the 18,000 theatres in the United States;
- "(f) negotiate for the sale of and sell rights to broadcast and telecast boxing contests to homes through more than 3,000 radio stations and 100 television stations in the United States; and
- "(g) negotiate for the sale of and sell rights to telecast boxing contests to some 200 motion picture theatres in various states of the United States for display by large-screen television."

The promoter's receipts from the sale of television, radio, and motion picture rights to championship matches, according to the complaint, represent on the average over 25% of the promoter's total revenue and in some instances exceed the revenue derived from the sale of admission tickets. The complaint alleges that the defendants have restrained and monopolized this trade and commerce - "the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests in the United States" - through a conspiracy to exclude competition in their line of business. The conspiracy, it is claimed, began in 1949 with an agreement among the defendants and Joe Louis, then heavyweight champion of the world, that Louis would resign his title, that he would procure exclusive rights to the services of the four leading title contenders in a series of elimination

contests which would result in the recognition of a new heavyweight champion, that he would also obtain exclusive rights to broadcast, televise, and film these contests, and that he would assign all such exclusive rights to the defendants. The defendants have allegedly sought to maintain and effectuate this conspiracy by the following means: by eliminating the “leading competing promoter” of championship matches; by acquiring the exclusive right to promote professional boxing contests in all the “principal arenas” where championship matches can be successfully presented; and by requiring each title contender to agree, as a condition of fighting for the championship, that if he wins he would, for a period of three (and sometimes five) years, take part only in title contests promoted by the defendants. As a consequence of these acts, the complaint alleges, the defendants have promoted, or participated in the promotion of, all but two of the 21 championship matches held in the United States between June 1949 and the filing of the complaint in March 1952.

These allegations must of course be taken as true at this stage of the proceeding. And the defendants do not deny that the allegations state a cause of action if their business is subject to the Sherman Act. The question thus presented is whether the defendants' business as described in the complaint - the promotion of professional championship boxing contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission - constitutes “trade or commerce among the several States” within the meaning of the Sherman Act.

The question is perhaps a novel one in that this Court has never before considered the antitrust status of the boxing business. Yet, if it were not for *Federal Baseball* and *Toolson*, we think that it would be too clear for dispute that the Government's allegations bring the defendants within the scope of the Act. A boxing match - like the showing of a motion picture (*United States v. Crescent Amusement Co.*) or the performance of a vaudeville act (*Hart v. B. F. Keith Vaudeville Exchange*) “is of course a local affair.” But that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce. Apart from *Federal Baseball* and *Toolson*, it would be sufficient, we believe, to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television, and motion picture rights.

Notwithstanding these decisions, the defendants contend that they are exempt from the Sherman Act under the rule of *stare decisis*. We cannot accept this argument.

For the reasons stated in the *Toolson* opinion, *Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*. Instead, “[w]ithout re-examination of the underlying issues,” the Court adhered to *Federal Baseball* “so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.” We have held today in that *Toolson* is not authority for exempting other businesses merely because of the circumstance that they are also based on the performance of local exhibitions.

Moreover, none of the factors underlying the *Toolson* decision are present in the instant case. At the time the Government's complaint was filed, no court had ever held that the boxing business was not subject to the antitrust laws. Indeed, this Court's decision in the *Hart* case, less than a year after the *Federal Baseball* decision, clearly established that *Federal Baseball* could

not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise. Surely there is nothing in the Holmes opinion or in the Hart case to suggest, even remotely, that the Court was drawing a line between athletic and nonathletic entertainment. Nor do we see the relevance of such a distinction for the purpose of determining what constitutes “trade or commerce among the several States.” The controlling consideration in Federal Baseball and Hart was, instead, a very practical one - the degree of interstate activity involved in the particular business under review. It follows that stare decisis cannot help the defendants here; for, contrary to their argument, Federal Baseball did not hold that all business based on professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court.

We hold that the complaint states a cause of action and that the Government is entitled to an opportunity to prove its allegations. The judgment of the court below is Reversed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE MINTON joins, dissenting.

It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a “trade or commerce.” Indeed, the interstate aspects of baseball and the extent of the exploitation of baseball through mass media are far more extensive than is true of boxing. If the intrinsic applicability of the Sherman Law were the issue, no attempt would be made to differentiate the two sports.

In 1922, the Court found commercialized baseball outside the scope of the Sherman Law. Last Term the Court refused to re-examine “the underlying issues” of this adjudication and adhered to it. The Court decided as it did in the Toolson case as an application of the doctrine of stare decisis. That doctrine is not, to be sure, an imprisonment of reason. But neither is it a whimsey. It can hardly be that this Court gave a preferred position to baseball because it is the great American sport. I do not suppose that the Court would treat the national anthem differently from other songs if the nature of a song became relevant to adjudication. If stare decisis be one aspect of law, as it is, to disregard it in identical situations is mere caprice.

Since, in the light of all the circumstances, Federal Baseball was left undisturbed by Toolson, I cannot bring myself to construe the respect that was thus accorded to stare decisis to be narrower than that all situations identical with what was passed on in the Federal Baseball case should be covered by it. I cannot translate even the narrowest conception of stare decisis into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or title from it. Boxing falls within Federal Baseball, which this Court revitalized in Toolson despite all the new factors on which the dissent in Toolson relied.

MR. JUSTICE MINTON, dissenting.

To make a case under the Sherman Act, two things among others are essential: (1) there must be

trade or commerce; (2) such trade or commerce must be among the States.

In the Federal Baseball case, this Court held that baseball was not trade or commerce. It said, “personal effort, not related to production, is not a subject of commerce,” and since the baseball game was an exhibition wholly intrastate, there could be no trade or commerce among the States.

In the Baseball case, this Court held that traveling from State to State to play the game and all the details of arrangements were incident to the exhibition. In *Toolson v. New York Yankees*, we did not overrule the Federal Baseball decision; in fact, we reaffirmed the holding of that case.

When boxers travel from State to State, carrying their shorts and fancy dressing robes in a ditty bag in order to participate in a boxing bout, which is wholly intrastate, it is now held by this Court that the boxing bout becomes interstate commerce. What this Court held in the Federal Baseball case to be incident to the exhibition now becomes more important than the exhibition. This is as fine an example of the tail wagging the dog as can be conjured up.

As I see it, boxing is not trade or commerce. There can be no monopoly or restraint of nonexistent commerce or trade. Whether Congress can control baseball and boxing I need not speculate. What I am saying is that Congress has not attempted to do so. If there is a conspiracy, it is not one to control commerce between the States.

## RADOVICH v. NATIONAL FOOTBALL LEAGUE ET AL

## SUPREME COURT OF THE UNITED STATES

352 U.S. 445

Argued January 17, 1957.  
Decided February 25, 1957.

MR. JUSTICE CLARK delivered the opinion of the Court.

This action for treble damages and injunctive relief, brought under the Clayton Act, tests the application of the antitrust laws to the business of professional football. Petitioner Radovich, an all-pro guard formerly with the Detroit Lions, contends that the respondents entered into a conspiracy to monopolize and control organized professional football in the United States, in violation of 1 and 2 of the Sherman Act; that part of the conspiracy was to destroy the All-America Conference, a competitive professional football league in which Radovich once played; and that pursuant to agreement, respondents boycotted Radovich and prevented him from becoming a player-coach in the Pacific Coast League. The trial court dismissed the cause for lack of jurisdiction and failure to state a claim on which relief could be granted. The Court of Appeals affirmed on the basis of *Federal Baseball Club v. National League* (1922), and *Toolson v. New York Yankees, Inc.* (1953), applying the baseball rule to all "team sports." We granted certiorari in order to clarify the application of the Toolson doctrine and determine whether the business of football comes within the scope of the Sherman Act. For the reasons hereafter stated we conclude that Toolson and *Federal Baseball* do not control; that the respondents' activities as alleged are within the coverage of the antitrust laws; and that the complaint states a cause of action thereunder.

Since the complaint was dismissed its allegations must be taken by us as true. It is, therefore, important for us to consider what Radovich alleged. Concisely the complaint states that:

1. Radovich began his professional football career in 1938 when he signed with the Detroit Lions, a National League club. After four seasons of play he entered the Navy, returning to the Lions for the 1945 season. In 1946 he asked for a transfer to a National League club in Los Angeles because of the illness of his father. The Lions refused the transfer and Radovich broke his player contract by signing with and playing the 1946 and 1947 seasons for the Los Angeles Dons, a member of the All-America Conference. In 1948 the San Francisco Clippers, a member of the Pacific Coast League which was affiliated with but not a competitor of the National League, offered to employ Radovich as a player-coach. However, the National League advised that Radovich was black-listed and any affiliated club signing him would suffer severe penalties. The Clippers then refused to sign him in any position. This black-listing effectively prevented his employment in organized professional football in the United States.
2. The black-listing was the result of a conspiracy among the respondents to monopolize

commerce in professional football among the States. The purpose of the conspiracy was to “control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States” in violation of the Sherman Act. It was part of the conspiracy to boycott the All-America Conference and its players with a view to its destruction and thus strengthen the monopolistic position of the National Football League.

3. As part of its football business, the respondent league and its member teams schedule football games in various metropolitan centers, including New York, Chicago, Philadelphia, and Los Angeles. Each team uses a standard player contract which prohibits a player from signing with another club without the consent of the club holding the player's contract. These contracts are enforced by agreement of the clubs to black-list any player violating them and to visit severe penalties on recalcitrant member clubs. As a further “part of the business of professional football itself” and “directly tied in and connected” with its football exhibitions is the transmission of the games over radio and television into nearly every State of the Union. This is accomplished by contracts which produce a “significant portion of the gross receipts” and without which “the business of operating a professional football club would not be profitable.” The playing of the exhibitions themselves “is essential to the interstate transmission by broadcasting and television” and the actions of the respondents against Radovich were necessarily related to these interstate activities.

In the light of these allegations respondents raise two issues: They say the business of organized professional football was not intended by Congress to be included within the scope of the antitrust laws; and, if wrong in this contention, that the complaint does not state a cause of action upon which relief can be granted.

Respondents' contention, boiled down, is that agreements similar to those complained of here, which have for many years been used in organized baseball, have been held by this Court to be outside the scope of the antitrust laws. They point to *Federal Baseball and Toolson*, both involving the business of professional baseball, asserting that professional football has embraced the same techniques which existed in baseball at the time of the former decision. They contend that *stare decisis* compels the same result here. True, the umbrella under which respondents hope to stand is not so large as that contended for in *United States v. International Boxing Club*. There we were asked to extend *Federal Baseball* to boxing. Here respondents say that the contracts and sanctions which baseball and football find it necessary to impose have no counterpart in other businesses and that, therefore, they alone are outside the ambit of the Sherman Act. In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball*. The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.

The Court was careful to restrict Toolson's coverage to baseball, following the judgment of Federal Baseball only so far as it "determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." In *International Boxing Club*, it added, "Toolson neither overruled Federal Baseball nor necessarily reaffirmed all that was said in Federal Baseball. . . Toolson is not authority for exempting other business merely because of the circumstance that they are also based on the performance of local exhibitions." Since Toolson and Federal Baseball are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, i. e., the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to - but not extend - the interpretation of the Act made in those cases. The volume of interstate business involved in organized professional football places it within the provisions of the Act.

If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But Federal Baseball held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of Toolson and Federal Baseball must yield to any congressional action and continues only at its sufferance.

We now turn to the sufficiency of the complaint. At the outset the allegations of the nature and extent of interstate commerce seem to be sufficient. In addition to the standard allegations, a specific claim is made that radio and television transmission is a significant, integral part of the respondents' business, even to the extent of being the difference between a profit and a loss. Unlike *International Boxing*, the complaint alleges no definite percentage in this regard. However, the amount must be substantial and can easily be brought out in the proof. If substantial, as alleged, it alone is sufficient to meet the commerce requirements of the Act.

Petitioner's claim need only be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade" and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public.

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

Reversed.

MR. JUSTICE FRANKFURTER, dissenting.

The difficult problem in this case derives for me not out of the Sherman Law but in relation to the appropriate compulsion of stare decisis. It does not derive from the Sherman Law because the most conscientious probing of the text and the interstices of the Sherman Law fails to disclose that Congress, whose will we are enforcing, excluded baseball - the conditions under which that sport is carried on - from the scope of the Sherman Law but included football. I say this, fully aware that the Sherman Law's applicability turns on the particular circumstances of activities pursued in trade and commerce among the several States. But whether the conduct of an enterprise is within or without the limits of the Sherman Law is, after all, a question for judicial determination, and conscious as I am of my limited competence in matters athletic, I have yet to hear of any consideration that led this Court to hold 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," (*Toolson v. New York Yankees*) that is not equally applicable to football.

But considerations pertaining to stare decisis do raise a serious question for me. That principle is a vital ingredient of law, for it "embodies an important social policy." It would disregard the principle for a judge stubbornly to persist in his views on a particular issue after the contrary had become part of the tissue of the law. Until then, full respect for stare decisis does not require a judge to forego his own convictions promptly after his brethren have rejected them.

The considerations that governed me two years ago in *United States v. International Boxing Club* have not lost their force by reason of the authority that time gives to a single decision. And so I am confronted with the *Toolson* case, which guides me to find the present situation within its scope, and the *Boxing* case, which, while it looks the other way, left *Toolson* as a living authority. Respect for the doctrine of stare decisis does not yet require me to disrespect the views I expressed in the *Boxing* case.

I would affirm.

MR. JUSTICE HARLAN, with whom MR. JUSTICE BRENNAN joins, dissenting.

What was foreshadowed by *United States v. International Boxing Club* has now come to pass. The Court, in holding that professional football is subject to the antitrust laws, now says in effect that professional baseball is sui generis so far as those laws are concerned, and that therefore *Federal Baseball Club v. National League* and *Toolson v. New York Yankees, Inc.* do not control football by reason of stare decisis. Since I am unable to distinguish football from baseball under the rationale of *Federal Baseball* and *Toolson*, and can find no basis for attributing to Congress a purpose to put baseball in a class by itself, I would adhere to the rule of stare decisis and affirm the judgment below.

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

## FLOOD v. KUHN

## SUPREME COURT OF THE UNITED STATES

407 U.S. 258

March 20, 1972, Argued

June 19, 1972, Decided

Mr. Justice Blackmun delivered the opinion of the Court.

For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.<sup>2</sup> Collateral issues of state law and of federal labor policy are also advanced.

### The Game

It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields, June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but the contest marked a significant date in baseball's beginnings. That early game led ultimately to the development of professional baseball and its tightly organized structure.<sup>3</sup>

And one recalls the appropriate reference to the "World Serious," attributed to Ring Lardner, Sr.; Ernest L. Thayer's "Casey at the Bat"; the ring of "Tinker to Evers to Chance"; and all the other happenings, habits, and superstitions about and around baseball that made it the "national pastime" or, depending upon the point of view, "the great American tragedy."

### The Petitioner

The petitioner, Curtis Charles Flood, born in 1938, began his major league career in 1956 when he signed a contract with the Cincinnati Reds for a salary of \$ 4,000 for the season. He had no attorney or agent to advise him on that occasion. He was traded to the St. Louis Cardinals before the 1958 season. Flood rose to fame as a center fielder with the Cardinals during the years 1958-1969. In those 12 seasons he compiled a batting average of .293. His best offensive season was 1967 when he achieved .335. He was .301 or better in six of the 12 St. Louis years. He participated in the 1964, 1967, and 1968 World Series. He played errorless ball in the field in 1966, and once enjoyed 223 consecutive errorless games. Flood has received seven Golden Glove Awards. He was co-captain of his team from 1965-1969. He ranks among the 10 major league outfielders possessing the highest lifetime fielding averages.

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<sup>2</sup> The reserve system, publicly introduced into baseball contracts in 1887 centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum. (note in the original, ed.)

<sup>3</sup> Justice Blackmun continued for several pages to describe the history and personages of baseball's development and golden years.

But at the age of 31, in October 1969, Flood was traded to the Philadelphia Phillies of the National League in a multi-player transaction. He was not consulted about the trade. He was informed by telephone and received formal notice only after the deal had been consummated. In December he complained to the Commissioner of Baseball and asked that he be made a free agent and be placed at liberty to strike his own bargain with any other major league team. His request was denied.

Flood then instituted this antitrust suit in January 1970 in federal court for the Southern District of New York. The defendants were the Commissioner of Baseball,<sup>4</sup> the presidents of the two major leagues, and the 24 major league clubs. In general, the complaint charged violations of the federal antitrust laws and civil rights statutes, violation of state statutes and the common law, and the imposition of a form of peonage and involuntary servitude contrary to the Thirteenth Amendment and [federal law]. Petitioner sought declaratory and injunctive relief and treble damages.

Flood declined to play for Philadelphia in 1970, despite a \$ 100,000 salary offer, and he sat out the year. After the season was concluded, Philadelphia sold its rights to Flood to the Washington Senators. Washington and the petitioner were able to come to terms for 1971 at a salary of \$110,000. Flood started the season but, apparently because he was dissatisfied with his performance, he left the Washington club on April 27, early in the campaign. He has not played baseball since then.

### **The Present Litigation**

[U.S. District Court] Judge Cooper, in a detailed opinion, first denied a preliminary injunction, observing on the way:

“Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young.

“Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there.”

Trial to the court took place in May and June 1970. In an ensuing opinion, Judge Cooper first noted that:

“Plaintiff’s witnesses in the main concede that some form of reserve on players is a

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<sup>4</sup> Commissioner Bowie Kuhn.

necessary element of the organization of baseball as a league sport, but contend that the present all-embracing system is needlessly restrictive and offer various alternatives which in their view might loosen the bonds without sacrifice to the game.”...

...

“Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of plaintiff himself, it shows that even plaintiff’s witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious ...”

He then held that *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), and *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), were controlling; that it was not necessary to reach the issue whether exemption from the antitrust laws would result because aspects of baseball now are a subject of collective bargaining; that the plaintiff’s state-law claims, those based on common law as well as on statute, were to be denied because baseball was not “a matter which admits of diversity of treatment;” that the involuntary servitude claim failed because of the absence of “the essential element of this cause of action, a showing of compulsory service;” and that judgment was to be entered for the defendants. Judge Cooper included a statement of personal conviction to the effect that “negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned” and that “the reserve clause can be fashioned so as to find acceptance by player and club.”

On appeal, the Second Circuit felt “compelled to affirm.” It regarded the issue of state law as one of first impression, but concluded that the Commerce Clause precluded its application. Judge Moore added a concurring opinion in which he predicted, with respect to the suggested overruling of *Federal Baseball* and *Toolson*, that “there is no likelihood that such an event will occur.”

We granted certiorari in order to look once again at this troublesome and unusual situation.

### The Legal Background

A. *Federal Baseball Club v. National League*<sup>5</sup> was a suit for treble damages instituted by a member of the Federal League (Baltimore) against the National and American Leagues and others. The plaintiff obtained a verdict in the trial court, but the Court of Appeals reversed. The main brief filed by the plaintiff with this Court discloses that it was strenuously argued, among other things, that the business in which the defendants were engaged was interstate commerce; that the interstate relationship among the several clubs, located as they were in different States, was predominant; that organized baseball represented an investment of colossal wealth; that it was an engagement in moneymaking; that gate receipts were divided by agreement between the home club and the visiting club; and that the business of baseball was to be distinguished from the mere playing of the game as a sport for physical exercise and diversion.

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<sup>5</sup> 259 U.S. 200 (1922)

Mr. Justice Holmes, in speaking succinctly for a unanimous Court, said:

“The business is giving exhibitions of base ball, which are purely state affairs. .... 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. ... The transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

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

The Court thus chose not to be persuaded by opposing examples proffered by the plaintiff, among them (a) Judge Learned Hand’s decision with respect to vaudeville entertainers traveling a theater circuit covering several States; (b) the first Mr. Justice Harlan’s opinion to the effect that correspondence courses pursued through the mail constituted commerce among the States; and (c) Mr. Justice Holmes’ own opinion, for another unanimous Court, relating to cattle shipment, the interstate movement of which was interrupted for the finding of purchasers at the stockyards.

**B.** *Federal Baseball* was cited a year later, and without disfavor, in another opinion by Mr. Justice Holmes for a unanimous Court. The complaint charged antitrust violations with respect to vaudeville bookings. It was held, however, that the claim was not frivolous and that the bill should not have been dismissed. *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923).

It has also been cited, not unfavorably, with respect to the practice of law, with respect to out-of-state contractors, and upon a general comparison reference.

In the years that followed, baseball continued to be subject to intermittent antitrust attack. The courts, however, rejected these challenges on the authority of *Federal Baseball*. In some cases stress was laid, although unsuccessfully, on new factors such as the development of radio and television with their substantial additional revenues to baseball. For the most part, however, the Holmes opinion was generally and necessarily accepted as controlling authority. And in the 1952 Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary it was said, in conclusion:

“On the other hand the overwhelming preponderance of the evidence established baseball’s need for some sort of reserve clause. Baseball’s history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle. The evidence adduced at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause.”

C. The Court granted certiorari in ... *Toolson* [and two other] cases and, by a short *per curiam*, affirmed the judgments of the respective courts of appeals in those three cases. *Federal Baseball* was cited as holding “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,” and:

“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. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, *supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”

This quotation reveals four reasons for the Court’s affirmance of *Toolson* and its companion cases: (a) Congressional awareness for three decades of the Court’s ruling in *Federal Baseball*, coupled with congressional inaction. (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws. (c) A reluctance to overrule *Federal Baseball* with consequent retroactive effect. (d) A professed desire that any needed remedy be provided by legislation rather than by court decree. The emphasis in *Toolson* was on the determination, attributed even to *Federal Baseball*, that Congress had no intention to include baseball within the reach of the federal antitrust laws.

D. *United States v. Shubert* was a civil antitrust action against defendants engaged in the production of legitimate theatrical attractions throughout the United States and in operating theaters for the presentation of such attractions.<sup>6</sup> The District Court had dismissed the complaint on the authority of *Federal Baseball* and *Toolson*. This Court reversed. Mr. Chief Justice Warren noted the Court’s broad conception of “trade or commerce” in the antitrust statutes and the types of enterprises already held to be within the reach of that phrase. He stated that *Federal*

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6 348 U.S. 222 (1955)

*Baseball* and *Toolson* afforded no basis for a conclusion that businesses built around the performance of local exhibitions are exempt from the antitrust laws. He then went on to elucidate the holding in *Toolson* by meticulously spelling out the [four] factors mentioned above.

**E.** *United States v. International Boxing Club* was a companion to *Shubert* and was decided the same day. This was a civil antitrust action against defendants engaged in the business of promoting professional championship boxing contests. Here again the District Court had dismissed the complaint in reliance upon *Federal Baseball* and *Toolson*. The Chief Justice observed that “if it were not for *Federal Baseball* and *Toolson*, we think that it would be too clear for dispute that the Government’s allegations bring the defendants within the scope of the Act.” He pointed out that the defendants relied on the two baseball cases but also would have been content with a more restrictive interpretation of them than the *Shubert* defendants, for the boxing defendants argued that the cases immunized only businesses that involve exhibitions of an athletic nature. The Court accepted neither argument. It again noted that “*Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*.” It stated:

“The controlling consideration in *Federal Baseball* was a very practical one – the degree of interstate activity involved in the particular business under review. It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court.”

The Court noted the presence then in Congress of various bills forbidding the application of the antitrust laws to “organized professional sports enterprises”; the holding of extensive hearings on some of these; subcommittee opposition; a postponement recommendation as to baseball; and the fact that “Congress thus left intact the then-existing coverage of the antitrust laws.”

Mr. Justice Frankfurter, joined by Mr. Justice Minton, dissented. “It would baffle the subtlest ingenuity,” he said, “to find a single differentiating factor between other sporting exhibitions . . . and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a ‘trade or commerce.’”

Mr. Justice Minton also separately dissented on the ground that boxing is not trade or commerce. He added the comment that “Congress has not attempted” to control baseball and boxing. The two dissenting Justices, thus, did not call for the overruling of *Federal Baseball* and *Toolson*; they merely felt that boxing should be under the same umbrella of freedom as was baseball and, as Mr. Justice Frankfurter said they could not exempt baseball “to the exclusion of every other sport different not one legal jot or tittle from it.”

**F.** The parade marched on. *Radovich v. National Football League* (1957), was a civil Clayton

Act case testing the application of the antitrust laws to professional football. The District Court dismissed. The Ninth Circuit affirmed in part on the basis of *Federal Baseball* and *Toolson*. The court did not hesitate to “confess that the strength of the pull” of the baseball cases and of *International Boxing* “is about equal,” but then observed that “football is a team sport” and boxing an individual one.

This Court reversed with an opinion by Mr. Justice Clark. He said that the Court made its ruling in *Toolson* “because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity.” He noted that Congress had not acted. He then said:

“Since *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to – but not extend – the interpretation of the Act made in those cases. . . .

“If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action.”

**G.** Finally, in *Haywood v. National Basketball Assn.* Mr. Justice Douglas, in his capacity as Circuit Justice, reinstated a District Court’s injunction *pendente lite* in favor of a professional basketball player and said, “Basketball . . . does not enjoy exemption from the antitrust laws.”

**H.** This series of decisions understandably spawned extensive commentary, some of it mildly critical and much of it not; nearly all of it looked to Congress for any remedy that might be deemed essential.

**I.** Legislative proposals have been numerous and persistent. Since *Toolson* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball. A few of these passed one house or the other. Those that did would have expanded, not restricted, the reserve system’s exemption to other professional league sports. And [amendments to the antitrust statutes in 1961 and 1966] were also expansive rather than

restrictive as to antitrust exemption.

## V

In view of all this, it seems appropriate now to say that:

1. Professional baseball is a business and it is engaged in interstate commerce.
2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.
3. Even though others might regard this as “unrealistic, inconsistent, or illogical,” the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court’s expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball’s unique characteristics and needs.
4. Other professional sports operating interstate – football, boxing, basketball, and, presumably, hockey and golf – are not so exempt.
5. The advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson*.
6. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball’s reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity.
7. The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.
8. The Court noted in *Radovich* that the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century.

This emphasis and this concern are still with us. We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far

beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich* and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in *Toolson* and from the concerns as to retrospectivity therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.

We repeat for this case what was said in *Toolson*:

“Without re-examination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, *supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”

And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.

The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Petitioner was a major league baseball player from 1956, when he signed a contract with the Cincinnati Reds, until 1969, when his 12-year career with the St. Louis Cardinals, which had obtained him from the Reds, ended and he was traded to the Philadelphia Phillies. He had no notice that the Cardinals were contemplating a trade, no opportunity to indicate the teams with which he would prefer playing, and no desire to go to Philadelphia. After receiving formal notification of the trade, petitioner wrote to the Commissioner of Baseball protesting that he was not “a piece of property to be bought and sold irrespective of my wishes,” and urging that he had the right to consider offers from other teams than the Phillies. He requested that the Commissioner inform all of the major league teams that he was available for the 1970 season. His request was denied, and petitioner was informed that he had no choice but to play for Philadelphia or not to play at all.

To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know

that it was not servitude that bound petitioner to the club owners; it was the reserve system. The essence of that system is that a player is bound to the club with which he first signs a contract for the rest of his playing days. He cannot escape from the club except by retiring, and he cannot prevent the club from assigning his contract to any other club.

This is a difficult case because we are torn between the principle of *stare decisis* and the knowledge that the decisions in *Federal Baseball Club v. National League* (1922) and *Toolson v. New York Yankees, Inc.* (1953) are totally at odds with more recent and better reasoned cases.

In *Federal Baseball Club*, Mr. Justice Holmes wrote that the business being considered was “giving exhibitions of base ball, which are purely state affairs.” Hence, the Court held that baseball was not within the purview of the antitrust laws. Thirty-one years later, the Court reaffirmed this decision, without reexamining it, in *Toolson*, a one-paragraph *per curiam* opinion. Like this case, *Toolson* involved an attack on the reserve system. We must now decide whether to adhere to the reasoning of *Toolson* – i.e., to refuse to re-examine the underlying basis of *Federal Baseball Club* – or to proceed with a re-examination and let the chips fall where they may.

In his answer to petitioner’s complaint, the Commissioner of Baseball “admits that under present concepts of interstate commerce defendants are engaged therein.” There can be no doubt that the admission is warranted by today’s reality. Since baseball is interstate commerce, if we re-examine baseball’s antitrust exemption, the Court’s decisions in *United States v. Shubert* (1955), *United States v. International Boxing Club* (1955), and *Radovich v. National Football League* (1957) require that we bring baseball within the coverage of the antitrust laws. We have only recently had occasion to comment that:

“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. ... Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.”

The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as they are to football players, lawyers, doctors, or members of any other class of workers. Baseball players cannot be denied the benefits of competition merely because club owners view other economic interests as being more important, unless Congress says so.

We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one’s ability as guaranteed by the antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here.

Accordingly, I would overrule *Federal Baseball Club* and *Toolson* and reverse the decision of the Court of Appeals.

This does not mean that petitioner would necessarily prevail, however. Lurking in the

background is a hurdle of recent vintage that petitioner still must overcome. In 1966, the Major League Players Association was formed. It is the collective-bargaining representative for all major league baseball players. Respondents argue that the reserve system is now part and parcel of the collective-bargaining agreement and that because it is a mandatory subject of bargaining, the federal labor statutes are applicable, not the federal antitrust laws.

In light of these consideration, I would remand this case to the District Court for consideration of whether petitioner can state a claim under the antitrust laws despite the collective-bargaining agreement, and, if so, for a determination of whether there has been an antitrust violation in this case.

## HAYWOOD v. NATIONAL BASKETBALL ASSOCIATION.

401 U.S. 1204

March 1, 1971.

Mr. Justice DOUGLAS, Circuit Justice.

Under the rules of the NBA a college player cannot be drafted until four years after he has graduated from high school. Players are drafted by teams in the inverse order of their finish during the previous season. No team may negotiate with a player drafted by another team.

Appellant played with the 1968 Olympic team and then went to college. Prior to graduation he signed with the rival American Basketball Association, but upon turning 21 he repudiated the contract, charging fraud. He then signed with Seattle of the NBA. This signing was less than four years after his high school class had graduated (thus leaving him ineligible to be drafted under the NBA rules). The NBA threatened to disallow the contract and also threatened Seattle's team with various sanctions.

Appellant then commenced an antitrust action against the NBA. He alleges the conduct of the NBA is a group boycott of himself and that under *Fashion Originators' Guild v. FTC* and *Klor's v. Broadway-Hale Stores*, it is a per se violation of the Sherman Act. He was granted an injunction which allowed him to play for Seattle and forbade NBA to take sanctions against the Seattle team. The District Court ruled:

'If Haywood is unable to continue to play professional basketball for Seattle, he will suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injustice will be perpetrated on him.'

The college player draft binds the player to the team selected. Basketball, however, does not enjoy exemption from the antitrust laws. Thus the decision in this suit would be similar to the one on baseball's reserve clause which our decisions exempting baseball from the antitrust laws have foreclosed. This group boycott issue in professional sports is a significant one.

The NBA appealed the granting of the preliminary injunction to the Court of Appeals for the Ninth Circuit. That court stayed the injunction, stating:

'We have considered the status quo existing prior to the District Court's action and the disturbance of that status resulting from the injunction; the nature and extent of injury which continuation of the injunction or its stay would cause to the respective parties; and the public interest in the institution of professional basketball and the orderly regulation of its affairs.'

The matter is of some urgency because the athletic contests are under way and the playoffs between the various clubs will begin on March 23. Should applicant prevail at the trial his team will probably not be in the playoffs, because under the stay order issued by the Court of Appeals he is unable to play. Should he be allowed to play and his team not make the playoffs then no one, of course, will have been injured. Should he be allowed to play and his team does make the

playoffs but the District Court decision goes in favor of the NBA, then it would be for the District Court to determine whether the NBA could disregard the Seattle victories in all games in which he participated and recompute who should be in the playoffs.

To dissolve the stay would preserve the interest and integrity of the playoff system, as I have indicated. Should there not be a decision prior to beginning of the playoffs and should Seattle make the playoffs then the District Court could fashion whatever relief it deems equitable.

In view of the equities between the parties, I have decided to allow the preliminary injunction of the District Court to be reinstated. The status quo provided by the Court of Appeals is the status quo before applicant signed with Seattle. The District Court preserved the status quo prior to the NBA's action against Seattle and Haywood. That is the course I deem most worthy of this interim protection. The stay will issue.

Stay granted.

## JOHN MACKEY, ET AL. v. NATIONAL FOOTBALL LEAGUE, ET AL.

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

543 F.2d 606

Submitted June 17, 1976

Decided October 18, 1976

**OPINION:** LAY, Circuit Judge.

This is an appeal by the National Football League (NFL), twenty-six of its member clubs, and its Commissioner, Alvin Ray “Pete” Rozelle, from a district court judgment holding the “Rozelle Rule” to be violative Section 1 of the Sherman Act, and enjoining its enforcement. The Rozelle Rule essentially provides that when a player’s contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player’s former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable. This action was initiated by a group of present and former NFL players, appellees herein. Their complaint alleged that the defendants’ enforcement of the Rozelle Rule constituted an illegal combination and conspiracy in restraint of trade denying professional football players the right to freely contract for their services.

Plaintiffs sought injunctive relief and treble damages. The district court held that the defendants’ enforcement of the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was therefore a *per se* violation of the Sherman Act. Alternatively, finding that the evidence offered in support of the clubs’ contention that the Rozelle Rule is necessary to the successful operation of the NFL insufficient to justify the restrictive effects of the Rule, the court concluded that the Rozelle Rule was invalid under the Rule of Reason standard. Finally, the court rejected the clubs’ argument that the Rozelle Rule was immune from attack under the Sherman Act because it had been the subject of a collective bargaining agreement between the club owners and the National Football League Players Association (NFLPA). The defendants raise two basic issues on this appeal: (1) whether the so-called labor exemption to the antitrust laws immunizes the NFL’s enforcement of the Rozelle Rule from antitrust liability; and (2) if not, whether the Rozelle Rule and the manner in which it has been enforced violate the antitrust laws.

**HISTORY**

We first turn to a brief examination of the pertinent history and operating principles of the National Football League. The NFL, which began operating in 1920, is an unincorporated association comprised of member clubs which own and operate professional football teams. It presently enjoys a monopoly over major league professional football in the United States. The League performs various administrative functions, including organizing and scheduling games, and promulgating rules. Pete Rozelle, Commissioner of the NFL since 1960, is an employee of the League and its chief executive officer.

Throughout most of its history, the NFL's operations have been unilaterally controlled by the club owners. In 1968, however, the National Labor Relations Board recognized the National Football League Player's Association (NFLPA) as a labor organization and as the exclusive bargaining representative of all NFL players. Since that time, the NFLPA and the clubs have engaged in collective bargaining over various terms and conditions of employment. Two formal agreements have resulted. The first was in effect from 1968 to 1970. The second, entered into in 1971, was made retroactive to 1970, and expired in 1974. Since 1974, the parties have been negotiating; however, they have not concluded a new agreement.

For a number of years, the NFL has operated under a reserve system whereby every player who signs a contract with an NFL club is bound to play for that club, and no other, for the term of the contract plus one additional year at the option of the club. The cornerstones of this system are the NFL Constitution and Bylaws, which requires that all club-player contracts be as prescribed in the Standard Player Contract adopted by the League. Once a player signs a Standard Player Contract, he is bound to his team for at least two years. He may, however, become a free agent at the end of the option year by playing that season under a renewed contract rather than signing a new one. A player "playing out his option" is subject to a 10% salary cut during the option year.

Prior to 1963, a team which signed a free agent who had previously been under contract to another club was not obligated to compensate the player's former club. In 1963, after R. C. Owens played out his option with the San Francisco 49ers and signed a contract with the Baltimore Colts, the member clubs of the NFL unilaterally adopted the following provision, now known as the Rozelle Rule, as an amendment to the League's Constitution and Bylaws:

Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

This provision, unchanged in form, is currently embodied in the NFL Constitution. The ostensible purposes of the rule are to maintain competitive balance among the NFL teams and protect the clubs' investment in scouting, selecting and developing players. During the period from 1963 through 1974, 176 players played out their options. Of that number, 34 signed with other teams. In three of those cases, the former club waived compensation. In 27 cases, the clubs involved mutually agreed upon compensation. Commissioner Rozelle awarded compensation in the four remaining cases.

We turn now to the contentions of the parties.

### **THE LABOR EXEMPTION ISSUE**

We review first the claim that the labor exemption immunizes the Commissioner and the clubs

from liability under the antitrust laws. Analysis of this contention requires a basic understanding of the legal principles surrounding the labor exemption and consideration of the factual record developed at trial.

The concept of a labor exemption from the antitrust laws finds its basic source in Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act. Those provisions declare that labor unions are not combinations or conspiracies in restraint of trade, and specifically exempt certain union activities such as secondary picketing and group boycotts from the coverage of the antitrust laws. The statutory exemption was created to insulate legitimate collective activity by employees, which is inherently anticompetitive but is favored by federal labor policy, from the proscriptions of the antitrust laws. The statutory exemption extends to legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests. It does not extend to concerted action or agreements between unions and non-labor groups. The Supreme Court has held, however, that in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act, certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions.

The players assert that only employee groups are entitled to the labor exemption and that it cannot be asserted by the defendants, an employer group. We must disagree. Since the basis of the nonstatutory exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both parties to the agreement. Accordingly, under appropriate circumstances, we find that a non-labor group may avail itself of the labor exemption.

The clubs and the Commissioner claim the benefit of the nonstatutory labor exemption here, arguing that the Rozelle Rule was the subject of an agreement with the players union and that the proper accommodation of federal labor and antitrust policies requires that the agreement be deemed immune from antitrust liability. The plaintiffs assert that the Rozelle Rule was the product of unilateral action by the clubs and that the defendants cannot assert a colorable claim of exemption. To determine the applicability of the nonstatutory exemption we must first decide whether there has been any agreement between the parties concerning the Rozelle Rule.

The district court found that neither the 1968 nor the 1970 collective bargaining agreement embodied an agreement on the Rozelle Rule, and that the union has never otherwise agreed to the Rule. At the outset of the negotiations preceding the 1968 agreement, the players did not seek elimination of the Rozelle Rule but felt that it should be modified. During the course of the negotiations, however, the players apparently presented no concrete proposals in that regard and there was little discussion concerning the Rozelle Rule. At the start of the negotiations leading up to the 1970 agreement, it appears that the players again decided not to make an issue of the Rozelle Rule. The only reference to the Rule in the union's formal proposals presented at the outset of the negotiations was the following:

The NFLPA is disturbed over reports from players who, after playing out their options, are unable to deal with other clubs because of the Rozelle Rule. A method should be found whereby a free agent is assured the opportunity to discuss contract with all NFL teams.

Since the beginning of the 1974 negotiations, the players have consistently sought the

elimination of the Rozelle Rule. The NFLPA and the clubs have engaged in substantial bargaining over that issue but have not reached an accord. Nor have they concluded a collective bargaining agreement to replace the 1970 agreement which expired in 1974. Based on the fact that the 1968 agreement incorporated by reference the Rozelle Rule and provided that free agent rules would not be changed, we conclude that the 1968 agreement required that the Rozelle Rule govern when a player played out his option and signed with another team. Assuming, without deciding, that the 1970 agreement embodied a similar understanding, we proceed to a consideration of whether the agreements fall within the scope of the nonstatutory labor exemption.

Under the general principles surrounding the labor exemption, the availability of the nonstatutory exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case. Although the cases giving rise to the nonstatutory exemption are factually dissimilar from the present case, certain principles can be deduced from those decisions governing the proper accommodation of the competing labor and antitrust interests involved here.

We find the proper accommodation to be: First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

Applying these principles to the facts presented here, we think it clear that the alleged restraint on trade effected by the Rozelle Rule affects only the parties to the agreements sought to be exempted. Accordingly, we must inquire as to the other two principles: whether the Rozelle Rule is a mandatory subject of collective bargaining, and whether the agreements thereon were the product of bona fide arm's-length negotiation.

Under the National Labor Relations Act, mandatory subjects of bargaining pertain to "wages, hours, and other terms and conditions of employment. . . ." On its face, the Rozelle Rule does not deal with "wages, hours and other terms or conditions of employment" but with inter-team compensation when a player's contractual obligation to one team expires and he is signed by another. Viewed as such, it would not constitute a mandatory subject of collective bargaining. The district court found, however, that the Rule operates to restrict a player's ability to move from one team to another and depresses player salaries. There is substantial evidence in the record to support these findings. Accordingly, we hold that the Rozelle Rule constitutes a mandatory bargaining subject within the meaning of the National Labor Relations Act.

The district court found that the parties' collective bargaining history reflected nothing which could be legitimately characterized as bargaining over the Rozelle Rule; that, in part due to its recent formation and inadequate finances, the NFLPA, at least prior to 1974, stood in a relatively weak bargaining position vis-a-vis the clubs; and that "the Rozelle Rule was unilaterally imposed by the NFL and member club defendants upon the players in 1963 and has been imposed on the players from 1963 through the present date."

On the basis of our independent review of the record, including the parties' bargaining history as set forth above, we find substantial evidence to support the finding that there was no bona fide arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements. The Rule imposes significant restrictions on players, and its form has remained unchanged since it was unilaterally promulgated by the clubs in 1963. The provisions of the collective bargaining agreements which operated to continue the Rozelle Rule do not in and of themselves inure to the benefit of the players or their union. Defendants contend that the players derive indirect benefit from the Rozelle Rule, claiming that the union's agreement to the Rozelle Rule was a *quid pro quo* for increased pension benefits and the right of players to individually negotiate their salaries. The district court found, however, that there was no such *quid pro quo*, and we cannot say, on the basis of our review of the record, that this finding is clearly erroneous.

In view of the foregoing, we hold that the agreements between the clubs and the players embodying the Rozelle Rule do not qualify for the labor exemption. The union's acceptance of the status quo by the continuance of the Rozelle Rule in the initial collective bargaining agreements under the circumstances of this case cannot serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act.

#### ANTITRUST ISSUES

We turn, then, to the question of whether the Rozelle Rule, as implemented, violates Section 1 of the Sherman Act, which declares illegal "every contract, combination, or conspiracy, in restraint of trade or commerce among the several States." The district court found the Rozelle Rule to be a *per se* violation of the Act. Alternatively, the court held the Rule to be violative of the Rule of Reason standard.

The clubs and the Commissioner first urge that the only product market arguably affected by the Rozelle Rule is the market for players' services, and that the restriction of competition for players' services is not a type of restraint proscribed by the Sherman Act. In other cases concerning professional sports, courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players' services. In other contexts, courts have subjected similar employer imposed restraints to the scrutiny of the antitrust laws.

We hold that restraints on competition within the market for players' services fall within the ambit of the Sherman Act.

We review next the district court's holding that the Rozelle Rule is *per se* violative of the Sherman Act. The express language of the Sherman Act is broad enough to render illegal nearly every type of agreement between businessmen. The Supreme Court has held, however, that only those agreements which "unreasonably" restrain trade come within the proscription of the Act. The "Rule of Reason" emerged from these cases.

As the courts gained experience with antitrust problems arising under the Sherman Act, they identified certain types of agreements as being so consistently unreasonable that they may be deemed to be illegal *per se*, without inquiry into their purported justifications. As the Supreme Court stated in *Northern Pac. R. Co. v. United States*:

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they

have caused or the business excuse for their use.

Among the practices which have been deemed to be so pernicious as to be illegal *per se* are group boycotts and concerted refusals to deal. The term “concerted refusal to deal” has been defined as “an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms.” The term “group boycott” generally connotes “a refusal to deal or an inducement of others not to deal or to have business relations with tradesmen.”

The district court found that the Rozelle Rule operates to significantly deter clubs from negotiating with and signing free agents. By virtue of the Rozelle Rule, a club will sign a free agent only where it is able to reach an agreement with the player’s former team as to compensation, or where it is willing to risk the awarding of unknown compensation by the Commissioner. The court concluded that the Rozelle Rule, as enforced, thus constituted a group boycott and a concerted refusal to deal, and was a *per se* violation of the Sherman Act.

There is substantial evidence in the record to support the district court’s findings as to the effects of the Rozelle Rule. We think, however, that this case presents unusual circumstances rendering it inappropriate to declare the Rozelle Rule illegal *per se* without undertaking an inquiry into the purported justifications for the Rule.

First, the line of cases which has given rise to *per se* illegality for the type of agreements involved here generally concerned agreements between business competitors in the traditional sense. Here, however, as the owners and Commissioner urge, the NFL assumes *some* of the characteristics of a joint venture in that each member club has a stake in the success of the other teams. No one club is interested in driving another team out of business, since if the League fails, no one team can survive. Although businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply *per se* illegality rules here, fashioned in a different context. This is particularly true where, as here, the alleged restraint does not completely eliminate competition for players’ services. In similar circumstances, when faced with a unique or novel business situation, courts have eschewed a *per se* analysis in favor of an inquiry into the reasonableness of the restraint under the circumstances. In view of the foregoing, we think it more appropriate to test the validity of the Rozelle Rule under the Rule of Reason.

The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary.

In defining the restraint on competition for players’ services, the district court found that the Rozelle Rule significantly deters clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players’ bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and that absent the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to another.

We find substantial evidence in the record to support these findings. Witnesses for both sides testified that there would be increased player movement absent the Rozelle Rule. Two

economists testified that elimination of the Rozelle Rule would lead to a substantial increase in player salaries. Carroll Rosenbloom, owner of the Los Angeles Rams, indicated that the Rams would have signed quite a few of the star players from other teams who had played out their options, absent the Rozelle Rule. Charles De Keado, an agent who represented Dick Gordon after he played out his option with the Chicago Bears, testified that the New Orleans Saints were interested in signing Gordon but did not do so because the Bears were demanding unreasonable compensation and the Saints were unwilling to risk an unknown award of compensation by the Commissioner. Jim McFarland, an end who played out his option with the St. Louis Cardinals, testified that he had endeavored to join the Kansas City Chiefs but was unable to do so because of the compensation asked by the Cardinals. Hank Stram, then coach and general manager of the Chiefs, stated that he probably would have given McFarland an opportunity to make his squad had he not been required to give St. Louis anything in return.

In support of their contention that the restraints effected by the Rozelle Rule are not unreasonable, the defendants asserted a number of justifications. First, they argued that without the Rozelle Rule, star players would flock to cities having natural advantages such as larger economic bases, winning teams, warmer climates, and greater media opportunities; that competitive balance throughout the League would thus be destroyed; and that the destruction of competitive balance would ultimately lead to diminished spectator interest, franchise failures, and perhaps the demise of the NFL, at least as it operates today. Second, the defendants contended that the Rozelle Rule is necessary to protect the clubs' investment in scouting expenses and player developments costs. Third, they asserted that players must work together for a substantial period of time in order to function effectively as a team; that elimination of the Rozelle Rule would lead to increased player movement and a concomitant reduction in player continuity; and that the quality of play in the NFL would thus suffer, leading to reduced spectator interest, and financial detriment both to the clubs and the players. Conflicting evidence was adduced at trial by both sides with respect to the validity of these asserted justifications.

The district court held the defendants' asserted justifications unavailing. As to the clubs' investment in player development costs, Judge Larson found that these expenses are similar to those incurred by other businesses, and that there is no right to compensation for this type of investment. With respect to player continuity, the court found that elimination of the Rozelle Rule would affect all teams equally in that regard; that it would not lead to a reduction in the quality of play; and that even assuming that it would, that fact would not justify the Rozelle Rule's anticompetitive effects. As to competitive balance and the consequences which would flow from abolition of the Rozelle Rule, Judge Larson found that the existence of the Rozelle Rule has had no material effect on competitive balance in the NFL. Even assuming that the Rule did foster competitive balance, the court found that there were other legal means available to achieve that end -- e.g., the competition committee, multiple year contracts, and special incentives. The court further concluded that elimination of the Rozelle Rule would have no significant disruptive effects, either immediate or long term, on professional football. In conclusion the court held that the Rozelle Rule was unreasonable in that it was overly broad, unlimited in duration, unaccompanied by procedural safeguards, and employed in conjunction with other anticompetitive practices such as the draft, Standard Player Contract, option clause, and the no-tampering rules.

We agree that the asserted need to recoup player development costs cannot justify the restraints of the Rozelle Rule. That expense is an ordinary cost of doing business and is not peculiar to professional football. Moreover, because of its unlimited duration, the Rozelle Rule is far more restrictive than necessary to fulfill that need. We agree, in view of the evidence adduced at trial with respect to existing players turnover by way of trades, retirements and new players entering the League, that the club owners' arguments respecting player continuity cannot justify the Rozelle Rule. We concur in the district court's conclusion that the possibility of resulting decline in the quality of play would not justify the Rozelle Rule. We do recognize, as did the district court, that the NFL has a strong and unique interest in maintaining competitive balance among its teams. The key issue is thus whether the Rozelle Rule is essential to the maintenance of competitive balance, and is no more restrictive than necessary. The district court answered both of these questions in the negative.

We need not decide whether a system of inter-team compensation for free agents moving to other teams is essential to the maintenance of competitive balance in the NFL. Even if it is, we agree with the district court's conclusion that the Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes it might have in this regard. First, little concern was manifested at trial over the free movement of average or below average players. Only the movement of the better players was urged as being detrimental to football. Yet the Rozelle Rule applies to every NFL player regardless of his status or ability. Second, the Rozelle Rule is unlimited in duration. It operates as a perpetual restriction on a player's ability to sell his services in an open market throughout his career. Third, the enforcement of the Rozelle Rule is unaccompanied by procedural safeguards. A player has no input into the process by which fair compensation is determined. Moreover, the player may be unaware of the precise compensation demanded by his former team, and that other teams might be interested in him but for the degree of compensation sought. In sum, we hold that the Rozelle Rule, as enforced, unreasonably restrains trade in violation of Section 1 of the Sherman Act.

### CONCLUSION

In conclusion, although we find that non-labor parties may potentially avail themselves of the nonstatutory labor exemption where they are parties to collective bargaining agreements pertaining to mandatory subjects of bargaining, the exemption cannot be invoked where, as here, the agreement was not the product of bona fide arm's-length negotiations. Thus, the defendants' enforcement of the Rozelle Rule is not exempt from the coverage of the antitrust laws. Although we disagree with the district court's determination that the Rozelle Rule is a *per se* violation of the antitrust laws, we do find that the Rule, as implemented, contravenes the Rule of Reason and thus constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

We note that our disposition of the antitrust issue does not mean that every restraint on competition for players' services would necessarily violate the antitrust laws. Also, since the Rozelle Rule, as implemented, concerns a mandatory subject of collective bargaining, any agreement as to interteam compensation for free agents moving to other teams, reached through good faith collective bargaining, might very well be immune from antitrust liability under the nonstatutory labor exemption. It may be that some reasonable restrictions relating to player

transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this.

We encourage the parties to resolve this question through collective bargaining. The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts. However, no mutual resolution of this issue appears within the present record. Therefore, the Rozelle Rule, as it is presently implemented, must be set aside as an unreasonable restraint of trade. With the exception of the district court's finding that implementation of the Rozelle Rule constitutes a *per se* violation of Section 1 of the Sherman Act and except as it is otherwise modified herein, the judgment of the district court is **AFFIRMED**.

The cause is remanded to the district court for further proceedings consistent with this opinion.







## IAIN FRASER ET AL v. MAJOR LEAGUE SOCCER, L.L.C., ET AL

## UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

284 F.3d 47

Decided March 20, 2002

**MR. CHIEF JUDGE BOUDIN, Chief Circuit Court Judge.**

Professional soccer players sued Major League Soccer, LLC (“MLS”), nine independent operator/investors in MLS, and the United States Soccer Federation, Inc. (“USSF”), alleging violations of Sherman Act sections 1 and 2, and Clayton Act section 7, and seeking injunctive relief and monetary damages. The district court granted summary judgment for defendants on the section 1 and Clayton Act counts. After a twelve-week long trial on the section 2 count, the jury returned a special verdict leading to judgment in favor of defendants. Players now appeal the disposition of all three counts. We begin with a statement of the background facts.

**I. BACKGROUND FACTS**

Despite professional soccer’s popularity abroad, the sport has achieved only limited success in this country. Several minor leagues have operated here (four such leagues exist today), but before the formation of MLS, only one other U.S. professional league--the North American Soccer League (“NASL”)--had ever obtained Division I, or top-tier, status. Launched in 1968, the NASL achieved some success before folding in 1985; MLS attributes the NASL’s demise in part to wide disparities in the financial resources of the league’s independently owned teams and a lack of centralized control.

In 1988, the USSF, the national governing body of soccer in the United States, was awarded the right to host the 1994 World Cup soccer tournament in the U.S. by the Federation Internationale de Football Association (“FIFA”), soccer’s international governing body. In consideration for the coveted sponsorship rights, the USSF promised to establish a viable Division I professional soccer league in the U.S. as soon as possible.

At its December 5, 1993, meeting the USSF board tentatively selected MLPS (the precursor to MLS, headed by the USSF’s own president, Alan Rothenberg) as the exclusive Division I professional soccer league in the U.S., based upon its relatively strong capitalization, higher proposed spending, business plan and management.

In the wake of a successful World Cup USA, MLS was officially formed in February 1995 as a limited liability company (“LLC”) under Delaware law. The league is owned by a number of independent investors (a mix of corporations, partnerships, and one individual) and is governed by a management committee known as the board of governors. Some of the investors are passive; others are also team operators as explained below.

MLS has, to say the least, a unique structure, even for a sports league. MLS retains significant centralized control over both league and individual team operations. MLS owns all of the teams that play in the league (a total of 12 prior to the start of 2002), as well as all

intellectual property rights, tickets, supplied equipment, and broadcast rights. MLS sets the teams' schedules; negotiates all stadium leases and assumes all related liabilities; pays the salaries of referees and other league personnel; and supplies certain equipment.

At issue in this case is MLS's control over player employment. MLS has the "sole responsibility for negotiating and entering into agreements with, and for compensating, Players." In a nutshell, MLS recruits the players, negotiates their salaries, pays them from league funds, and, to a large extent, determines where each of them will play. For example, to balance talent among teams, it decides, with the non-binding input of team operators, where certain of the league's "marquee" players will play.

However, MLS has also relinquished some control over team operations to certain investors. MLS contracts with these investors to operate nine of the league's teams (the league runs the other three). These investors are referred to as operator/investors and are the co-defendants in this action. Each operator/investor has the "exclusive right and obligation to provide Management Services for a Team within its Home Territory" and is given some leeway in running the team and reaping the potential benefits therefrom.

In return for the services of the operator/investors, MLS pays each of them a "management fee" that corresponds (in large part) to the performance of their respective team. The remaining revenues of the league are distributed in equal portions to all investors. Thus, while the investors qua investors share equally in the league's profits and losses, the individual team operators qua operators fare differently depending at least in part on the financial performance of their respective teams. It bears mentioning, however, that neither the league nor, apparently, any of its teams has yet made a profit.

The league began official play in 1996. The following February of 1997, eight named players sued MLS, the USSF, and the operator/investors under various antitrust theories. In count I, the players claimed MLS and its operator/investors violated Sherman Act section 1 by agreeing not to compete for player services. In count III, the players claimed MLS monopolized or attempted to monopolize, or combined or conspired with the USSF to monopolize, the market for the services of Division I professional soccer players in the U.S., in violation of Sherman Act section 2, by preventing any other entity from being sanctioned as a Division I professional soccer league in the United States or otherwise competing against MLS. In count IV, the players claimed that the combination of assets of the operator/investors in MLS substantially lessened competition and tended to create monopoly in violation of Clayton Act section 7.

In February 1998, before the close of discovery, MLS and its operator/investors moved for summary judgment on counts I and IV; On April 19, 2000, the district court granted MLS summary judgment on both counts, holding that MLS and its operator/investors comprised a single entity and as such, could not conspire in violation of section 1. On the section 7 claim, the court held that the creation of MLS "did not reduce competition in an existing market because when the company was formed there was no active market for Division I professional soccer in the United States."

A three-month jury trial commenced in September 2000 on players' remaining section 2 claims. It found that players had failed to prove what they had alleged, namely, that the relevant geographic market is the United States and that the relevant product market is limited to Division I professional soccer players. Players then filed this appeal.

## II. SHERMAN ACT SECTION 1

Some have urged that sports leagues in general be treated as single entities--individual sports teams, after all, must collaborate to produce a. However, this approach has not been adopted in this circuit, and we must work with the framework of existing circuit law. Single entity status for ordinarily organized leagues has been rejected in several other circuits as well.

Even so, the district court concluded that under *Copperweld Corp. v. Independence Tube Corp.* (1984), MLS and its operator/investors were uniquely integrated and did comprise a single entity. *Copperweld* established that a parent and its wholly owned subsidiary are not subject to attack under section 1 for agreements between them. But what the Supreme Court has never decided is how far (this) applies to more complex entities and arrangements that involve a high degree of corporate and economic integration.

While MLS defends the district court's single entity ruling, players say that this view is form over substance and the substance is simply a conspiracy among de facto team owners to fix player salaries, which they claim to be a per se violation of the antitrust laws. We disagree completely with this latter characterization.

If ordinary investors decided to set up a company that would own and manage all of the teams in a league, it is hard to see why this arrangement would fall outside *Copperweld's* safe harbor. Certainly the potential for competition within the firm is not enough: after all, a railroad could in theory provide alternative routes between the same cities and a grocery could locate competing branches of its chain quite near one another; yet no law requires competition within a company. It is common practice, but hardly essential, that the teams in a sports league have independent owner/managers.

Further, MLS is manifestly more than an arrangement for individual operator/investors by which they can cap player salaries. In many ways, MLS does resemble an ordinary company: it owns substantial assets (teams, player contracts, stadium rights, intellectual property) critical to the performance of the league; a substantial portion of generated revenues belongs to it and is to be shared conventionally with both operator/investors and passive investors. And the fact that MLS was structured with the aim of achieving results that might not otherwise be possible does not automatically condemn it.

Focusing on the operator/investors' role as stockholders, the district court stressed that both sides of the supposed conspiracy were parts of the same corporate entity; and it noted that "unlike MLS, NFL football clubs do not exist as part of an overarching corporate structure." And, as *Copperweld* itself shows, its protection is not lost merely because there are separate legal entities--here, the operator/investors--or because one posits arrangements between them and MLS that could not be made by existing competitors without violating the antitrust laws.

Nevertheless, it is hard to treat the corporate integration as conclusive. The challenge here is primarily to the operator/investors' role as team managers, not as ordinary stockholders, and to restrictions imposed on them in that role preventing competition for player services. That a stockholder may be insulated by *Copperweld* when making ordinary governance decisions does not mean automatic protection when the stockholder is also an entrepreneur separately contracting with the company. Above all, there are functional differences between this case and *Copperweld* that are significant for antitrust policy.

First, there is a diversity of entrepreneurial interests that goes well beyond the ordinary company. MLS and its operator/investors have separate contractual relationships giving the operator/investors rights that take them part way along the path to ordinary sports team owners: they do some independent hiring and make out-of-pocket investments in their own teams; they retain a large portion of the revenues from the activities of their teams; and each has limited sale rights in its own team that relate to specific assets and not just shares in the common enterprise. One might well ask why the formal difference in corporate structure should warrant treating MLS differently than the National Football League or other traditionally structured sports leagues.

This contrasts with Copperweld's observation that the parent and its wholly owned subsidiary in that case shared a "complete unity of interests." Second, in this case the analogy to a single entity is weakened, and the resemblance to a collaborative venture strengthened, by the fact that the operator/investors are not mere servants of MLS; effectively, they control it, having the majority of votes on the managing board. The problem is especially serious where, as here, the stockholders are themselves potential competitors with MLS and with each other. Here, it is MLS that has two roles: one as an entrepreneur with its own assets and revenues; the other (arguably) as a nominally vertical device for producing horizontal coordination, i.e., limiting competition among operator/investors.

From the standpoint of antitrust policy, this prospect of horizontal coordination among the operator/investors through a common entity is a distinct concern. Whatever efficiencies may be thought likely where a single entrepreneur makes decisions for a corporate entity (or set of connected entities), the presumption is relaxed--and may in some contexts be reversed--where separate entrepreneurial interests can collaborate; the fixing of above market prices by sellers is the paradigm. This does not make MLS a mere front for price fixing, but it does distinguish Copperweld by introducing a further danger and a further argument for testing it under section 1's rule of reason.

To sum up, the present case is not Copperweld but presents a more doubtful situation; MLS and its operator/investors comprise a hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors. And, of course, there is not one kind of hybrid but a range of possibilities (imagine the operator/investors with their separate entrepreneurial interests but without their control of MLS). The question is what legal approach to take.

The law at this point could develop along either or both of two different lines. One would expand upon Copperweld to develop functional tests or criteria for shielding (or refusing to shield) such hybrids from section 1 scrutiny for intra-enterprise arrangements. This would be a complex task and add a new layer of analysis; but where the analysis shielded the arrangement it would serve to cut off similarly difficult, intrusive scrutiny of such intra-enterprise activities under extremely generalized rule of reason standards. It would also prevent claims, clearly inappropriate in our view, under per se rules or precedents dealing with arrangements between existing independent competitors.

The other course is to reshape section 1's rule of reason toward a body of more flexible rules for interdependent multi-party enterprises. Sports leagues are a primary example but so are common franchising arrangements and joint ventures that perform specific services for

competitors. Certainly the trend of section 1 law has been to soften per se rules and to recognize the need for accommodation among interdependent enterprises.

The same choice of approach presents itself in franchise cases. There, too, we have a close but not complete integration of separate entities under separate entrepreneurial control. Traditionally, vertically imposed arrangements restricting competition among franchisees have been tested (and often upheld) under the rule of reason. Yet since *Copperweld*, several district court decisions have avoided the section 1 inquiry by deeming franchiser and franchisee part of a single entity.

Once one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases. To the extent the criteria reflect judgments that a particular practice in context is defensible, assessment under section 1 is more straightforward and draws on developed law. Indeed, the best arguments for upholding MLS's restrictions--that it is a new and risky venture, constrained in some (perhaps great) measure by foreign and domestic competition for players, that unquestionably creates a new enterprise without combining existing competitors--have little to do with its structure.

In all events, we conclude that the single entity problem need not be answered definitively in this case. The case for expanding *Copperweld* is debatable and, more so, the case for applying the single entity label to MLS. But even if we assume that section 1 applies, it is clear to us that the venture cannot be condemned by per se rules and presents at best a debatable case under the rule of reason. More significantly, as structured by plaintiffs themselves, this case would have been lost at trial based on the jury's rejection of plaintiffs' own market definition.

The rejection of the per se rule is straightforward. Although players portray MLS as a sham for horizontal price fixing, the extent of real economic integration is obvious. Further, MLS and its investors did not compete previously; the arrangement was formed as a risky venture against a background of prior failure, and the outcome has been to add new opportunities for players--a Division I soccer league in the United States--and to raise salaries for soccer players here above existing levels.

The possibility that a less integrated and restrictive salary regime might make some individual salaries even higher is hardly conclusive. Without the restrictions, MLS might not exist or, if it did, might have larger initial losses and a shorter life. This would hardly enhance competition. Thus, the effects of the MLS arrangement are simply too uncertain to warrant application of the per se rule. As in any other non-per se case, players would have to show that MLS exercised significant market power in a properly defined market, that the practices in question adversely affected competition in that market and that on balance the adverse effects on competition outweighed the competitive benefits.

Here, the jury said that neither the United States nor Division I delimited the relevant market--findings that imply that MLS faced significant competition for player services both from outside the United States and from non-Division I teams. That inference at a minimum creates uncertainty as to whether the jury could have found market power under section 1. However, the peculiar assemblage of evidence, including MLS-authored materials suggesting that it expected to exercise some control over player salaries (see Part III below), makes it impossible to rule out abstractly the possibility of a jury finding of MLS market power in a broader market.

In theory, there may be a broader market which plaintiffs might show (without contradicting the jury findings) in which unrestricted salary competition between the MLS operator/investors might result in somewhat higher player salaries. In that event, assuming that the single entity defense failed, a basis for liability might exist.

However, we have been given no reason to think that any other market would have been alleged. We thus have every reason to think that if the section 1 claim had not been dismissed on summary judgment it would have been presented at trial with the same market analysis alleged in the complaint. It follows that had the district court allowed the section 1 claim, it too would have been defeated by the jury's finding that the market alleged in the complaint had not been proved. Accordingly, any error in dismissing the claim based on a single entity theory was harmless so long as the jury verdict stands, a matter we address in the next section.

### III. SHERMAN ACT SECTION 2

At trial, players alleged three possible violations of section 2: that MLS monopolized the market for Division I professional soccer in the U.S.; that it attempted to monopolize that market; and that it conspired with the USSF to monopolize the same market. The jury found that players had failed to establish the relevant market as alleged; it reached no other issue in the case. The court thereafter entered judgment for the defendants on all three section 2 claims.

To show monopolization, players had to prove that MLS had engaged in an act that helped create or maintain its alleged monopoly. In section 2 cases, the wrongful act is usually one designed to exclude competitors from the market (e.g., predatory price, exclusive dealing). If MLS and its operator/investors are viewed as a single competitor, then the league's centralized hiring structure hardly constitutes an exclusionary act, even if it results in below-market wages for players. After all, suppressing player salaries ought to spur, rather than impair, competition from rival leagues.

However, if the operator/investors are viewed instead more as individual potential competitors--an issue that we (unlike the district court) have not decided--it is not difficult to see how an agreement among them not to compete--a mirror image of players' section 1 claim--might create a monopsony and eliminate competition among them.

Nonetheless, the jury's findings remain as an obstacle. Attempt and monopolization both require a showing that a market has been or may well be subject to monopoly power, the only market alleged by the players was rejected by the jury; and this dooms the players' section 2 claims regardless of which practice--the exclusive arrangement with the USSF or the agreement not to compete for players--is alleged to satisfy the exclusionary act element of the cause of action. This assumes, however, that the jury verdict stands.

MLS offered testimony that its players had played in 67 different foreign leagues, prior to or after playing for MLS; plaintiffs countered that the opportunities were more limited and less attractive than MLS claimed.

The jury in defining the relevant market "should consider whether any effective competition significantly restrains MLS's ability to control wages for its players"; and second, the jury should include in the relevant market only those leagues which are "sufficiently attractive and practically available to a large enough number of MLS players to prevent MLS from having the power to pay wages below competitive market levels." MLS could be constrained so long as

enough individual players had an alternative foreign league even if an individual foreign league would by itself attract or be available to only a small number of players.

Next, players claim the court erred in permitting a defense witness, Neil Farnsworth, co-owner of a Seattle Division II professional soccer team, to testify that he was competing with MLS for two specific players, while refusing to identify the players by name on “confidentiality” grounds. At trial, Farnsworth testified that:

“We compete with MLS for players every day. We have a situation right now where I have one player that is being courted by MLS. He’s rejected one offer by MLS now to stay with us... We also have a player from MLS that has played in MLS for probably four years that has contacted us for next season expressing an interest to play for us and then play indoor in addition to playing for us, instead of playing for MLS.”

#### IV. CLAYTON ACT SECTION 7

In their final argument, players say that the district court erred in dismissing their claim that the formation of MLS violated section 7 of the Clayton Act. Count IV of the complaint alleged that, “[i]f not for this combination of assets and purchase of stock, MLS Member Teams would compete with each other for players, like teams in all other major professional sports leagues in the United States.” Section 7 prohibits, with certain commerce-related conditions, stock or asset acquisitions whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”

The district court granted summary judgment to the defendants on the ground that “[t]here can be no Section 7 liability because the formation of MLS did not involve the acquisition or merger of existing business enterprises, but rather the formation of an entirely new entity which itself represented the creation of an entirely new market. According to the district court:

“The relevant test under § 7 looks to whether competition in existing markets has been reduced. . . . Where there is no existing market, there can be no reduction in the level of competition. There are no negative numbers in this math; there is nothing lower than zero. Competition that does not exist cannot be decreased. The creation of MLS did not reduce competition in an existing market because when the company was formed there was no active market for Division I professional soccer in the United States.”

Both sides make much of the district court’s reference to a “new market.” Players say that there is no implied immunity from section 7 for combinations that lessen competition in a new market.

The district court was saying no more than that, after the failure of the NASL and prior to the formation of MLS, there was no enterprise engaged in providing Division I soccer in the United States and thus that a combination that added Division I soccer in this country could hardly reduce competition where none before existed. This is plainly correct insofar as the creation of MLS added a new entrant without subtracting any existing competitors. To this extent, the most common threat addressed by section 7--the merger of two or more entities currently competing with one another --is not present in this case.

The Supreme Court has recognized that section 7 also reaches mergers that combine an existing competitor with a potential competitor commonly perceived to be a strong potential entrant where the number of such entrants is limited. In such cases, the notion is that the gobbling up of the “perceived potential entrant” removes an existing constraint on competition and thus reduces present competitive pressure that may currently be constraining price.

The players make no attempt to show that this form of existing competitive constraint was eliminated by the formation of MLS. Rather, their explicit theory is that, if MLS were held unlawful under section 7, its operator/investors would enter the market independently, thus increasing the amount of competition over and above the level provided by MLS itself. At the outset, the question arises whether section 7 can be used to prevent a merger that itself increases competition where it can be confidently predicted that prevention will or probably will increase competition even more. The classic hypothetical is the merger of an existing competitor with a non-competing company whose interest in entry is unknown and so exerts no current pressure on the market as a perceived potential entrant. Yet when its private files are examined incident to a court suit, plans are discovered for independent entry if the merger is disallowed.

The Supreme Court has expressly reserved the question whether section 7 can be read to reach such a case. It is uncertain how the Supreme Court will ultimately resolve the issue. Plaintiffs’ view bumps up against the most straightforward reading of the phrase “may . . . lessen competition” in which “competition” is understood to refer to the existing level of competition prior to the merger in question. Further, it is often hard enough to determine whether a merger will reduce competition in relation to a known baseline, namely, existing market conditions. If a new combination will, as here, initially enhance competition, one might hesitate at a further and even more difficult conjecture that prohibiting the transaction would lead to even more competition further down the line.

On the other hand, the antitrust statutes are not always read literally, as Copperweld itself demonstrates. The Antitrust Division, often a significant influence on the development of antitrust case law, seemingly supports a generous reading of Section 7 to embrace so called “actual potential competition.” And there might be cases where the facts might compel the conclusion that turning down a pro-competitive merger (compared to the status quo) would produce an even more competitive realignment.

That is not this case. Here, there is no possible way to predict just what would happen if the current version of MLS were precluded. Players assert that, had the operator/investors not formed MLS, they would have entered the market as a traditionally structured league. But as the district court noted, it is “not inevitable that the league would be formed and would operate the same way as previous sports leagues.” More importantly, it is quite possible these investors would have found the alternative structures unattractive and simply abandoned their effort altogether--hardly a pro-competitive outcome.

Even the alternative result suggested by players--that another, more traditionally structured league like the APSL would have received the Division I sanction instead--appears on the surface no more pro-competitive. The evidence indicates that the APSL was not as well financed or well managed as MLS (hence the USSF’s decision to certify MLS and not the APSL), thus increasing the risk that the new Division I league would fail in the long run. In addition, elevating the APSL to Division I status would not necessarily increase competition significantly,

since the APSL, an existing minor league, may have already been in the relevant market.

It might be argued that these objections present issues that a jury ought to consider; but there is one final objection that the jury did effectively consider. Even advocates of a broader reading of section 7 concede that striking down a combination that does not threaten present competition could be justified, in the hope of obtaining more competition in the future, only in already concentrated markets. “In the absence of significant market power in the hands of existing firms, . . . the loss through merger of a potential entrant would not affect present or future competition.”

Thus, even on the broader reading of section 7 and allowing room for conjectures about future effects, it would have been necessary for players to prove that MLS operates within a relevant economic market that is presently concentrated. In their section 7 count, the players alleged the same relevant United States/Division I market as in their section 1 and section 2 counts. For reasons already discussed in connection with the section 1 claim, the jury’s rejection of this relevant market would also have doomed the section 7 claim based on enhancing future competition if it too had been presented.

Affirmed.

## **PART TWO**

### **SPORTS AND OTHER ANTITRUST CONSIDERATIONS**

Discussion questions:

358 U.S. 242

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL.

v.

UNITED STATES.

Argued November 13, 1958.

Decided January 12, 1959.

MR. JUSTICE CLARK delivered the opinion of the Court.

This civil Sherman Act 1 case was here four years ago on direct appeal from a dismissal by the District Court, which had held that the Act did not apply to the business of professional boxing. We reversed, finding that “the complaint states a cause of action [under the Act] and that the Government is entitled to an opportunity to prove its allegations,” and remanded the case for trial on the merits. The complaint charged the appellants with a combination and conspiracy in unreasonable restraint of trade and commerce among the States in the promotion, broadcasting, and televising of professional world championship boxing contests, as well as a conspiracy to monopolize and monopolization of the same. After a trial, the District Court, in an opinion incorporating detailed findings of fact and conclusions of law based on the principles laid down in our earlier opinion, found that the allegations of the complaint had been sustained. After further hearings on the nature and extent of the relief necessary to protect the public interest, the court entered its final judgment dissolving two of the corporate appellants, directing divestiture of certain stock owned by the individual appellants and granting injunctive relief designed to open up the market in the business of promoting professional world championship boxing matches.

The appellants, while not attacking any specific finding as clearly erroneous, claim that the proof did not show that they violated either Section 1 or 2 of the Act. In this regard appellants level their strongest blows at the District Court's definition of the relevant market. Out of the entire field of professional boxing, the District Court carved a market in championship contests alone, holding it to be the relevant market at which the conspiracy was aimed. In the alternative, appellants insist that the relief granted the Government was “unnecessarily punitive,” even if liability is assumed. We have concluded that the findings of the District Court are not clearly erroneous and that in view of our former holding on the sufficiency of the complaint the judgment on the merits was properly entered. As to the relief granted we find that the court did not exceed the limits of allowable discretion in framing a decree “that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.”

#### THE FINDINGS.

The conspiracy began in January 1949, when appellants Norris and Wirtz, who owned and controlled the Chicago Stadium, the Detroit Olympia Arena and the St. Louis Arena, made an agreement with Joe Louis, the then heavyweight boxing champion of the world. Wishing to retire, Louis agreed to give up his title after obtaining from each of the four leading contenders exclusive promotion rights including rights to radio, television and movie revenues. Upon

securing these exclusive contracts Louis assigned them to the appellant International Boxing Club, Illinois, which was organized by Norris and Wirtz for the purpose of promoting boxing for the combination in Illinois. They paid Louis \$150,000 cash plus an employment contract and a 20% stock interest in I. B. C., Illinois.

In March 1949 Norris and Wirtz approached appellant Madison Square Garden, in which they had for many years owned 50,000 shares of stock. It was the "foremost sports arena in New York City and is the best known arena of its kind in the United States, if not the world." However, its facilities were tied up by an exclusive lease it had granted to Mike Jacobs' interests - the leading professional boxing promoter in the field at that time. Norris and Wirtz proposed that they should all "work together now and keep the events for our buildings and not create a competitive situation that would be harmful to all." In order to effectuate this program, appellant Madison Square Garden bought out Mike Jacobs' interests, including, in addition to his lease on Madison Square Garden, his exclusive leases to Yankee Stadium and the St. Nicholas Arena and his contract with the then welterweight champion Sugar Ray Robinson. These contracts were assigned to International Boxing Club, New York, organized for the purpose of promoting boxing for the combination in New York.

Once Jacobs' interests had been acquired, there remained only one substantial competitor in the field of promoting championship boxing matches. That was Tournament of Champions, Inc., owned in part by the Columbia Broadcasting System. It owned an exclusive lease on the Polo Grounds as well as an exclusive promotion contract covering the next two fights of the then middleweight champion of the world. In May 1949 Madison Square Garden bought all of the stock of Tournament of Champions at a cost of \$100,000 plus 25% of the net profits on the next two middleweight championship matches. The assets thus acquired were likewise assigned to I. B. C., New York. By a simultaneous separate agreement, Columbia Broadcasting System agreed for a five-year period not to invest in or promote any professional boxing matches in return for a first refusal right to the broadcasting of certain boxing matches staged for a like period in Madison Square Garden.

This series of agreements, consummated within four months' time, gave appellants exclusive control of the promotion of boxing matches in three championship divisions, i. e., heavyweight, middleweight, and welterweight. Not satisfied with this temporary control, however, appellants perpetuated their hold on championship bouts by requiring each contender for the title to grant to them an exclusive promotion contract to his championship fights, including film and broadcasting, for a period of from three to five years. Over the facilities for the staging of contests appellants exercised like control, owning or managing the "key" arenas and stadia in the Nation.

Tightening the ropes around the ring thus built, Norris and Wirtz increased their stockholdings in Madison Square Garden to where they controlled it and were able to "dictate its policies and boxing activities." Their control over this boxing empire is revealed by the fact that Norris is president of each of the four top corporations, i. e., Madison Square Garden, I. B. C., New York, Chicago Stadium Corporation, and I. B. C., Illinois. He and Wirtz are directors in all four, while I. B. C., Illinois and I. B. C., New York, which have owned all of the promotion contracts with the contenders, have a joint board of directors.

The effect of the conspiracy is obvious. Using the facilities of I. B. C., Illinois, and I. B. C.,

New York, appellants entered into exclusive promotion contracts with title aspirants, requiring exclusive handling agreements in the event the contender became champion. In amassing their empire, appellants obtained control of champions in three divisions. The choice given a contender thereafter was clear, i. e., to sign with appellants or not to fight. With appellants in control of the key arenas and stadia of the country through Madison Square Garden, Chicago Stadium Corporation, and others, an event could not be successfully staged in any of these areas, the most fruitful in the Nation, without their consent. The exercise of this power brought immediate results. From June 1949, when appellants staged their first championship fight, until May 15, 1953, the date of the amended complaint, they staged or controlled the promotion of 36 of the 44 championship battles held in this country, giving them approximately 81% of that field. In two of the classifications, heavyweight and middleweight, the combine staged all of the contests. The power of the combine to exclude competitors in the championship field is graphically shown by their promotion of 25 out of 27 fights in all divisions, a total of 93%, during the two-and-a-half-year period ending with the filing of the amended complaint. This power extended to the sale of film and broadcasting rights - most valuable adjuncts to successful promotion in the business.

Appellants launch a vigorous attack on the finding that the relevant market was the promotion of championship boxing contests in contrast to all professional boxing events. They rely primarily on *United States v. du Pont & Co.* (1956). That case, involving an alleged monopoly of the market in cellophane, held that the relevant market was not cellophane alone but the entire field of flexible packaging materials. In testing for the relevant market in Sherman Act cases, the Court said:

“... no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that ‘part of the trade or commerce,’ monopolization of which may be illegal.”

The appellants argue that the “physical identity of the products here would seem necessarily to put them in one and the same market.” They say that any boxing contest, whether championship or not, always includes one ring, two boxers and one referee, fighting under the same rules before a greater or lesser number of spectators either present at ringside or through the facilities of television, radio, or moving pictures.

We do not feel that this conclusion follows. As was also said in *du Pont*: “The ‘market’ . . . will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered.”

With this in mind, the lower court in the instant case found that there exists a “separate, identifiable market” for championship boxing contests. This general finding is supported by detailed findings to the effect that the average revenue from all sources for appellants' championship bouts was \$154,000, compared to \$40,000 for their nonchampionship programs; that television rights to one championship fight brought \$100,000, in contrast to \$45,000 for a nontitle fight seven months later between the same two fighters; that the average “Nielsen” ratings over a two-and-one-half-year period were 74.9% for appellants' championship contests, and 57.7% for their nonchampionship programs (reflecting a difference of several million viewers between the two types of fights); that although the revenues from movie rights for six of

appellants' championship bouts totaled over \$600,000, no full-length motion picture rights were sold for a nonchampionship contest; and that spectators pay “substantially more” for tickets to championship fights than for nontitle fights. In addition, numerous representatives of the broadcasting, motion picture and advertising industries testified to the general effect that a “particular and special demand exists among radio broadcasting and telecasting [and motion picture] companies for the rights to broadcast and telecast [and make and distribute films of] championship contests in contradistinction to similar rights to non-championship contests.”

In view of these findings, we cannot say that the lower court was “clearly erroneous” in concluding that nonchampionship fights are not “reasonably interchangeable for the same purpose” as championship contests. Championship boxing is the “cream” of the boxing business, and, as has been shown above, is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes.

#### THE RELIEF.

The yardstick which the trial court should apply in monopolization cases is well stated by the Court. The decree should (1) put “an end to the combination or conspiracy when that is itself the violation”; (2) deprive “the antitrust defendants of the benefits of their conspiracy”; and (3) “break up or render impotent the monopoly power which violates the Act.”

The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court. Though the records are usually most voluminous and their review exceedingly burdensome, we have painstakingly undertaken it to make certain that justice has been done. That we have done here. We have finally concluded that the relief granted was not beyond the allowable discretion of the District Court.

In this setting the District Court ordered Norris and Wirtz to divest themselves, within a five-year period, of all stock which they owned “directly or indirectly” in Madison Square Garden. In addition, both of the International Boxing Clubs, Illinois and New York, were ordered dissolved. The Chicago Stadium and Madison Square Garden were each enjoined from staging more than two championship bouts annually. All exclusive agreements for the promotion of boxing events, including nonchampionship, were banned. Madison Square Garden was ordered for a period of five years to lease its premises when available at a “fair and reasonable” rental to any duly qualified promoter applying in writing therefore. Failure to agree on terms would require submission to the courts for determination. Like requirement was imposed on Chicago Stadium Corporation, provided Norris-and-Wirtz control continued.

The District Judge concluded that it was necessary to include each of these provisions in the decree in order to put an end to the combination, deprive the appellants of the benefit of their conspiracy and break up their monopoly power. At the conclusion of the final hearing on relief he observed that prior to 1949 the Norris-Wirtz group was in Chicago while the Madison Square Garden enterprise was in New York. They were “two separate entities,” one promoting contests in the mid-West and the other in New York. He declared that “in order to destroy this monopoly we have to return the situation as nearly as possible to the economic conditions as they existed in 1949” and, further, “I can see no way in this case . . . that a proper decree can be formulated unless that power that Wirtz and Norris have in Madison Square Garden is curtailed. They have

to get out of the control.”

The judgment should be affirmed.

It is so ordered.

## NATIONAL FOOTBALL LEAGUE et al. v. NORTH AMERICAN SOCCER LEAGUE et al

December 6, 1982

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The petition for a writ of certiorari is denied.

Justice REHNQUIST, dissenting.

This lawsuit is an attack under 1 of the Sherman Act by the North American Soccer League and most of its member teams (NASL) on the cross-ownership rule imposed by the National Football League (NFL) on the owners of its member teams. The rule, in essence, prohibits NFL owners from obtaining a controlling interest in any other major league professional sports team. The Court of Appeals found that the rule violates 1 under the Rule of Reason, and enjoined the NFL from enforcing it. The NASL's complaint alleged that the cross-ownership rule excludes it from a substantial share of the market for "professional sports capital and entrepreneurial skill." The NFL contended that the relevant market was for capital generally, and that the rule does not exclude anyone from a significant share of the capital market. The District Court decided that the relevant market is in between - a market for "sports capital" - but did not define precisely the extent of this market. It then decided that any competition between the NFL and the NASL in that market is competition between two single economic entities. It thus held that 1 of the Sherman Act does not apply because the NFL is a single economic entity that cannot combine or conspire with itself.

The Court of Appeals rejected this view. It thought "[t]he characterization of the NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition." The Court of Appeals thought the objective of the cross-ownership rule is to protect individual teams as well as the league from competition.

The Court of Appeals first decided that there is a market for "sports capital and skill," which is a submarket of the capital market. "[A]n owner may in practice sell his franchise only to a relatively narrow group of eligible purchasers, not to any financier." It did not define this market except to say that it is "not limited to existing or potential major sports team owners," but "is relatively limited in scope and is only a small fraction of the total capital funds market."

The Court of Appeals then proceeded to apply the Rule of Reason. There is no dispute as to the proper statement of the Rule. "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."

On the basis of the facts as described by the Court of Appeals I seriously doubt whether the Rule of Reason was violated. The Court of Appeals held the cross-ownership rule is anticompetitive because it restricts the access of NASL teams to sports capital, and that this anticompetitive effect outweighs any procompetitive effects of the rule. It rejected the argument that the rule enables NFL owners to compete effectively in the entertainment market by assuring them of the undivided loyalty of fellow-owners. I believe the Court of Appeals gave too little weight to the procompetitive features of the cross-ownership rule and engaged in excessive

speculation as to its anticompetitive effect.

The NFL owners are joint ventures who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the market place. The NFL negotiates its television contracts, for example, in a single block. The revenues from broadcast rights are pooled. Indeed, the only inter-team competition occurs when two teams are located in one major city, such as New York or Los Angeles. These teams compete with one another for home game attendance and local broadcast revenues. In all other respects, the league competes as a unit against other forms of entertainment.

This arrangement is largely a matter of necessity. If the teams were entirely independent, there could be no consistency of staffing, rules, equipment, or training. All of these are at least arguably necessary to permit the league to create an appealing product in the entertainment market. Thus, NFL football is a different product from what the NFL teams could offer independently, and the NFL, like ASCAP, is “not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its [product] of which the individual [teams] are raw material. [The NFL], in short, made a market in which individual [teams] are inherently unable to compete fully effectively.”

The cross-ownership rule, then, is a covenant by joint venturers who produce a single product not to compete with one another. The rule governing such agreements was set out over 80 years ago by Judge (later Chief Justice) Taft: A covenant not to compete is valid if “it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of its fruits by the other party.”

The cross-ownership rule seems to me to meet this test. Its purposes are to minimize disputes among the owners and to prevent some owners from using the benefits of their association with the joint venture to compete against it. Participation in the league gives the owner the benefit of detailed knowledge about market conditions for professional sports, the strength and weaknesses of the other teams in the league, and the methods his co-venturers use to compete in the market place. It is only reasonable that the owners would seek to prevent their fellows from giving these significant assets, which are in some respects analogous to trade secrets, to their competitors.

The courts have not, to my knowledge, prohibited businesses from requiring employees to agree not to compete with their employer while they remain employed. I cannot believe the Court of Appeals would expect a law firm to countenance its partners working part-time at a competing firm while remaining partners. Indeed, this Court has noted that the Rule of Reason does not prohibit a seller of a business from contracting not to compete with the buyer in a reasonable geographic area for a reasonable time after he has terminated his relationship with the business. It is difficult for me to understand why the cross-ownership rule is not valid under this standard.

The anti-competitive element of the restraint, as found by the Court of Appeals, is that competitors are denied access to “sports capital and skill.” In defining this market, the Court of Appeals noted that although capital is fungible, the skills of successful sports entrepreneurs are not. This entrepreneurial skill, however, is precisely what each NFL owner, as co-venturer,

contributes to every other owner.

The validity of covenants not to compete does not depend upon the availability to competing firms of similarly qualified individuals, but rests on the principle that competitors may seek to maintain their ability to compete effectively without running afoul of the antitrust laws. The Court of Appeals seems to me to have implicitly adopted the view that businesses must arrange their affairs so as to make it possible for would-be competitors to compete successfully. This Court has explicitly stated the contrary: The inquiry under the Rule of Reason is concerned only with “impact on competitive conditions.” “The antitrust laws were enacted for ‘the protection of competition, not competitors.’” “Indeed, the Second Circuit has applied this principle in the past: “We should always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition.” The Court of Appeals should have been more mindful of its own admonition.

In any event, it seems to me that the cross-ownership rule is narrowly drawn to vindicate the legitimate interests described above. The owners are limited only in areas where the special knowledge and skills provided by their co-owners can be expected to be of significant value. They are not prohibited from competing with the NFL in areas of the entertainment market other than professional sports. An owner may invest in television movies, rock concerts, plays, or anything else that suits his fancy.

It simply does not appear that the positive effects of the challenged restraint in helping the NFL to compete in the economic market place are outweighed by their negative effects on competition. The antitrust laws do not require the NFL to operate so as to make it easier for another league to compete against it. I fear that, under the decision below, the maxim that the antitrust laws exist to protect competition, not competitors may be reduced to a dead letter.

I would grant certiorari.





## PART THREE

### SPORTS AND DISCRIMINATION

The case of *Dawson v. Baltimore* extended the principals of the Supreme Court's decision in *Brown v. Board of Education* to public recreation facilities. Dawson, and others, had challenged the City of Baltimore's practice of racial segregation on public beaches, and by extension, any publicly owned recreation or athletic facility. After losing in U.S. District Court, Dawson prevailed at the Court of Appeals. The Supreme Court affirmed this decision and along with *Holmes v. Atlanta* which involved racial segregation of public golf courses in Atlanta, Georgia.

Though the U.S. Supreme Court decided in *Dawson v. Baltimore* in 1955 that publicly owned recreational and athletic facilities could not be segregated, it took until 1969 for the same principal to be extended to privately owned facilities open to the general public. In *Daniel v. Paul*, the court's majority found that provisions of the Civil Rights Act of 1964 applied to such facilities as "public accommodations."

Discussion questions:

## DAWSON v. BALTIMORE

## UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

220 F.2d 386

January 11, 1955, Argued

March 14, 1955, Decided

These appeals<sup>7</sup> were taken from orders of the District Court dismissing actions brought by Negro citizens to obtain declaratory judgments and injunctive relief against the enforcement of racial segregation in the enjoyment of public beaches and bathhouses maintained by the public authorities of the State of Maryland and the City of Baltimore at or near that city.

Notwithstanding prior decisions of the Supreme Court of the United States striking down the practice of segregation of the races in certain fields, the District Judge did not feel free to disregard the decision of the Court of Appeals of Maryland in *Durkee v. Murphy*<sup>8</sup> and the decision of this court in *Boyer v. Garrett*.<sup>9</sup> Both of these cases are directly in point since they related to the field of public recreation and held, on the authority of *Plessy v. Ferguson*<sup>10</sup> that segregation of the races in athletic activities in public parks or playgrounds did not violate the 14<sup>th</sup> Amendment if substantially equal facilities and services were furnished both races.

Our view is that the authority of these cases was swept away by the subsequent decisions of the Supreme Court. In *McLaurin v. Oklahoma State Regents*<sup>11</sup> the Supreme Court had held that it was a denial of the equal protection guaranteed by the Fourteenth Amendment for a state to segregate on the ground of race a student who had been admitted to an institution of higher learning. In *Henderson v. United States*<sup>12</sup> segregation on the ground of race in railway dining cars had been held to be an unreasonable regulation violative of the provisions of the Interstate Commerce Act. Subsequently, in *Brown v. Board of Education of Topeka*<sup>13</sup> segregation of white and colored children in the public schools of the state was held to be a denial of the equal protection clause of the 14th Amendment. In these cases, the 'separate but equal' doctrine adopted in *Plessy v. Ferguson* was held to have no place in modern public education.

The combined effect of these decisions of the Supreme Court is to destroy the basis of the decision of the Court of Appeals of Maryland in *Durkee v. Murphy*, and the decision of this court in *Boyer v. Garrett*. The Court of Appeals of Maryland based its decision in *Durkee v. Murphy* on the theory that the segregation of the races in the public parks of Baltimore was within the power of the Board of Park Commissioners of the City to make rules for the preservation of order within the parks; and it was said that the separation of the races was

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<sup>7</sup> This case was decided along with another titled *Lonesome v. Maxwell*. The U.S. Supreme Court affirmed this decision without comment in 1955. (350 U.S. 877)

<sup>8</sup> 181 Md. 259 (1942)

<sup>9</sup> 183 F.2d 582 (1950)

<sup>10</sup> 163 U.S. 537 (1896)

<sup>11</sup> 339 U.S. 637 (1950)

<sup>12</sup> 339 U.S. 816 (1950)

<sup>13</sup> 347 U.S. 483 (1954)

normal treatment in Maryland and that the regulation before the court was justified as an effort on the part of the authorities to avoid any conflict which might arise from racial antipathies.

It is now obvious, however, that segregation cannot be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race are equal to those furnished to the other. The Supreme Court expressed the opinion in *Brown v. Board of Education of Topeka* that it must consider public education in the light of its full development and its present place in American life, and therefore could not turn the clock back to 1896 when *Plessy v. Ferguson* was written, or base its decision on the tangible factors only of a given situation, but must also take into account the psychological factors recognized at this time, including the feeling of inferiority generated in the hearts and minds of Negro children, when separated solely because of their race from those of similar age and qualification. With this in mind, it is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional.

The decision in *Bolling v. Sharpe* also throws strong light on the question before us for it admonishes us that in approaching the solution of problems of this kind we should keep in mind the ideal of equality before the law which characterizes our institutions. The court said:

“Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared the principle ‘that the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race.’

“Although the Court has not assumed to define ‘liberty’ with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes a burden that constitutes an arbitrary deprivation of liberty in violation of the Due Process Clause.

*Reversed.*



## DANIEL v. PAUL

## SUPREME COURT OF THE UNITED STATES

395 U.S. 298

March 24-25, 1969, Argued

June 2, 1969, Decided

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, Negro residents of Little Rock, Arkansas, brought this class action in the District Court for the Eastern District of Arkansas to enjoin respondent from denying them admission to a recreational facility called Lake Nixon Club owned and operated by respondent, Euell Paul, and his wife. The complaint alleged that Lake Nixon Club was a “public accommodation” subject to the provisions of Title II of the Civil Rights Act of 1964, and that respondent violated the Act in refusing petitioners admission solely on racial grounds. After trial, the District Court, although finding that respondent had refused petitioners admission solely because they were Negroes, dismissed the complaint on the ground that Lake Nixon Club was not within any of the categories of “public accommodations” covered by the 1964 Act. The Court of Appeals for the Eighth Circuit affirmed, one judge dissenting. We reverse.

Lake Nixon Club, located 12 miles west of Little Rock, is a 232-acre amusement area with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar. The Pauls purchased the Lake Nixon site in 1962 and subsequently operated this amusement business there in a racially segregated manner.

Title II of the Civil Rights Act of 1964 enacted a sweeping prohibition of discrimination or segregation on the ground of race, color, religion, or national origin at places of public accommodation whose operations affect commerce. This prohibition does not extend to discrimination or segregation at private clubs. But, as both courts below properly found, Lake Nixon is not a private club. It is simply a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs. It is true that following enactment of the Civil Rights Act of 1964, the Pauls began to refer to the establishment as a private club. They even began to require patrons to pay a 25-cent “membership” fee, which gains a purchaser a “membership” card entitling him to enter the Club’s premises for an entire season and, on payment of specified additional fees, to use the swimming, boating, and miniature golf facilities. But this “membership” device seems no more than a subterfuge designed to avoid coverage of the 1964 Act. White persons are routinely provided “membership” cards, and some 100,000 whites visit the establishment each season. As the District Court found, Lake Nixon is “open in general to all of the public who are members of the white race.” Negroes, on the other hand, are uniformly denied “membership” cards, and thus admission, because of the Pauls’ fear that integration would “ruin” the “business.” The conclusion of the courts below that Lake Nixon is not a private club is plainly correct - indeed, respondent does not challenge that conclusion here.

We therefore turn to the question whether Lake Nixon Club is “a place of public accommodation” as defined by the 1964 Act, and, if so, whether its operations “affect commerce” within the meaning of that Act.

[The 1964 Act] defines four categories of establishments as covered public accommodations. Three of these categories are relevant here:

“any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises;

any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

any establishment (A) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.”

[The 1964 Act] sets forth standards for determining whether the operations of an establishment in any of these categories affect commerce within the meaning of Title II:

“The operations of an establishment affect commerce within the meaning of this title if it serves or offers to serve interstate travelers, or [if] a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; [if] it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; [or if] there is physically located within its premises, an establishment the operations of which affect commerce. For purposes of this section, ‘commerce’ means travel, trade, traffic, commerce, transportation, or communication among the several States.”

Clearly, the snack bar is “principally engaged in selling food for consumption on the premises.” Thus, it is a covered public accommodation if “it serves or offers to serve interstate travelers or a substantial portion of the food which it serves ... has moved in commerce.” We find that the snack bar is a covered public accommodation under either of these standards.

The Pauls advertise the Lake Nixon Club in a magazine distributed to guests at Little Rock hotels [and] over area radio stations. In addition, Lake Nixon has advertised at the Little Rock Air Force Base. This choice of advertising media leaves no doubt that the Pauls were seeking broad-based patronage from an audience which they knew to include interstate travelers. And it would be unrealistic to assume that none of the 100,000 patrons actually served by the Club each season was an interstate traveler. Since the Lake Nixon Club offered to serve and served out-of-state persons, and since the Club’s snack bar was established to serve all patrons of the entire facility, we must conclude that the snack bar offered to serve and served out-of-state persons.

There can be no serious doubt that a “substantial portion of the food” served at the snack

bar has moved in interstate commerce. The snack bar's status as a covered establishment automatically brings the entire Lake Nixon facility within the ambit of the Civil Rights Act of 1964.

Under any accepted definition of "entertainment," the Lake Nixon Club would surely qualify as a "place of entertainment." And indeed it advertises itself as such. Respondent argues, however, that in the context of § 201 (b)(3) "place of entertainment" refers only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity. We find no support in the legislative history for respondent's reading of the statute. The few indications of legislative intent are to the contrary.

President Kennedy, in submitting to Congress the public accommodations provisions of the proposed Civil Rights Act, emphasized that "no action is more contrary to the spirit of our democracy and Constitution – or more rightfully resented by a Negro citizen who seeks only equal treatment – than the barring of that citizen from restaurants, hotels, theatres, *recreational areas* and other public accommodations and facilities." (Emphasis added.) While [the Act] was being considered by the Senate, a civil rights demonstration occurred at a Maryland amusement park. The then Assistant Majority Leader of the Senate, Hubert Humphrey, took note of the demonstration and opined that such an amusement park would be covered by the provisions which were eventually enacted:

"The spectacle of national church leaders being hauled off to jail in a paddy wagon demonstrates the absurdity of the present situation regarding equal access to public facilities in Maryland and the absurdity of the arguments of those who oppose title II of the President's omnibus civil rights bill."

Admittedly, most of the discussion in Congress regarding the coverage of Title II focused on places of spectator entertainment rather than recreational areas. But it does not follow that the scope of [the Act] should be restricted to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage. In light of the overriding purpose "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public," we agree with the *en banc* decision of the Court of Appeals for the Fifth Circuit in *Miller v. Amusement Enterprises, Inc.*<sup>14</sup> that the statutory language "place of entertainment" should be given full effect according to its generally accepted meaning and applied to recreational areas.

The remaining question is whether the operations of the Lake Nixon Club "affect commerce." We conclude that they do. Lake Nixon's customary "sources of entertainment ... move in commerce." The Club leases 15 paddle boats on a royalty basis from an Oklahoma company. Another boat was purchased from the same company. The Club's juke box was manufactured outside Arkansas and plays records manufactured outside the State. The legislative history indicates that mechanical sources of entertainment such as these were considered by

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<sup>14</sup> 394 F.2d 342 (1968)

Congress to be “sources of entertainment.”

*Reversed.*





GROVE CITY COLLEGE ET AL. v. BELL, SECRETARY OF EDUCATION, ET AL.  
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD  
CIRCUIT

465 U.S. 555

Argued November 29, 1983

Decided February 28, 1984

JUSTICE WHITE delivered the opinion of the Court.

Section 901(a) of Title IX of the Education Amendments of 1972 prohibits sex discrimination in “any education program or activity receiving Federal financial assistance,” and 902 directs agencies awarding most types of assistance to promulgate regulations to ensure that recipients adhere to that prohibition. Compliance with departmental regulations may be secured by termination of assistance “to the particular program, or part thereof, in which . . . noncompliance has been . . . found” or by “any other means authorized by law.”

This case presents several questions concerning the scope and operation of these provisions and the regulations established by the Department of Education. We must decide, first, whether Title IX applies at all to Grove City College, which accepts no direct assistance but enrolls students who receive federal grants that must be used for educational purposes. If so, we must identify the “education program or activity” at Grove City that is “receiving Federal financial assistance” and determine whether federal assistance to that program may be terminated solely because the College violates the Department’s regulations by refusing to execute an Assurance of Compliance with Title IX.

I

Petitioner Grove City College is a private, coeducational, liberal arts college that has sought to preserve its institutional autonomy by consistently refusing state and federal financial assistance. Grove City’s desire to avoid federal oversight has led it to decline to participate, not only in direct institutional aid programs, but also in federal student assistance programs under which the College would be required to assess students’ eligibility and to determine the amounts of loans, work-study funds, or grants they should receive. Grove City has, however, enrolled a large number of students who receive Basic Educational Opportunity Grants (BEOG’s), under the Department of Education’s Alternate Disbursement System (ADS).

The Department concluded that Grove City was a “recipient” of “Federal financial assistance” as those terms are defined in the regulations implementing Title IX, and, in July 1977, it requested that the College execute the Assurance of Compliance

When Grove City persisted in refusing to execute an Assurance, the Department initiated proceedings to declare the College and its students ineligible to receive BEOG’s. The Administrative Law Judge held that the federal financial assistance received by Grove City obligated it to execute an Assurance of Compliance and entered an order terminating assistance

until Grove City “corrects its noncompliance with Title IX and satisfies the Department that it is in compliance” with the applicable regulations.

## II

In defending its refusal to execute the Assurance of Compliance required by the Department’s regulations, Grove City first contends that neither it nor any “education program or activity” of the College receives any federal financial assistance within the meaning of Title IX by virtue of the fact that some of its students receive BEOG’s and use them to pay for their education. We disagree.

Grove City provides a well-rounded liberal arts education and a variety of educational programs and student services. The question is whether any of those programs or activities “receiv[es] Federal financial assistance” within the meaning of Title IX when students finance their education with BEOG’s. The structure of the Education Amendments of 1972, in which Congress both created the BEOG program and imposed Title IX’s nondiscrimination requirement, strongly suggests an affirmative conclusion. BEOG’s were aptly characterized as a “centerpiece of the bill,” and Title IX “relate[d] directly to [its] central purpose.” In view of this connection and Congress’ express recognition of discrimination in the administration of student financial aid programs, it would indeed be anomalous to discover that one of the primary components of Congress’ comprehensive “package of federal aid,” was not intended to trigger coverage under Title IX.

It is not surprising to find, therefore, that the language of 901(a) contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students. The linchpin of Grove City’s argument that none of its programs receives any federal assistance is a perceived distinction between direct and indirect aid, a distinction that finds no support in the text of 901(a). Nothing in 901(a) suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. Our reluctance grows when we pause to consider the available evidence of Congress’ intent.

The economic effect of direct and indirect assistance often is indistinguishable, and the BEOG program was structured to ensure that it effectively supplements the College’s own financial aid program. Congress undoubtedly comprehended this reality in enacting the Education Amendments of 1972. The legislative history of the Amendments is replete with statements evincing Congress’ awareness that the student assistance programs established by the Amendments would significantly aid colleges and universities. 14 In fact, one of the stated purposes of the student aid provisions was to “provid[e] assistance to institutions of higher education.”

With the benefit of clear statutory language, powerful evidence of Congress’ intent, and a longstanding and coherent administrative construction of the phrase “receiving Federal financial assistance,” we have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City’s students rather than directly to one of the College’s educational programs. There remains the question, however, of identifying the “education program or activity” of the College that can properly be characterized as “receiving” federal assistance through grants to some of the students attending the College.

## III

An analysis of Title IX's language and legislative history led us to conclude in *North Haven Board of Education v. Bell*, that "an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitations of 901 and 902." Although the legislative history contains isolated suggestions that entire institutions are subject to the nondiscrimination provision whenever one of their programs receives federal assistance, we cannot accept the Court of Appeals' conclusion that in the circumstances present here Grove City itself is a "program or activity" that may be regulated in its entirety.

If Grove City participated in the BEOG program through the RDS, we would have no doubt that the "education program or activity receiving Federal financial assistance" would not be the entire College; rather, it would be its student financial aid program. RDS institutions receive federal funds directly, but can use them only to subsidize or expand their financial aid programs and to recruit students who might otherwise be unable to enroll. In short, the assistance is earmarked for the recipient's financial aid program. Only by ignoring Title IX's program-specific language could we conclude that funds received under the RDS, awarded to eligible students, and paid back to the school when tuition comes due represent federal aid to the entire institution.

We see no reason to reach a different conclusion merely because Grove City has elected to participate in the ADS. Although Grove City does not itself disburse students' awards, BEOG's clearly augment the resources that the College itself devotes to financial aid. As is true of the RDS, however, the fact that federal funds eventually reach the College's general operating budget cannot subject Grove City to institutionwide coverage. Grove City's choice of administrative mechanisms, we hold, neither expands nor contracts the breadth of the "program or activity" - the financial aid program - that receives federal assistance and that may be regulated under Title IX.

To the extent that the Court of Appeals' holding that BEOG's received by Grove City's students constitute aid to the entire institution rests on the possibility that federal funds received by one program or activity free up the College's own resources for use elsewhere, the Court of Appeals' reasoning is doubly flawed. First, there is no evidence that the federal aid received by Grove City's students results in the diversion of funds from the College's own financial aid program to other areas within the institution. Second, and more important, the Court of Appeals' assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal assistance earmarked for use elsewhere within the institution is inconsistent with the program-specific nature of the statute. Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such indirect benefits. Under the Court of Appeals' theory, an entire school would be subject to Title IX merely because one of its students received a small BEOG or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent.

We conclude that the receipt of BEOG's by some of Grove City's students does not trigger institutionwide coverage under Title IX. In purpose and effect, BEOG's represent federal financial assistance to the College's own financial aid program, and it is that program that may

properly be regulated under Title IX.

V

Since Grove City operates an “education program or activity receiving Federal financial assistance,” the Department may properly demand that the College execute an Assurance of Compliance with Title IX.

A refusal to execute a proper program-specific Assurance of Compliance warrants termination of federal assistance to the student financial aid program. The College’s contention that termination must be preceded by a finding of actual discrimination finds no support in the language of 902, which plainly authorizes that sanction to effect “[c]ompliance with any requirement adopted pursuant to this section.” We conclude, therefore, that the Department may properly condition federal financial assistance on the recipient’s assurance that it will conduct the aided program or activity in accordance with Title IX and the applicable regulations.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

The Court today concludes that Grove City College is “receiving Federal financial assistance” within the meaning of Title IX of the Education Amendments of 1972, because a number of its students receive federal education grants. As the Court persuasively demonstrates in Part II of its opinion, that conclusion is dictated by “the need to accord [Title IX] a sweep as broad as its language”; by reference to the analogous statutory language and legislative history of Title VI of the Civil Rights Act of 1964; by reliance on the unique postenactment history of Title IX; and by recognition of the strong congressional intent that there is no “substantive difference between direct institutional assistance and aid received by a school through its students.” For these same reasons, however, I cannot join Part III of the Court’s opinion, in which the Court interprets the language in Title IX that limits application of the statute to “any education program or activity” receiving federal moneys. By conveniently ignoring these controlling indicia of congressional intent, the Court also ignores the primary purposes for which Congress enacted Title IX. The result - allowing Title IX coverage for the College’s financial aid program, but rejecting institutionwide coverage even though federal moneys benefit the entire College - may be superficially pleasing to those who are uncomfortable with federal intrusion into private educational institutions, but it has no relationship to the statutory scheme enacted by Congress.

In determining the scope of Title IX coverage, the primary focus should be on the purposes meant to be served by the particular federal funds received by the institution. In this case, Congress has clearly indicated that BEOG moneys are intended to benefit any college or university that enrolls students receiving such grants. As the Court repeatedly recognizes: “The legislative history of the [Education Amendments of 1972] is replete with statements evincing Congress’ awareness that the student assistance programs established by the amendments would significantly aid colleges and universities.”

In many respects, therefore, Congress views financial aid to students, and in particular BEOG’s, as the functional equivalent of general aid to institutions. Given this undeniable and clearly stated congressional purpose, it would seem to be self-evident that Congress intended colleges or universities enrolling students who receive BEOG’s to be covered, in their entirety, by the antidiscrimination provisions of Title IX. That statute’s primary purpose, after all, is to ensure that federal moneys are not used to support discriminatory practices.

Under the Court’s holding, in contrast, Grove City College is prohibited from discriminating on the basis of sex in its own “financial aid program,” but is free to discriminate in other “programs or activities” operated by the institution. Underlying this result is the unstated and unsupported assumption that moneys received through BEOG’s are meant only to be utilized by the College’s financial aid program. But it is undisputed that BEOG moneys, paid to the institution as tuition and fees and used in the general operating budget, are utilized to support most, and perhaps all, of the facilities and services that together constitute Grove City College.

The absurdity of the Court’s decision is further demonstrated by examining its practical effect. According to the Court, the “financial aid program” at Grove City College may not discriminate on the basis of sex because it is covered by Title IX, but the College is not prohibited from discriminating in its admissions, its athletic programs, or even its various academic departments. The Court thus sanctions practices that Congress clearly could not have intended: for example, after today’s decision, Grove City College would be free to segregate male and female students in classes run by its mathematics department. This would be so even though the affected students are attending the College with the financial assistance provided by federal funds. If anything about Title IX were ever certain, it is that discriminatory practices like the one just described were meant to be prohibited by the statute.

In sum, the program-specific language in Title IX was designed to ensure that the reach of the statute is dependent upon the scope of federal financial assistance provided to an institution. When that financial assistance is clearly intended to serve as federal aid for the entire institution, the institution as a whole should be covered by the statute’s prohibition on sex discrimination. Any other interpretation clearly disregards the intent of Congress and severely weakens the antidiscrimination provisions included in Title IX. I therefore cannot join in Part III of the Court’s opinion.





## PGA TOUR, INC. v. MARTIN

000 U.S. 00-24

Argued January 17, 2001

Decided May 29, 2001

MR. JUSTICE STEVENS delivered the opinion of the Court.

This case raises two questions concerning the application of the Americans with Disabilities Act of 1990 to a gifted athlete: first, whether the Act protects access to professional golf tournaments by a qualified entrant with a disability; and second, whether a disabled contestant may be denied the use of a golf cart because it would “fundamentally alter the nature” of the tournaments to allow him to ride when all other contestants must walk.

Petitioner PGA TOUR, Inc., a nonprofit entity formed in 1968, sponsors and cosponsors professional golf tournaments conducted on three annual tours. About 200 golfers participate in the PGA TOUR; about 170 in the NIKE TOUR; and about 100 in the SENIOR PGA TOUR. PGA TOUR and NIKE TOUR tournaments typically are 4-day events, played on courses leased and operated by petitioner. The entire field usually competes in two 18-hole rounds played on Thursday and Friday; those who survive the “cut” play on Saturday and Sunday and receive prize money in amounts determined by their aggregate scores for all four rounds. The revenues generated by television, admissions, concessions, and contributions from cosponsors amount to about \$300 million a year, much of which is distributed in prize money.

There are various ways of gaining entry into particular tours. For example, a player who wins three NIKE TOUR events in the same year, or is among the top-15 money winners on that tour, earns the right to play in the PGA TOUR. Additionally, a golfer may obtain a spot in an official tournament through successfully competing in “open” qualifying rounds, which are conducted the week before each tournament. Most participants, however, earn playing privileges in the PGA TOUR or NIKE TOUR by way of a three-stage qualifying tournament known as the “Q-School.”

Any member of the public may enter the Q-School by paying a \$3,000 entry fee and submitting two letters of reference from, among others, PGA TOUR or NIKE TOUR members. The \$3,000 entry fee covers the players' greens fees and the cost of golf carts, which are permitted during the first two stages, but which have been prohibited during the third stage since 1997. Each year, over a thousand contestants compete in the first stage, which consists of four 18-hole rounds at different locations. Approximately half of them make it to the second stage, which also includes 72 holes. Around 168 players survive the second stage and advance to the final one, where they compete over 108 holes. Of those finalists, about a fourth qualify for membership in the PGA TOUR, and the rest gain membership in the NIKE TOUR. The significance of making it into either tour is illuminated by the fact that there are about 25 million golfers in the country. Three sets of rules govern competition in tour events. First, the “Rules of Golf,” jointly written by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of Scotland, apply to the game as it is played, not only by millions of amateurs on

public courses and in private country clubs throughout the United States and worldwide, but also by the professionals in the tournaments conducted by petitioner, the USGA, the Ladies' Professional Golf Association, and the Senior Women's Golf Association. Those rules do not prohibit the use of golf carts at any time.

Second, the "Conditions of Competition and Local Rules," often described as the "hard card," apply specifically to petitioner's professional tours. The hard cards for the PGA TOUR and NIKE TOUR require players to walk the golf course during tournaments, but not during open qualifying rounds. On the SENIOR PGA TOUR, which is limited to golfers age 50 and older, the contestants may use golf carts. Most seniors, however, prefer to walk.

Third, "Notices to Competitors" are issued for particular tournaments and cover conditions for that specific event. Such a notice may, for example, explain how the Rules of Golf should be applied to a particular water hazard or man-made obstruction. It might also authorize the use of carts to speed up play when there is an unusual distance between one green and the next tee.

The basic Rules of Golf, the hard cards, and the weekly notices apply equally to all players in tour competitions. As one of petitioner's witnesses explained with reference to "the Masters Tournament, which is golf at its very highest level ... the key is to have everyone tee off on the first hole under exactly the same conditions and all of them be tested over that 72-hole event under the conditions that exist during those four days of the event."

Casey Martin is a talented golfer. As an amateur, he won 17 Oregon Golf Association junior events before he was 15, and won the state championship as a high school senior. He played on the Stanford University golf team that won the 1994 National Collegiate Athletic Association (NCAA) championship. As a professional, Martin qualified for the NIKE TOUR in 1998 and 1999, and based on his 1999 performance, qualified for the PGA TOUR in 2000. In the 1999 season, he entered 24 events, made the cut 13 times, and had 6 top-10 finishes, coming in second twice and third once.

Martin is also an individual with a disability as defined in the Americans with Disabilities Act of 1990 (ADA or Act). Since birth he has been afflicted with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart. The disease is progressive; it causes severe pain and has atrophied his right leg. During the latter part of his college career, because of the progress of the disease, Martin could no longer walk an 18-hole golf course. Walking not only caused him pain, fatigue, and anxiety, but also created a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required. For these reasons, Stanford made written requests to the Pacific 10 Conference and the NCAA to waive for Martin their rules requiring players to walk and carry their own clubs. The requests were granted.

When Martin turned pro and entered petitioner's Q-School, the hard card permitted him to use a cart during his successful progress through the first two stages. He made a request, supported by detailed medical records, for permission to use a golf cart during the third stage. Petitioner refused to review those records or to waive its walking rule for the third stage. Martin therefore filed this action.

At trial, petitioner did not contest the conclusion that Martin has a disability covered by the ADA, or the fact "that his disability prevents him from walking the course during a round of

golf.” Rather, petitioner asserted that the condition of walking is a substantive rule of competition, and that waiving it as to any individual for any reason would fundamentally alter the nature of the competition. Petitioner’s evidence included the testimony of a number of experts, among them some of the greatest golfers in history. Arnold Palmer, Jack Nicklaus, and Ken Venturi explained that fatigue can be a critical factor in a tournament, particularly on the last day when psychological pressure is at a maximum. Their testimony makes it clear that, in their view, permission to use a cart might well give some players a competitive advantage over other players who must walk. They did not, however, express any opinion on whether a cart would give Martin such an advantage.

Rejecting petitioner’s argument that an individualized inquiry into the necessity of the walking rule in Martin’s case would be inappropriate, the District Court stated that it had “the independent duty to inquire into the purpose of the rule at issue, and to ascertain whether there can be a reasonable modification made to accommodate plaintiff without frustrating the purpose of the rule” and thereby fundamentally altering the nature of petitioner’s tournaments. The judge found that the purpose of the rule was to inject fatigue into the skill of shot-making, but that the fatigue injected “by walking the course cannot be deemed significant under normal circumstances.” Furthermore, Martin presented evidence, and the judge found, that even with the use of a cart, Martin must walk over a mile during an 18-hole round, and that the fatigue he suffers from coping with his disability is “undeniably greater” than the fatigue his able-bodied competitors endure from walking the course. As the judge observed:

“[P]laintiff is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg. To perceive that the cart puts him--with his condition--at a competitive advantage is a gross distortion of reality.”

On the merits, because there was no serious dispute about the fact that permitting Martin to use a golf cart was both a reasonable and a necessary solution to the problem of providing him access to the tournaments, the Court of Appeals regarded the central dispute as whether such permission would “fundamentally alter” the nature of the PGA TOUR or NIKE TOUR. Like the District Court, the Court of Appeals viewed the issue not as “whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so.” That issue turned on “an intensively fact-based inquiry,” and, the court concluded, had been correctly resolved by the trial judge. In its words, “[a]ll that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability.”

Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals. In studying the need for such legislation, Congress found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” Congress noted that the many forms such discrimination takes include “outright intentional exclusion” as well as the “failure to make modifications to existing facilities and practices.” After thoroughly investigating the problem, Congress concluded that there was a “compelling need” for a “clear and comprehensive national mandate” to eliminate discrimination against disabled individuals, and to integrate them “into the economic and social mainstream of American life.”

In the ADA, Congress provided that broad mandate. To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III). At issue now, as a threshold matter, is the applicability of Title III to petitioner’s golf tours and qualifying rounds, in particular to petitioner’s treatment of a qualified disabled golfer wishing to compete in those events.

Title III of the ADA prescribes, as a “[g]eneral rule”

The question whether petitioner has violated that rule depends on a proper construction of the term “discrimination,” which is defined by Title III to include:

“a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.”

Petitioner does not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments. Martin’s claim thus differs from one that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity. In such cases, an accommodation might be reasonable but not necessary. In this case, however, the narrow dispute is whether allowing Martin to use a golf cart, despite the walking requirement that applies to the PGA TOUR, the NIKE TOUR, and the third stage of the Q-School, is a modification that would “fundamentally alter the nature” of those events.

In theory, a modification of petitioner’s golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition. We are not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense.

As an initial matter, we observe that the use of carts is not itself inconsistent with the

fundamental character of the game of golf. From early on, the essence of the game has been shot-making--using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible. That essential aspect of the game is still reflected in the very first of the Rules of Golf, which declares: "The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules." Over the years, there have been many changes in the players' equipment, in golf course design, in the Rules of Golf, and in the method of transporting clubs from hole to hole. Originally, so few clubs were used that each player could carry them without a bag. Then came golf bags, caddies, carts that were pulled by hand, and eventually motorized carts that carried players as well as clubs. "Golf carts started appearing with increasing regularity on American golf courses in the 1950's. Today they are everywhere. And they are encouraged. For one thing, they often speed up play, and for another, they are great revenue producers." There is nothing in the Rules of Golf that either forbids the use of carts, or penalizes a player for using a cart. That set of rules, as we have observed, is widely accepted in both the amateur and professional golf world as the rules of the game. The walking rule that is contained in petitioner's hard cards, based on an optional condition buried in an appendix to the Rules of Golf, is not an essential attribute of the game itself.

Indeed, the walking rule is not an indispensable feature of tournament golf either. As already mentioned, petitioner permits golf carts to be used in the SENIOR PGA TOUR, the open qualifying events for petitioner's tournaments, the first two stages of the Q-School, and, until 1997, the third stage of the Q-School as well. Moreover, petitioner allows the use of carts during certain tournament rounds in both the PGA TOUR and the NIKE TOUR. In addition, although the USGA enforces a walking rule in most of the tournaments that it sponsors, it permits carts in the Senior Amateur and the Senior Women's Amateur championships.

Petitioner, however, distinguishes the game of golf as it is generally played from the game that it sponsors in the PGA TOUR, NIKE TOUR, and (at least recently) the last stage of the Q-School--golf at the "highest level." According to petitioner, "[t]he goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules." The waiver of any possibly "outcome-affecting" rule for a contestant would violate this principle and therefore, in petitioner's view, fundamentally alter the nature of the highest level athletic event. The walking rule is one such rule, petitioner submits, because its purpose is "to inject the element of fatigue into the skill of shot-making," and thus its effect may be the critical loss of a stroke. As a consequence, the reasonable modification Martin seeks would fundamentally alter the nature of petitioner's highest level tournaments even if he were the only person in the world who has both the talent to compete in those elite events and a disability sufficiently serious that he cannot do so without using a cart.

The force of petitioner's argument is, first of all, mitigated by the fact that golf is a game in which it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome. For example, changes in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. A lucky bounce may save a shot or two. Whether such happenstance events are more or less probable than the likelihood that a golfer afflicted

with Klippel-Trenaunay-Weber Syndrome would one day qualify for the NIKE TOUR and PGA TOUR, they at least demonstrate that pure chance may have a greater impact on the outcome of elite golf tournaments than the fatigue resulting from the enforcement of the walking rule.

Further, the factual basis of petitioner's argument is undermined by the District Court's finding that the fatigue from walking during one of petitioner's 4-day tournaments cannot be deemed significant. The District Court credited the testimony of a professor in physiology and expert on fatigue, who calculated the calories expended in walking a golf course (about five miles) to be approximately 500 calories--"nutritionally ... less than a Big Mac." What is more, that energy is expended over a 5-hour period, during which golfers have numerous intervals for rest and refreshment. In fact, the expert concluded, because golf is a low intensity activity, fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients. And even under conditions of severe heat and humidity, the critical factor in fatigue is fluid loss rather than exercise from walking.

Moreover, when given the option of using a cart, the majority of golfers in petitioner's tournaments have chosen to walk, often to relieve stress or for other strategic reasons. As NIKE TOUR member Eric Johnson testified, walking allows him to keep in rhythm, stay warmer when it is chilly, and develop a better sense of the elements and the course than riding a cart.

Even if we accept the factual predicate for petitioner's argument--that the walking rule is "outcome affecting" because fatigue may adversely affect performance--its legal position is fatally flawed. Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, and to that end Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered. To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.

Under the ADA's basic requirement that the need of a disabled person be evaluated on an individual basis, we have no doubt that allowing Martin to use a golf cart would not fundamentally alter the nature of petitioner's tournaments. As we have discussed, the purpose of the walking rule is to subject players to fatigue, which in turn may influence the outcome of tournaments. Even if the rule does serve that purpose, it is an uncontested finding of the District Court that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking." The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart. A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to "fundamentally alter" the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires. As a result, Martin's request for a waiver of the walking rule should have been granted.

The ADA admittedly imposes some administrative burdens on the operators of places of

public accommodation that could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified persons with disabilities. But surely, in a case of this kind, Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE SCALIA, with whom MR. JUSTICE THOMAS joins, dissenting.

In my view today's opinion exercises a benevolent compassion that the law does not place it within our power to impose. The judgment distorts the text of Title III, the structure of the ADA, and common sense. I respectfully dissent.

The Court holds that a professional sport is a place of public accommodation and that respondent is a "customer" of "competition" when he practices his profession. The Court pronounces respondent to be a "customer" of the PGA TOUR or of the golf courses on which it is played. That seems to me quite incredible. The PGA TOUR is a professional sporting event, staged for the entertainment of a live and TV audience, the receipts from whom (the TV audience's admission price is paid by advertisers) pay the expenses of the tour, including the cash prizes for the winning golfers. The professional golfers on the tour are no more "enjoying" (the statutory term) the entertainment that the tour provides, or the facilities of the golf courses on which it is held, than professional baseball players "enjoy" the baseball games in which they play or the facilities of Yankee Stadium. To be sure, professional ballplayers participate in the games, and use the ballfields, but no one in his right mind would think that they are customers of the American League or of Yankee Stadium. They are themselves the entertainment that the customers pay to watch. And professional golfers are no different.

As the Court points out, the ADA specifically identifies golf courses as one of the covered places of public accommodation. Respondent did not seek to "exercise" or "recreate" at the PGA TOUR events; he sought to make money (which is why he is called a professional golfer). He was not a customer buying recreation or entertainment; he was a professional athlete selling it. That is the reason (among others) the Court's reliance upon Civil Rights Act cases like *Daniel v. Paul* is misplaced. A professional golfer's practicing his profession is not comparable to John Q. Public's frequenting "a 232-acre amusement area with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar."

Since it has held (or assumed) professional golfers to be customers "enjoying" the "privilege" that consists of PGA TOUR golf; and since it inexplicably regards the rules of PGA TOUR golf as merely "policies, practices, or procedures" by which access to PGA TOUR golf is provided, the Court must then confront the question whether respondent's requested modification of the supposed policy, practice, or procedure of walking would "fundamentally alter the nature" of the PGA TOUR game. The Court attacks this "fundamental alteration"

analysis by asking two questions: first, whether the “essence” or an “essential aspect” of the sport of golf has been altered; and second, whether the change, even if not essential to the game, would give the disabled player an advantage over others and thereby “fundamentally alter the character of the competition.” It answers no to both.

Before considering the Court’s answer to the first question, it is worth pointing out that the assumption which underlies that question is false. Nowhere is it writ that PGA TOUR golf must be classic “essential” golf. Why cannot the PGA TOUR, if it wishes, promote a new game, with distinctive rules (much as the American League promotes a game of baseball in which the pitcher’s turn at the plate can be taken by a “designated hitter”)? If members of the public do not like the new rules--if they feel that these rules do not truly test the individual’s skill at “real golf” (or the team’s skill at “real baseball”) they can withdraw their patronage. But the rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone--not even the Supreme Court of the United States--can pronounce one or another of them to be “nonessential” if the rulemaker (here the PGA TOUR) deems it to be essential.

If one assumes, however, that the PGA TOUR has some legal obligation to play classic, Platonic golf--and if one assumes the correctness of all the other wrong turns the Court has made to get to this point--then we Justices must confront what is indeed an awesome responsibility. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a “fundamental” aspect of golf.

Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question. It is quite impossible to say that any of a game’s arbitrary rules is “essential.” Eighteen-hole golf courses, 10-foot-high basketball hoops, 90-foot baselines, 100-yard football fields--all are arbitrary and none is essential. Many, indeed, consider walking to be the central feature of the game of golf--hence Mark Twain’s classic criticism of the sport: “a good walk spoiled.” Having concluded that dispensing with the walking rule would not violate federal-Platonic “golf” (and, implicitly, that it is federal-Platonic golf, and no other, that the PGA TOUR can insist upon) the Court moves on to the second part of its test: the competitive effects of waiving this nonessential rule. In this part of its analysis, the Court first finds that the effects of the change are “mitigated” by the fact that in the game of golf weather, a “lucky bounce,” and “pure chance” provide different conditions for each competitor and individual ability may not “be the sole determinant of the outcome.” I guess that is why those who follow professional golfing consider Jack Nicklaus the luckiest golfer of all time, only to be challenged of late by the phenomenal luck of Tiger Woods. The Court’s empiricism is unpersuasive. “Pure chance” is randomly distributed among the players, but allowing respondent to use a cart gives him a “lucky” break every time he plays.

In resolving that second step--determining whether waiver of the “nonessential” rule will have an impermissible “competitive effect”--by measuring the athletic capacity of the requesting

individual, and asking whether the special dispensation would do no more than place him on a par (so to speak) with other competitors, the Court guarantees that future cases of this sort will have to be decided on the basis of individualized factual findings. Which means that future cases of this sort will be numerous, and a rich source of lucrative litigation. One can envision the parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball. (If they are successful, the only thing that could prevent a court order giving the kid four strikes would be a judicial determination that, in baseball, three strikes are metaphysically necessary, which is quite absurd.)

The statute, of course, provides no basis for this individualized analysis that is the Court's last step on a long and misguided journey. The statute seeks to assure that a disabled person's disability will not deny him equal access to (among other things) competitive sporting events--not that his disability will not deny him an equal chance to win competitive sporting events. The latter is quite impossible, since the very nature of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence. This unequal distribution is precisely what determines the winners and losers--and artificially to "even out" that distribution, by giving one or another player exemption from a rule that emphasizes his particular weakness, is to destroy the game. That is why the "handicaps" that are customary in social games of golf--which, by adding strokes to the scores of the good players and subtracting them from scores of the bad ones, "even out" the varying abilities--are not used in professional golf.

My belief that today's judgment is clearly in error should not be mistaken for a belief that the PGA TOUR clearly ought not allow respondent to use a golf cart. That is a close question, on which even those who compete in the PGA TOUR are apparently divided; but it is a different question from the one before the Court. Just as it is a different question whether the Little League ought to give disabled youngsters a fourth strike, or some other waiver from the rules that makes up for their disabilities. In both cases, whether they ought to do so depends upon (1) how central to the game that they have organized (and over whose rules they are the master) they deem the waived provision to be, and (2) how competitive--how strict a test of raw athletic ability in all aspects of the competition--they want their game to be. But whether Congress has said they must do so depends upon the answers to the legal questions I have discussed above--not upon what this Court sentimentally decrees to be "decent, tolerant, [and] progressive."

And it should not be assumed that today's decent, tolerant, and progressive judgment will, in the long run, accrue to the benefit of sports competitors with disabilities. Now that it is clear courts will review the rules of sports for "fundamentalness," organizations that value their autonomy have every incentive to defend vigorously the necessity of every regulation. They may still be second-guessed in the end as to the Platonic requirements of the sport, but they will assuredly lose if they have at all wavered in their enforcement. The lesson the PGA TOUR and other sports organizations should take from this case is to make sure that the same written rules are set forth for all levels of play, and never voluntarily to grant any modifications. The second lesson is to end open tryouts. I doubt that, in the long run, even disabled athletes will be well served by these incentives that the Court has created.

Complaints about this case are not "properly directed to Congress." They are properly directed to this Court's Kafkaesque determination that professional sports organizations, and the

fields they rent for their exhibitions, are “places of public accommodation” to the competing athletes, and the athletes themselves “customers” of the organization that pays them; its Alice in Wonderland determination that there are such things as judicially determinable “essential” and “nonessential” rules of a made-up game; and its Animal Farm determination that fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one’s lack of ability (or at least no one’s lack of ability so pronounced that it amounts to a disability) will be a handicap. The year was 2001, and “everybody was finally equal.

## APPENDICES

### GLOSSARY OF LEGAL TERMS

Stare decisis: Literally, “Let the decision stand.” To make a decision based primarily upon past precedent.

PER CURIAM.

Per se:

writ of certiorari

*See Meat Cutters v. Jewel Tea, supra. See also Smith v. Pro-Football*, 420 F. Supp. 738 (D.D.C. 1976); *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462, 496-500 (E.D. Pa. 1972); *Boston Professional Hockey Ass’n., Inc. v. Cheevers*, 348 F. Supp. 261, 267 [\*\*21] [\*615] (D. Mass.), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972).

. *See Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974); *Robertson v. National Basketball Ass’n.*, 389 F. Supp. 867 (S.D. N.Y. 1975). *See also Radovich v. National Football League, supra; Smith v. Pro-Football, supra; Boston Professional Hockey Ass’n., Inc. v. Cheevers, supra; Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971), *stay vacated*, 401 U.S. 1204, 91 S. Ct. 672, 28 L. Ed. 2d 206 (1971) (Justice Douglas, Opinion in Chambers).

*See e.g., Klor’s v. Broadway-Hale Stores*, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959); *Fashion Originators’ Guild of America v. FTC*, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941). *See generally Worthen Bank & Trust Co. v. National BankAmericard Inc., supra.*

*See United States v. National Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

This is particularly true where, as here, the alleged restraint does not completely eliminate competition for players’ services. *Compare Kapp v. National Football League, supra [\*\*38] with Smith v. Pro-Football, supra.*

*See Kansas City Royals v. Major League Baseball Players*, 532 F.2d 615, 632 (8th Cir. 1976).

## THE ESSENTIAL ANTITRUST AND SPORTS REGULATION STATUTES

**SHERMAN ACT, Statute 209, 15 U.S.C.A.**

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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the courts.
2. Every person who shall monopolize, or attempt to monopolize, or to 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 felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

**Section 901(a) of Title IX of the Education Amendments of 1972 provides:**

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

**Section 844 of the Education Amendments of 1974 further provides:**

The Secretary of Health, Education, and Welfare shall prepare and publish proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

[Institutions] must provide reasonable opportunities for such award (of financial assistance) for members of each sex in proportion to the number of students of each sex participating in !!! inter-collegiate athletics.

The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion

which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club or intramural athletics. “provide equal athletic opportunities for members of both sexes.” In determining whether an institution is providing equal opportunity in intercollegiate athletics the regulation requires the Department to consider, among others, the following factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) Provision and maintenance of equipment and supplies;
- (3) Scheduling of games and practice times;
- (4) Travel and per diem expenses;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training services and facilities;
- (9) Provision of housing and dining services and facilities; and
- (10) Publicity

#### Title III of ADA

“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” given petitioner’s suggested limitation, any less broadly.

The question whether petitioner has violated that rule depends on a proper construction of the term “discrimination,” which is defined by Title III to include:

“a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.”