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Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws

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JUDICIAL REINTERPRETATION OF STATUTES: THE EXAMPLE OF BASEBALL AND THE ANTITRUST LAWS

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I. INTRODUCTION

Because of the increasing codification of the law, the interpretation of statutes has become the major task of our courts. As might be expected, the literature concerning statutory construction is voluminous.[1] However, the majority of the commentary does not address itself to the peculiar problems courts face when they are called upon to review prior interpretations of statutes. This article will attempt to disclose the questions brought about in this circumstance, the solutions courts have hit upon and, by use of example, the practical ramifications of the solutions.

Traditionally, courts have either steadfastly refused to overrule prior statutory interpretations, thereby paying strict credence to the doctrine of stare decisis, or have indicated a willingness to review and reexamine prior constructions, at least to some degree. Thus, an essential question posed by this inquiry is whether there are adequate reasons for applying stare decisis more rigidly to precedents of statutory interpretation than to common law precedents.

The prevailing view is that stare decisis should be adhered to more strictly when statutory interpretation is implicated. The main thrust of this reasoning is that a usurpation of the legislative function occurs when courts reverse an earlier decision concerning statutory construction. The belief is that courts are legislating because by not following precedent they actually change the meaning of the statute previously construed. This is said to impinge upon the legislative function. If the legislature disagrees with the initial interpretation, the argument runs, then it has the sole mandate to change the law by amending the statute.

Assuming that one views the legislative and judicial functions of this circumstance this simplistically, the supposed legislative review of judicial interpretations of statutes is fraught with difficulty. For example, the reasoning presupposes that legislatures are responsive to judicial edicts. In

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1. *See, e.g.*, C. SANDS, STATUTES AND STATUTORY CONSTRUCTION (4th ed. 1973) (six volumes). *See also* P. LANGAN, MAXWELL ON THE INTERPRETATION OF STATUTES (12th ed. 1969).

many instances this may not be an accurate presupposition. Legislatures are usually extremely busy while in session. The issue presented by a court reversal of a prior statutory construction may be considered trivial or of little importance compared to the other questions confronting a legislature. Further, the nature of legislative bodies may restrict responsiveness to judicial mandates. This is part and parcel of a recognized inertia problem in legislative bodies.[2] As Dean Pound observed, legislatures are primarily designed and organized for action on appropriations and for political legislation, not for the evaluation of legal matters arising from the promulgation of statutes.[3]

Given these rather general observations about the nature of the problem, a close analysis of a particular sequence of decisions involving an initial interpretation of a statute and subsequent judicial confrontations with that interpretation over a period of years will particularize various aspects of the difficulty facing the courts and perhaps suggest some solutions. The so-called antitrust exemption enjoyed by organized baseball[4] affords an excellent departure point from which to scrutinize and speculate about the tasks faced by the judiciary when reevaluating statutory interpretations and to illustrate pointedly the logical binds in which courts can find themselves.

II. Early History of Organized Baseball

In 1922, the Supreme Court held that organized baseball was not subject to antitrust violations under the Sherman Act.[5] In order to understand the significance to professional baseball of this decision and the later litigation that sought to reverse this interpretation of the Sherman Act, a brief recapitulation of the origins and early travails of the sport is necessary.

The playing of baseball for money began in 1864 with the formation of the first professional baseball club, the Cincinnati Red Stockings.[6] The first professional league was formed in 1871 and existed until 1875. Sixteen of the original twenty-five clubs were economic failures. In 1876, eight of the nine survivors formed the National League, but the financial plight of the fledgling sport failed to improve. By the end of the 1879 season, only

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2. *See* H. Hart & A. Sacks, Materials for a General View of the American Legal System 1154-57 (tentative ed. 1956) (interesting discussion of the implications of the failure of Congress to legislate).

3. Pound, *Anachronisms in the Law*, 3 J. Am. Jud. Soc'y 142 (1919).

4. The term "antitrust exemption" is a misnomer for the status organized baseball has with regard to the antitrust laws. Congress has not given baseball a statutory exemption; the nonapplicability of the Sherman Act to baseball is the result of judicial construction of the statute. Thus, the Sherman Act has been construed as not covering organized baseball; no exception to the statute for baseball has been created.

5. Federal Baseball Club v. National League, 259 U.S. 200 (1922), *aff'g* 269 F. 681 (D.C. Cir. 1920) (construing 15 U.S.C. § 1 (1970)).

6. Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary, Organized Baseball, H.R. Rep. No. 2002, 82d Cong., 2d Sess. 17-18 (1952) [hereinafter cited as House Report].

seven of a total of fifteen clubs admitted during the first four years of the league had survived.[7]

The major cause of this difficult beginning was the lack of any restraint on the movement of players. They were free to sign with the highest bidder, and jumping from club to club was common. Then, as now, a franchise's success depended in large measure on the performance of the team on the playing field. As a result, the wealthiest clubs attracted the star performers, and competition on the field became very uneven, further hindering the start of professional baseball. For example, the 1869 Cincinnati Red Stockings were undefeated in fifty-seven games. In 1875 the Boston Red Stockings were first-place finishers with a record seventy-one victories and eight losses. The Brooklyn Atlantics finished last with only two victories in forty-four games.[8]

The unrestricted competition for players resulted in player salaries accounting for two-thirds of the average club's budget. Finally, the seven survivors of the National League, in an attempt to remain in business, agreed not to compete for the services of any player frozen by a club prior to the 1880 season. Each club was initially allowed to freeze five players. The new rule resulted in lower payrolls and improved competition on the field.[9]

The reserve rule agreement became public in 1883 after the National League entered into a "National Agreement" with the old American Association, its strongest rival. This agreement, which marked the formal beginning of organized baseball, permitted each team to reserve up to eleven players and authorized fines for any team tampering with reserve lists.[10] Then a few years later a most significant and far-reaching addendum was incorporated into the agreement. The clubs agreed that player contracts and the attendant "reserved rights" were assignable within organized baseball. This addition essentially gave a team the power to buy, sell, and trade the services of ballplayers without their consent and was the precursor of the reserve clause binding players to one team ad infinitum.[11]

The tightening of the reserve system was caused to a great extent by competition or player wars between organized baseball and upstart leagues not subject to the National Agreement.[12] Prior to the turn of the century,

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7. *Id.* at 18-22.
8. *Id.*
9. *Id.* at 22, 111.
10. *Id.* at 26-27.
11. *Id.* at 29-31.
12. Since its inception, organized baseball has been involved in at least 13 commercial wars with outlaw leagues. The last challenge to organized baseball's market monopoly was the two-year war with the Federal League in 1914-15. The two major leagues of organized baseball bought out the Federal League to end the war. However, the failure of the Baltimore franchise of the Federal League to acquiesce in the buy-out resulted in the continuation of the antitrust suit the Federal League had filed against organized baseball. The ultimate end was the Supreme Court's refusal to apply the Sherman Act to organized baseball in Federal Baseball Club v. National League, 259 U.S. 200 (1922). It should be noted that since the Federal League's market monopoly

when organized baseball was struggling to establish itself, outlaw leagues frequently attempted to raid the rosters of clubs in organized baseball by offering higher salaries. The first war, between the National League and the original American Association in 1882, resulted in the National Agreement creating the interleague combination now called organized baseball.[13]

The competing outlaw leagues attacked organized baseball on two fronts: in competitive bidding for players already under contract to another club, and in rivalry over consumer markets.[14] The attraction of top players was vital to the success of any fledgling league. The free-market bidding resulted in increased salaries[15] and induced contract jumping by players on clubs in organized baseball.

Organized baseball sought to combat the raiding of the outlaw leagues by resort to the courts. By 1887, every player contract in organized baseball contained a reserve clause by which a player recognized the team's right to retain his services for the succeeding year. The club owners sought to have the courts declare the reserve clause a valid option to renew, which would effectively prohibit players from playing with clubs outside the organized baseball penumbra. The courts were not receptive to this approach initially and refused to enjoin ballplayers from changing leagues, holding the reserve clause unenforceable because of lack of mutuality, indefiniteness, and unconscionability.[16] Facile attempts to restrict the reserve clause to meet judicial objections were generally unsuccessful.[17] When the American League declared itself a major league in 1901 and began raiding National League rosters for players subject to the reserve system, thereby becoming an outlaw league, litigation failed to stop the open bidding for the talents of many players, including the legendary Napoleon Lajoie.[18]

Apart from the attempted enforcement of the reserve clause, organized baseball frequently tried to enforce player contracts with the aim of prohibiting athletes from breaching contracts and jumping from one club to another during the operative term of the contract. The results were almost

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challenge, three foreign leagues have challenged the player monopoly by signing players in contravention of organized baseball's reserve clause: the Mexican League (1946), the Cuban Winter League (1946-47), and the Quebec Provincial League (1947-48). Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 604 & n.148 (1953).

13. HOUSE REPORT, *supra* note 6, at 26-29.

14. Attempts to attract players were involved in every baseball war and competition with consumer markets was also included in seven other wars. *Id.*

15. For example, Ty Cobb's salary increased from $12,000 to $20,000 during the Federal League War and Walter Johnson's salary nearly tripled, going from $7,000 to $20,000. HOUSE REPORT, *supra* note 6, at 52-53.

16. *See, e.g.*, Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779, 781-85 (Sup. Ct. 1890); Philadelphia Ball Club, Ltd. v. Hallman, 8 Pa. County Ct. 57 (C.P. 1890).

17. *See* Griffin v. Brooklyn Ball Club, 68 App. Div. 566, 73 N.Y.S. 864, 872 (1902); HOUSE REPORT, *supra* note 6, at 36.

18. Philadelphia Baseball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902), *rev'g* 10 Pa. Dist. 309 (C.P. 1901). Lajoie jumped to Cleveland in the American League from the Philadelphia Phillies; his salary went from $2,400 to $5,500. Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 589 n.68 (1953).

as discouraging for organized baseball as were the attempts to enforce the reserve clause.[19] Courts were of the general opinion that player contracts were lacking in mutuality and not amenable to specific performance.[20]

As a consequence of failure in the courts, organized baseball resorted to extralegal methods to enforce contracts and prevent raiding. It is significant that organized baseball has not sought judicial enforcement of the reserve clause since 1902 or of the uniform player's contract since 1915. The tactics seized upon by organized baseball in the wars against outlaw leagues were boycotts against outsiders making offers to players, blacklists of players jumping leagues, salary wars for players' services, and games in direct competition with the newcomer's territory and schedule.[21]

The most effective weapon was the blacklist. Organized baseball simply threatened to prevent any player who ignored the reserve rule or jumped his contract from playing for any team in organized baseball for a period of from three years to life. Outlaw clubs were forced to offer substantially larger salaries in their raiding activities, reducing financial viability from the outset.[22] And organized baseball clubs did not hesitate to give ample salary increments to players wavering before offers from rival leagues.[23]

The extralegal techniques were demonstrably effective in combating the outlaw leagues. The wars resulted in either the extinction of the independent league or its joinder with organized baseball.[24] As noted, the current major league alignment of the National League and the American

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19. Unsuccessful attempts by organized baseball to enforce the reserve clause included: Weegham v. Killefer, 215 F. 168 (W.D. Mich. 1914); Brooklyn Baseball Club v. McGuire, 116 F. 783 (C.C.E.D. Pa. 1902); American Base Ball & Athletic Exhibition Co. v. Harper, 54 Cent. L. J. 449 (Mo. Cir. Ct. 1902); American League Baseball Club v. Chase, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914); Baltimore Base Ball Co. v. Hayden & Wiltse, 14 Pa. Dist. 529, 31 Pa. County Ct. 500 (C.P. 1905). *See* Neville, *Baseball and the Antitrust Laws,* 16 FORDHAM L. REV. 208, 210 n.6 (1947) (providing citations to similar cases).

20. Refer to cases in note 19 *supra.* The *Chase* litigation involved Hal Chase, one of the premier first basemen of his day. Chase was known as a troublemaker and gambler, and was implicated (as a gambler, not a player) but never indicted in the 1919 Black Sox Scandal. He was eventually banned from the game by Baseball Commissioner Landis. *See generally* E. ASINOF, EIGHT MEN OUT 14, 225 (1963). Chase would undoubtedly be in the Hall of Fame but for his off-the-field activities. Chase signed with Buffalo of the Federal League and the Chicago White Sox attempted to enjoin him from jumping leagues. American League Baseball Club v. Chase, 86 Misc. 441, 149 N.Y.S. 6, 8 (Sup. Ct. 1914). The court refused to grant the injunction because of the lack of mutuality in the standard player's contract then used. 149 N.Y.S. at 20. The contract provided for a 10-day cancellation by the club at any time while the player was bound by the reserve clause. *Id.* at 14.

21. HOUSE REPORT, *supra* note 6, at 35, 47, 79 (boycotts); *id.* at 77-81 (blacklists); *id.* at 51-52, 55 (price wars); *id.* at 35 (competing schedules).

22. *Id.* at 51-52, 55.

23. Refer to note 15 *supra.*

24. The Union Association (1884), Players League (1890), old American Association (1891), Atlantic Association (1909), and Federal League (1915) were forced into extinction. HOUSE REPORT, *supra* note 6, at 29, 35, 56-57. The old American Association (1883), new American Association (1902), American League (1903), Tri-State League (1907), California State League (1909), Cuban Winter League (1947), and Quebec Provincial League (1949) all merged with organized baseball. *Id.* at 26, 42, 47-48, 81-82.

League came about as a result of a settlement between warring factions.

The last challenge to the monopoly of organized baseball was the war occasioned by the formation of the Federal League in 1914. This confrontation is particularly important to baseball's legal history because it culminated in the Supreme Court holding in *Federal Baseball Club v. National League*[25] that organized baseball was not subject to the antitrust laws. The Federal League was underwritten by some wealthy, aggressive backers and all-out war ensued after organized baseball refused to declare it a major league. The Feds conducted an extensive campaign to obtain the services of established players.[26] Increased salaries resulted from a bidding war as organized baseball sought to retain its top stars. Litigation ensued as clubs sought to restrain players from jumping contracts and playing with Federal League teams.[27] And the Federal League and its constituent clubs brought a restraint-of-trade suit against organized baseball under sections 1 and 2 of the Sherman Act.

The financial pocket of the Federal League was seriously depleted by these maneuvers.[28] Finally in December of 1915, the Feds capitulated and entered into a peace agreement with organized baseball that called for the dissolution of the outlaw league and its constituent clubs.[29] The agreement convincingly reestablished organized baseball's monopoly.

However, the Baltimore franchise of the Federal League refused to enter into the dissolution agreement and continued to prosecute the antitrust suit against the National and American Leagues. Specifically the plaintiff alleged that the National Agreement violated the antitrust laws because players were bound to their teams by the reserve clause, which made it impossible for the Federal League to compete or obtain the services of players of major league caliber.[30]

By the time the suit reached the Supreme Court in 1922, professional baseball was reeling from the effects of the Black Sox Scandal, which threatened the integrity of the game. Eight members of the 1919 Chicago White Sox team had conspired to throw the World Series to the Cincinnati

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25. 259 U.S. 200 (1922), *aff'g* 269 F. 681 (D.C. Cir. 1920).

26. Among the noteworthy ballplayers jumping to the Federal League were Joe Tinker, Hal Chase, Ed Plank, and Shoeless Joe Jackson. Tinker and Plank are in Baseball's Hall of Fame, and Jackson and Chase would be but for their involvement in the 1919 Black Sox Scandal. *See* M. OLDERMAN, NELSON'S 20TH CENTURY ENCYCLOPEDIA OF BASEBALL (1963).

27. Refer to notes 15 and 20 *supra*. Wade Killefer, a catcher for the Philadelphia Phillies received $3,200 for the 1913 season. In January 1914, he signed a three-year contract with Chicago of the Federal League for $5,833.33 per season. Twelve days later he jumped back to the Phillies for $6,500 a year for three years. HOUSE REPORT, *supra* note 6, at 55. Chicago subsequently failed to enjoin the breach of his Federal League contract. Weegham v. Killefer, 215 F. 289 (6th Cir.), *aff'g* 215 F. 168 (W.D. Mich. 1914). *See* HOUSE REPORT, *supra* note 6, at 52-53.

28. The backers of the Federal League lost a reported $2,500,000 in their attempt to achieve major league status independently of organized baseball. HOUSE REPORT, *supra* note 6, at 56.

29. Federal Baseball Club v. National League, 269 F. 681, 682 (1920), *aff'd*, 259 U.S. 200 (1922).

30. 269 F. at 682-83.

Redlegs in return for cash from gamblers. Although the accused ballplayers were acquitted in a jury trial that focused the attention of the country on the national pastime, the Commissioner of Baseball banned all eight from the game for life.[31]

The *Federal Baseball* decision was argued before the Supreme Court amid organized baseball's climate of instability and internal disorder. Although the sport was flourishing on the playing field, organized baseball had experienced a tumultuous beginning off the playing field. It is difficult to ascertain what direct effect this instability had on the Court.[32] In any event, the Court held that baseball was not engaged in interstate commerce as defined by section 1 of the Sherman Act, with the result that organized baseball did not come within the parameters of the antitrust laws.[33] This brief and terse decision gave baseball a total antitrust exemption which has withstood all challenges and persisted to the present.

III. Later Challenges to the *Federal Baseball* Decision

The antitrust immunity granted organized baseball by *Federal Baseball* stood virtually unchallenged for twenty-five years.[34] The first substantial judicial criticism of the statutory interpretation of Justice Holmes in *Federal Baseball* occurred in the 1949 case of *Gardella v. Chandler*,[35] when the Second Circuit ruled that Gardella, an outfielder who was blacklisted for ignoring the reserve clause and signing with the outlaw Mexican League, had stated a cause of action for treble damages under the Sherman Act.[36] In a concurring opinion, Judge Frank characterized *Federal Baseball* as an "impotent zombi" and expressed the view that the Supreme Court would certainly construe the Sherman Act as encompassing organized baseball if presented with the issue de novo.[37] However, *Gardella* and a similar case[38] were settled out of court, leaving *Federal Baseball* unscathed, at least temporarily.

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31. See E. Asinof, Eight Men Out (1963) for a full coverage of the Black Sox Scandal.

32. One commentator has even suggested that the Supreme Court's favorable ruling in *Federal Baseball* was influenced by the fact that Chief Justice William H. Taft was related to Chicago Cubs owner Phillip Wrigley. J. Spink, Judge Landis and Twenty-Five Years of Baseball 109 (1947).

33. Federal Baseball Club v. National League, 259 U.S. 200, 209 (1922).

34. *But cf.* Niemiec v. Seattle Rainier Baseball Club, 67 F. Supp. 705, 712 (W.D. Wash. 1946) (court displayed some dissatisfaction with the *Federal Baseball* decision, but held baseball's exemption to be irrelevant to the case at hand).

35. 172 F.2d 402 (2d Cir. 1949), *rev'g* 79 F. Supp. 260 (S.D.N.Y. 1948). For a brief discussion of this case, see Topkis, *Monopoly in Professional Sports*, 58 Yale L.J. 691, 691-95 (1949).

36. 172 F.2d at 408.

37. *Id.* at 408-09 (concurring opinion).

38. The other case involved two St. Louis Cardinals, Max Lanier and Fred Martin, who jumped to the Mexican League. Martin v. National League, 174 F.2d 917 (2d Cir. 1949). *See also* Eckler, *Baseball—Sport or Commerce?*, 17 U. Chi. L. Rev. 56, 57-60 (1949).

Four years later in *Toolson v. New York Yankees*[39] the Supreme Court was squarely faced with determining if the *Federal Baseball* interpretation of the Sherman Act's requirement of interstate trade or commerce should be reevaluated. The Court, applying the rule of stare decisis narrowly,[40] affirmed the *Federal Baseball* decision while carefully avoiding an explicit reexamination of the commerce requirement of the Sherman Act or any of "the underlying issues."[41] The Court placed emphasis on the industry's development and reliance on the antitrust exemption in the thirty-year interim since *Federal Baseball.* However, most significantly, the Court assumed that congressional inaction subsequent to *Federal Baseball* equaled congressional approval of organized baseball's antitrust exemption. Any change in the status quo, the Court stated, was a legislative and not a judicial function.[42]

For the next two decades organized baseball clung steadfastly to its antitrust exemption. Then, in October of 1969, the St. Louis Cardinals attempted to trade their all-star centerfielder, Curt Flood, to the Philadelphia Phillies. Flood was not consulted and sought to negotiate a contract with teams other than Philadelphia, in contravention of the reserve clause. When Commissioner of Baseball Bowie Kuhn refused this request, Flood filed suit in federal court charging that the reserve system constituted an unreasonable restraint of trade under sections 1 and 2 of the Sherman Act. Flood was denied relief in the District Court for the Southern District of New York and the Second Circuit Court of Appeals, and the Supreme Court again granted certiorari.[43]

But the interim since *Toolson* had produced a different setting. The Court had methodically refused to extend the statutory interpretation of *Federal Baseball* and *Toolson* to the booking of legitimate theatre productions throughout the country,[44] professional boxing,[45] and professional football.[46] In each case the Court found that the activity or business was engaged in interstate trade or commerce and within the purview of section 1 of the Sherman Act. *Toolson* was characterized as a narrow application of the rule of stare decisis, and the Court emphasized that it was up to Congress not only to contract the doctrine embodied in that decision but

39. 346 U.S. 356 (1953). The decision encompassed three cases brought by professional baseball players seeking treble damages for violations of the antitrust laws. Corbett v. Chandler, 202 F.2d 428 (6th Cir. 1953); Kowalski v. Chandler, 202 F.2d 413 (6th Cir. 1953); Toolson v. New York Yankees, 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd,* 200 F.2d 198 (9th Cir. 1952).

40. Toolson v. New York Yankees, 346 U.S. 356, 357 (1953). This holding is discussed in United States v. Shubert, 348 U.S. 222, 229-30 (1955). In this decision, the Court declined to grant to theatrical enterprises the same exemption accorded organized baseball. *Id.* at 230.

41. Toolson v. New York Yankees, 346 U.S. 356, 357 (1953).

42. *Id.*

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

44. United States v. Shubert, 348 U.S. 222, 230-31 (1955).

45. United States v. International Boxing Club, 348 U.S. 236, 244 (1955).

46. Radovich v. National Football League, 352 U.S. 445, 452 (1957).

also to expand it to other sports or entertainments.[47] In essence, the Court limited the statutory interpretation of the Sherman Act espoused in *Federal Baseball* to organized baseball and refused to extend the construction to even a like business enterprise such as professional football.

The professional football case, *Radovich v. National Football League*,[48] struck down that sport's reserve clause and firmly established that the Court's view of the meaning of the interstate trade or commerce requirement of section 1 of the Sherman Act had changed as applied to professional athletics. The Court stated in *Radovich*, in an apparent attempt to justify the inconsistency of the interpretation of the same statute in different sports, that baseball would come within the ambit of the antitrust laws if that question were presented to the Court for the first time.[49] Again the conclusion was that the legislature had the sole prerogative to eliminate the discrimination or inconsistency.[50] In later decisions, federal courts uniformly held that professional hockey and professional basketball were subject to the antitrust laws.[51]

A somewhat different judicial attack on the *Federal Baseball* and *Toolson* duality occurred in *Salerno v. American League of Professional Baseball Clubs*.[52] Although the plaintiffs failed to secure federal jurisdiction for their claim that their discharge as umpires in the American League constituted antitrust violations, Judge Friendly expressed his opinion that interstate television broadcasts made "baseball's immunity from the antitrust laws more anomalous than ever."[53] The *Toolson* decision was not an affirmation of the *Federal Baseball* rationale that baseball's activities did not sufficiently affect interstate commerce to come within the Sherman Act but rather was based on the ground that Congress had evinced no intention to bring baseball within the antitrust laws. The *Toolson* Court deferred to the legislative function but, nevertheless, interpreted the legislative silence following *Federal Baseball* as congressional intent to exclude baseball from the Sherman Act. Judge Friendly strongly noted his disagreement with the statutory interpretation of *Federal Baseball* and termed the *Toolson* rationale "extremely dubious."[54]

Despite these criticisms and the uniform application of the antitrust laws to other professional sports, the Supreme Court affirmed the *Federal*

47. *See, e.g.*, United States v. Shubert, 348 U.S. 222, 230 (1955).
48. 352 U.S. 445 (1957).
49. *Id.* at 452.
50. *Id.*
51. Haywood v. National Basketball Ass'n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971) (basketball); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) (basketball); Peto v. Madison Square Garden Corp., 1958 TRADE CAS. (CCH) ¶ 69,106 (S.D.N.Y.) (hockey); Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956) (basketball). *See* Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 GEO. L.J. 771 (1972).
52. 429 F.2d 1003 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).
53. 429 F.2d at 1005.
54. *Id.*

Baseball and *Toolson* decisions and refused to declare organized baseball subject to the Sherman Act in the 1972 case of *Flood v. Kuhn*.[55] The opinion contained a nostalgic tribute to the game of baseball, which may have colored the author's neutrality on the subject.[56] Still, the reasoning of the opinion was forthright. Justice Blackmun candidly stated that "[p]rofessional baseball is a business and it is engaged in interstate commerce."[57] However, that admission did not necessitate the overruling of *Federal Baseball* and *Toolson* because of the principle of stare decisis. Although the exclusion of baseball was characterized as an aberration, the Court justified the strict application of stare decisis because of baseball's unique characteristics and needs.[58] Thus, rather than reevaluating the *Federal Baseball* statutory construction of section 1 of the Sherman Act on its merits, the Court, while admitting the insufficiency of that interpretation, affirmed the *Toolson* reasoning that Congress has expressed no intent that organized baseball be included within the antitrust laws. Since the issue was considered appropriate for legislative and not judicial action, the Court believed that it was constrained to maintain the status quo.[59]

IV. Implications of *Federal Baseball* and *Flood*

The preceding legal history of organized baseball vividly illustrates the varied considerations courts may meet when reviewing a prior statutory interpretation. It also illustrates the kind of illogical and inconsistent propositions that a strict adherence to principles of stare decisis can produce. This is paradoxical because a traditional justification of stare decisis is the uniformity and consistency it gives the law. However, it may be that the alternative of reinterpreting the prior statutory construction and overruling the previous line of cases does not on balance mandate a result sufficient to cast aside stare decisis. Thus the query is whether the strict application of stare decisis to prior statutory interpretations is justified when the result is the affirmance of a decision acknowledged to be an anachronism.

It is indisputable that the maturation of organized baseball since the *Federal Baseball* decision in 1922, together with the precedent of the application of the antitrust laws to other professional sports, indicates that a court facing an initial interpretation of the Sherman Act as applied to baseball would have little choice but to hold organized baseball subject to the antitrust laws. Then the application of stare decisis to the initial statutory interpretation has, at least in the circumstance of organized base-

55. 407 U.S. 258, 283-85 (1972).
56. *Id.* at 260-64. One commentator viewed Justice Blackmun's tribute to the game of baseball as follows: "Judicial impartiality blurs somewhat when the author wears his heart on his sleeve." 118 Cong. Rec. 22283 (1972) (reprinting Dowling, *Quaint Opinion From the Court*, Washington Evening Star, June 25, 1972). *See also* Note, *Antitrust Law*, 48 Notre Dame Law. 460, 471 n.87 (1972).
57. 407 U.S. at 282.
58. *Id.*
59. *Id.* at 283-84.

ball, produced a different result than if the *Flood* case were one of first instance.

All of this does not, however, mean that *Federal Baseball* was improperly decided. Organized baseball had experienced a tumultuous beginning and had great difficulty establishing financial viability. Upstart leagues had repeatedly challenged the financial stability of organized baseball by engaging in economic warfare. As a consequence, organized baseball's control over the top players was constantly undermined. Then, after baseball had seemingly survived the strong Federal League challenge, the Black Sox Scandal was unveiled. The scandal threatened the moral integrity of the game. A reorganization of the administration of organized baseball was undertaken and a Commissioner of Baseball was named in an attempt to police the sport more tightly. In the wake of this, baseball was increasingly capturing the imagination of the post-World War I American public, at least on the playing field. With the advent of the "live" ball and the emergence of Babe Ruth, baseball was more popular than ever before. In view of organized baseball's past hardships and its seeming emergence from them, it is understandable that the Supreme Court in *Federal Baseball* believed it necessary to maintain the status quo and insulate the sport from further wars with leagues outside organized baseball.[60]

On the other hand, the same considerations did not apply to organized baseball in 1972. The sport was firmly established financially, and no outside threats had appeared on the horizon in years.[61] There was no question, particularly with the widespread radio and television coverage of the games, that baseball was engaged in interstate commerce.[62] Further, the antitrust laws were applied to other professional sports with little apparent deleterious effect.

From all indications it is certain that the Supreme Court would interpret section 1 of the Sherman Act as applying to organized baseball if confronted with an initial construction of the Act.[63] In *Flood* the Court refused to reach the merits of the prior interpretation; that is, it neither reinterpreted the meaning and applicability of the statute nor determined that the initial construction was correct. Thus, the Supreme Court viewed its judicial function differently when reviewing prior statutory interpre-

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60. Of course, the Supreme Court arguably could have taken the opposite view and required baseball to meet its competition and compete in the market place subject to antitrust restraints like other businesses.

61. The Mexican League, in 1946, did offer attractive salaries to several established major league ballplayers to jump their teams. However, there was no challenge to organized baseball's market monopoly. Similarly, the Cuban Winter League (1946-47) and the Quebec Provincial League (1947-48) also sought to sign players in organized baseball, although to a lesser scale. HOUSE REPORT, *supra* note 6, at 77-84.

62. In fact, in 1961, Congress enacted legislation exempting baseball, basketball, football, and hockey from the antitrust laws with regard to their sale of televising and broadcasting rights. 15 U.S.C. §§ 1291-1295 (1970).

63. *See* Flood v. Kuhn, 407 U.S. 258, 288 (1972) (Douglas, J., dissenting).

tations than when confronted with a statute for the first time.

The Supreme Court in *Flood* affirmed the *Toolson* rationale that congressional silence subsequent to the *Federal Baseball* decision indicated congressional approval of the initial statutory interpretation. Since the Court believed that, once it made the initial statutory interpretation, the legislature had the sole mandate to review and change the interpretation, the Court was constrained to rigidly apply stare decisis. Congress had not seen fit to change the law made by *Federal Baseball* and, since it was the legislative function to do so, silence could only mean congressional approval. Thus, the Court-created exemption of organized baseball from the antitrust laws is subject only to legislative and not judicial review.

V. Congressional Silence

As the *Flood* dissents of Justices Douglas and Marshall disclose, the Supreme Court has wavered in its view of the limitation congressional silence places on judicial reinterpretations of statutes.[64] While *Flood* possibly represents the Court's greatest expression of deference to congressional silence, the 1940 decision of *Helvering v. Hallock*[65] is indicative of the opposite view. There Justice Frankfurter, in an oft-quoted passage, stated:

> It would require very persuasive circumstances enveloping Congressional silence to debar this court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities . . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction . . . of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.[66]

Similarly in *Girouard v. United States*[67] the Supreme Court held that "it is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law."[68] A middle ground was reached in *Jones v. Liberty Glass Co.*[69] where the Court stated that legislative silence subsequent to a judicial construction of a statute is at best only an auxiliary tool for use in interpreting an ambiguous statutory provision.[70]

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64. *Id.* at 287-88, 292-93.
65. 309 U.S. 106 (1940).
66. *Id.* at 119-21.
67. 328 U.S. 61 (1946).
68. *Id.* at 69.
69. 332 U.S. 524 (1947).
70. *Id.* at 534; *see* Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 Vand. L. Rev. 456, 468 (1950). *But see* United States v. South Buffalo Ry., 333 U.S. 771, 774-83 (1948) (prior construction is binding where Congress has expressly refused to take legislative action that would overrule the judicial construction in question). For a view that legislative silence is absolutely binding on courts, see Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 Texas L. Rev. 247, 252 (1947).

The vagaries of the Supreme Court opinions on the doctrine of congressional acquiescence in judicial statutory interpretations suggest that each Justice has his own view of the subject; indeed, some Justices appear to waver on the subject.[71] It is quite conceivable that the Court has utilized congressional silence as a means to achieve the end at which the majority arrives. While the suggested use of the doctrine as a justification for decisions may be speculative, the failure of the Court to establish any consistency when dealing with prior interpretations leads to this kind of conclusion.[72]

Of course, judicial deference to congressional silence may often be argued because of a corollary consideration. If a court believes that the issue is one for legislative and not judicial resolution, it will refrain from positing anything that would be a usurpation of the legislative function. In the case of the review of a prior statutory interpretation, a court taking this position cannot reinterpret or change the prior construction because to do so would interfere with the duty of the legislature. Thus, in order to justify the resulting affirmance of the prior interpretation, the court must view the intervening legislative inaction as an expression of approval of the initial interpretation, since any reevaluation is for the legislature. This kind of circuitous reasoning is precisely what was employed in the *Toolson* and *Flood* decisions to justify the judicial refusal to reevaluate the Court-made exclusion of organized baseball from the antitrust laws.

Judicial deference to legislative silence based on the belief that the question presented is one for legislative action does not justify the use of

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71. As an example of judicial wavering, *compare* the views of Justice Douglas in United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 406 (1965) (prior construction should stand in the event of legislative silence), *with* Flood v. Kuhn, 407 U.S. 278, 287-88 (1972), *and* Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 746-47 (1949) (prior construction may be reinterpreted regardless of legislative silence).

72. State courts are likewise inconsistent in their treatment of prior statutory constructions. For example, in Windust v. Department of Labor & Industries, 52 Wash. 2d 33, 323 P.2d 241 (1958), the Washington Supreme Court reversed its prior interpretation of a workmen's compensation statute that had been uniformly applied for 25 years. The court rashly declared that stare decisis did not apply to prior judicial statutory constructions. 323 P.2d at 244. The enigmatic opinion viewed the application of stare decisis to statutes as giving more weight to judicial decisions than to the statutes themselves. The result was then eventual repeal or amendment of the statute because the legislative purpose of the statute would be eroded through continual judicial paraphrasing of the statute when applying precedent. *Id.* The court believed that the judiciary should look only to the language of the statute when applying statutory law. *Id.* at 245. But the Texas Supreme Court has taken an antipodal stance. In Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968), the court held that the Texas wrongful death act could not be given extraterritorial effect because it had been construed for 80 years in accordance with the normal presumption that a statute is presumed to have no extraterritorial application unless it expressly so provides. The court stated that stare decisis has its greatest force when statutory interpretation is involved. *Id.* at 186. In contrast to the Washington court, the Texas court viewed subsequent reinterpretations of a statute as diluting the original statutory meaning. The court pointed out that the legislature could amend if the initial construction was unacceptable. *Id.* Interestingly, the Texas Legislature did amend the wrongful death statute subsequent to the *Mustang Aviation* decision, giving Texas courts the right to give extraterritorial effect to the Texas wrongful death statute. TEX. REV. CIV. STAT. ANN. art. 4678 (Supp. 1977).

legislative inaction to support a judicial decision. If presented as a justification for the courts' use of legislative silence to denote legislative approval of a prior statutory interpretation, more must be exhibited than the expression that the question is one for legislative action. Even assuming that the issue is one particularly within the legislative realm, it does not follow that legislative silence subsequent to a judicial statutory construction necessarily mandates legislative approval of the interpretation. This position presupposes that legislatures are peculiarly responsive to the actions of the courts.

Dean Levi, in a famous statement of the propriety of judicial deference to legislative silence, recognized that the inaction of a legislature subsequent to a judicial statutory interpretation does not imply legislative approval.[73] He viewed the problem as one of correctly allocating responsibility for effective action.[74] Legislatures are responsible for the enactment and proliferation of statutes and should have the responsibility for changing their meanings. Further, Dean Levi believed that legislative bodies are better equipped to handle, and thus more responsive to, needed statutory changes. Judicial reversal of statutory construction is justified, according to Levi, only when the matter is one of constitutional import.[75] Judicial deference to legislative silence was said to mark the essential dichotomy between case law and the law resulting from statutory interpretation.

Dean Levi recognizes that legislative silence does not connote legislative sanction of a judicial statutory construction, which is another way of saying that legislatures are not automatically responsive to judicial fiat. He must therefore believe that it is preferable for some misconstructions of statutes to go uncorrected than for a court to be permitted to overrule its own errors.[76] This phenomenon is illustrated by the *Toolson* and *Flood* decisions. The *Flood* Court in particular seemed in agreement that, at the least, the statutory construction of *Federal Baseball* was no longer apposite given the recognizably interstate character of organized baseball in the 1970s and the judicial decisions applying the Sherman Act to other professional sports. However, the judicial belief that any reevaluation of the prior construction was for Congress and the absence of congressional action either prior or subsequent to *Toolson* and *Flood* has singularly perpetuated the *Federal Baseball* anomaly.

Further, it can be seen that judicial deference to the legislative function of reviewing all statutory interpretations can not only have the effect of permitting misconstructions to go uncorrected but must have the more startling effect of perpetuating and legitimizing the mistake. As the *Toolson* and *Flood* cases again show, the continued judicial refusal to reexamine

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73. Levi, *Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948).
74. *Id.*
75. *Id.; accord,* Boys Markets, Inc. v. Retail Clerk's Union, 398 U.S. 235, 259 (1970) (Black, J., dissenting).
76. For a critical appraisal of this position, see P. MISHKIN & C. MORRIS, ON LAW IN COURTS 483 (1965).

prior statutory interpretations results in the application of the doctrine of stare decisis by each succeeding court to the original mistake. The application of stare decisis, by its own terms, has the effect of legitimizing and exhibiting judicial approval of the original misconstruction or, at least, of an outdated interpretation.

Given the foregoing considerations, it is crucial to inquire whether a strict bifurcation of legislative and judicial responsibility is worth the price paid. Aside from questions of effectiveness and responsiveness to the review of statutory interpretations,[77] the fear is prevalent that the judiciary will completely usurp the legislative role of revising statutory law. Underscoring this is the belief that in our system of government, change, particularly controversial change, should be made by legislative bodies.[78] Legislators are at least in theory directly answerable to their constituents for their actions. And although the responsiveness of legislatures to judicial misconstructions is questionable, legislative bodies are purportedly more adept at the review of statutory law because they have the facility to deliberate about a wide range of considerations, while courts are limited to the facts of the case before them. Thus, the argument runs, legislatures are better equipped to consider and effectuate changes, particularly major changes with long-lasting effects, when statutory reform is necessary.

In response to this line of reasoning, it is important to remember that legislatures always have the power to overrule a court's construction of a statute, whether it be after the initial interpretation or a subsequent reinterpretation. It may be hypothesized that legislatures are most likely to react whenever vigorous disagreement with a judicial statutory edict exists. A statutory interpretation by a court that is disparate from the legislative purpose is likely to overcome legislative inertia and divert legislative attention from its traditional tasks.[79] Also, the limited focus of a court reviewing a prior statutory interpretation serves as a check of judicial usurpation of the legislative province. Since a court is confined to the application of a particular statute to a particular factual situation, the likelihood that sweeping reforms or controversial reversals will occur are substantially lessened, especially considering that where a statute has already been the subject of a judicial pronouncement, the court is further constrained by the principle of stare decisis. And the legislature can always check the impact of a controversial interpretation by amendment or repeal.

A judicial unwillingness to reevaluate prior statutory interpretations impedes rather than assists the development and refinement of the law. Instead of having two interdependent bodies responsible for improving and advancing statutory law, only the legislature has responsibility after a court

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77. *See generally* Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 791 (1963).

78. Levi, *Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 523 (1948).

79. Refer to note 72 *supra* for a discussion of the *Mustang Aviation* decision relating to the Texas wrongful death act.

has once spoken on the subject. The judiciary is put in the anomalous position of being unable to correct its own errors.

VI. STARE DECISIS

When courts refuse to review the merits of a prior statutory construction, whether owing to legislative silence, deference to the legislative function, or both, the doctrine of stare decisis is more rigidly applied than when courts are faced with common law or court-made precedents. Adherence to legal precedent is typically predicated on the desire to have certainty and predictability in the law.[80] If achieved, the public is able to place strong reliance on judicial decisions and conduct its affairs in a lawful manner. When dealing with the review of statutory interpretations, an additional reason can be posited for strict allegiance to stare decisis. If one views a judicial reevaluation of a construction of a statute as a usurpation of the legislative function, then the application of stare decisis to a prior interpretation is mandatory absent intervening legislative action.

Justices Brandeis and Black have been the leading Supreme Court proponents of this reasoning. In his dissent in *Boys Markets, Inc. v. Retail Clerk's Union*,[81] Justice Black stated:

> When this Court is interpreting a statute, however, an additional factor must be weighed in the balance. It is the deference that this Court owes to the primary responsibility of the legislature in the making of laws . . . . When the law has been settled by an earlier case then any subsequent "reinterpretation" of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute.[82]

Black went even a step further and suggested that since reinterpretation of a statute by a court is tantamount to a judicial statutory amendment, such action may constitute a constitutional violation of the legislative powers of Congress under article I of the Constitution.[83] However, Black did believe, along with Justice Douglas,[84] that the limitations of stare decisis do not prohibit the reconsideration of a statute where constitutional questions are present.[85]

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80. Lord Eldon said long ago that it was "better the law should be certain, than that every Judge should speculate upon improvements . . . ." Sheddon v. Goodrich, 32 Eng. Rep. 441, 447 (Ch. 1803). Professor Wasserstrom has stated that the major justifications for the use of precedent are certainty, reliance, equality, and efficiency. R. WASSERSTROM, THE JUDICIAL DECISION 60-73 (1961). *See also* Catlett, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 21 WASH. L. REV. 158 (1946).

81. 398 U.S. 235 (1970).

82. *Id.* at 257-58 (Black, J., dissenting).

83. *Id.* at 258.

84. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 406 (1965) (Douglas, J., dissenting). Refer to text accompanying note 71 *supra*.

85. 398 U.S. at 259 (Black, J., dissenting).

Justice Brandeis, writing in 1932, laid the cards on the table when he said: "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[86] The reasoning in the *Toolson* and *Flood* decisions is certainly consistent with this view. It also is indicative of the difficulties that such a rigid approach promulgates. For if the legislature is not responsive in correcting an imprudent judicial result, the law remains unaltered. The argument that a consistent, predictable result is assured wanes when the propriety of the result perpetuated is questionable.

Justice Frankfurter has been the leading proponent of the view that a court is not arbitrarily limited in reinterpreting a statute. In *Helvering v. Hallock*[87] he maintained that:

> Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications. Surely we are not bound by reason or by the considerations that underlie stare decisis to persevere in distinctions taken in the application of a statute which, on further examination, appear consonant neither with the purposes of the statute nor with this Court's own conception of it.[88]

The *Hallock* Court candidly reviewed and overruled an earlier statutory construction, holding that the earlier interpretation did not effectuate the purpose of the statute.[89] The Court subsequently has reinterpreted and reversed prior constructions of statutes on frequent occasions including more recently the reversal of an earlier interpretation of the Norris-LaGuardia Act in *Boys Markets*.[90]

The retrenchment of the Court in the *Flood* case illustrates the character of the fundamental difference between standing by the bare result of a case and standing by the essential reasoning of it.[91] The strict application of stare decisis precludes the possibility of ever reaching the propriety of the prior interpretation. The decision-making process is reduced to ruminations about who should decide the issue and speculation about what the legislative position on the matter is rather than considerations or concern about the appropriateness of the earlier result to the present day and to the legislative purpose. Further, the mandatory application of stare decisis to statutory interpretations has the effect of imputing legislative

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86. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

87. 309 U.S. 106 (1940).

88. *Id.* at 122.

89. *Id.* The case involved the applicability of § 302(c) of the Revenue Act of 1926 to *inter vivos* transfers of property in trust. The Court, in overruling prior statutory interpretations, held that the value of the remainder interest of the trust fund should be included in the decedent's gross estate under § 302(c). *Id.*

90. 398 U.S. at 254-55. *But see* Johnson v. Mississippi, 421 U.S. 213 (1975), where the Court refused to overrule prior decisions interpreting the federal removal statute and held that it was up to Congress to make revisions. *Id.* at 227-28.

91. *See* H. HART & A. SACKS, MATERIALS FOR A GENERAL VIEW OF THE AMERICAN LEGAL SYSTEM 1128-40 (tentative ed. 1956).

sanction to a silent legislature. Since legislative approval may or may not be correctly inferred, judicial respect to the supposed approval should not be conferred.

Compulsory adherence to precedent in statutes transfers the responsibility for the improvement and correction of the application of statutory law to the legislature. If the legislature does not for whatever reason meet the challenge, the law remains static. The status quo is fostered by the judicial application of stare decisis. But a major justification which is said to outweigh this consequence is the preservation of uniformity and predictability in the law. However, *Flood* signifies a notable irony. For, as a result of the Supreme Court's earlier refusal to apply the statutory interpretation of *Federal Baseball* to any other sport or entertainment, the strict adherence to precedent in *Flood* insures not uniformity but diversity in the law. It is hard to understand how the law's stability and predictability are promoted when professional football and professional basketball are subject to the antitrust laws but organized baseball is not.

Justice Black's argument, espoused in his *Boys Markets* dissent, that the deference courts owe to legislatures as the primary lawmakers increases the role of stare decisis in statutory review likewise suffers when the product is the confusion and inconsistency of *Flood*. The position inappropriately assumes that the legislature will in fact fulfill its designated role as primary lawmaker. When it does not or cannot, no decisionmaker remains to fill the void. Such an approach overlooks the reality that legislatures are principally effective in producing new law, not in reviewing old law.[92] Legislatures should be free to confront contemporary issues rather than oversee judicial blunders. The judiciary is better equipped to correct its errors than is a legislative body, because a court will normally have to face the problem squarely, if it faces it at all, while a legislature may never consider an improprietous statutory construction for a variety of reasons.

The fear of judicial overreaching and the usurpation of legislative power is exaggerated by proponents of the compulsory use of precedent.[93] Most courts go to great lengths to divine the legislative purpose and intent of a statute. The judiciary is cognizant of its role as an interpreter and not a promulgator of statutory law. It is quite unlikely that the Supreme Court would have been criticized about the lack of judicial restraint if it had overruled *Federal Baseball* in *Flood*, considering the change of circumstances surrounding organized baseball and the lack of congressional action in the intervening fifty years. And of course, the legislature always has the authority and the prerogative to defeat any judicial construction not in

92. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 791 (1963).

93. *See* Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 415 (1961).

keeping with the legislative purpose, whether it be after an initial or subsequent statutory interpretation.

Finally, compulsory stare decisis may weaken the regard for our legal institutions. The failure of the courts and Congress to right the indefensible inconsistencies resulting from organized baseball's antitrust status breeds contempt for the system.[94]

VII. NONJUDICIAL SOLUTIONS

When the judiciary and legislatures fail to resolve issues in a contemporary manner, satisfaction may be obtained elsewhere. Organized baseball historically developed with little direction from either the courts or the legislatures. The early outlaw league wars were resolved extrajudicially either by compromise or by use of economic measures. Even judicial interpretation of the reserve clause was largely circumvented.[95] When the eight ballplayers accused of throwing the 1919 World Series were acquitted by a jury in 1921, the Commissioner nevertheless banned all eight from the game for life.[96]

More recently the baseball players' union forced an extrajudicial compromise upon the baseball owners that weakened the reserve system and resulted in a special draft for players who had not signed contracts with their respective clubs for the past season.[97] This settlement was greatly precipitated not by court action but by nonjudicial arbitration resulting from collective bargaining. The arbitrator held that the reserve clause obligated a player contractually for only one year after the term of the contract.[98] After the option year, a player is thus free to sign with the highest bidder. The arbitration award gave Andy Messersmith and Dave McNally, of the Los Angeles Dodgers and Montreal Expos respectively,

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94. Szanton, *Stare Decisis; A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959). The author of this article states:

> The jurist concerned with "public confidence in, and acceptance of the judicial system" might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.

Id. See also Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 746-47 (1949); Comment, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. IND. & COM. L. REV. 737, 746 (1971).

95. Refer to text accompanying notes 15-21 *supra*.

96. HOUSE REPORT, *supra* note 6, at 60; E. ASINOF, EIGHT MEN OUT 273 (1963); J. SPINK, JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL (1947).

97. In addition to the special draft, the agreement provided that a player with five years of major league experience can demand to be traded to another team and may list six teams to which he does not wish to be traded. Also, the agreement provided that in the future any player may become a free agent by playing out the option or renewal year in his contract. N.Y. Times, July 25, 1976, § 5, at 8, col. 3; *id.* July 13, 1976, § 1, at 1, col. 1.

98. *Id.* Dec. 24, 1975, § 1, at 1, col. 7; *id.* Dec. 25, 1975, § 1, at 15, col. 6.

free-agent status.[99] Although McNally retired, Messersmith signed a lucrative long-term contract with the Atlanta Braves.

The agreement to arbitrate prohibited appeal to the courts. The baseball owners appealed anyway, but the federal district court held that the arbitrator's decision was binding.[100] A substantial number of players sought to take advantage of the decision and played out their options during the 1976 season. Players currently in their option year were declared free agents at the end of the 1976 season according to the agreement, and a special draft was held to determine which teams could bid for their services. Fourteen established ballplayers were among the more than twenty players participating in the special draft.[101]

One of the traditional arguments of organized baseball in support of the reserve clause and the antitrust exemption has been that the reserve system is essential to maintain a competitive balance within the leagues. The fear was prevalent that in a free market the top talent would be attracted to the richest clubs in the glamour cities. But only one of the free agents, Reggie Jackson, who went from Baltimore to the New York Yankees, signed with a team that had a better record than the team the player performed for in 1976.[102] The poorer clubs actually benefited at the expense of teams higher in the standings.

It is admittedly early to draw conclusions about the forced restructuring of the reserve system.[103] But the failure of the courts and Congress to adequately confront the difficulties has led to a nonjudicial and nonlegislative resolution.

VIII. The Nature of the Statute

One facet of statutory interpretation often overlooked by judges and commentators is the influence that the nature of the statute should play in delineating the judicial interpretive role. Statutes may be drawn to cover specific, discernible objectives or may be designed to provide gen-

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99. Refer to note 98 *supra*.

100. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233 (W.D. Mo. 1976); N.Y. Times, Feb. 5, 1976, § 1, at 19, col. 2.

101. N.Y. Times, Dec. 5, 1976 § 5, at 1, col. 3.

102. *Id.* Nov. 28, 1976, § 5, at 3, col. 2.

103. Of course, there is no doubt that the compromise has had a drastic effect on player salaries. The average major league salary in 1969 was less than $25,000. In 1976 it was about $50,000 and the average will probably be close to $100,000 in 1977. Significantly, not only free agents benefited financially from the special draft, but many players who elected to remain with their old clubs obtained substantial salary increases. Ticket prices are expected to rise, and some organizations may be forced to cut back on farm systems and scouting. *See id.* Dec. 5, 1976, § 5, at 1, col. 3; Gammons, *Cashing in Their Tickets*, Sports Illustrated, Nov. 22, 1976, at 82; Keith, *After the Free-For-All Was Over*, Sports Illustrated, Dec. 13, 1976, at 29. There is evidence that many more players will now refuse to sign contracts with their existing teams, play out their options, and become free agents, hoping to obtain lucrative multiyear contracts through the free-agent draft. Refer to note 97 *supra* and accompanying text. By the middle of spring training in 1977, about 100 major league players were unsigned. Chicago Tribune, March 26, 1977, § 2, at 1, col. 1.

eral directions. The Sherman Act is a prime example of a broadly framed statute meant to oversee a multitude of business activities. Traditionally, Congress has enacted broad statutes when faced with a novel or untouched subject. These statutes then purposefully leave courts free to formulate more definite standards within the general mandate set forth by the legislature.[104] As a necessary corollary, judges play a more pronounced and active role in the lawmaking process than when applying narrowly construed statutes to given factual situations. And frequently judges will find themselves confronted with a difficulty not contemplated by the applicable statute; then again the courts cannot evade their lawmaking function.[105]

When Congress passed the antitrust laws in 1890, it was not responding to the troubles of the infant sport of baseball. The legislation was directed at the prevalent monopolistic practices of the time and gave the courts a framework and a set of standards for meeting the problem. A federal court succinctly characterized the judicial role mandated by the Act: "[W]e have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law and by so doing has delegated to the courts the duty of fixing the standard for each case."[106]

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104. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 792 (1963); *see* Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 415-16 (1961).

105. Professor Llewellyn had the following to say on this subject:

> [A]s a statute gains in age—its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation.

Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 400 (1950). *See also* Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 So. CAL. L. REV. 1, 2 (1965); Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 415 (1950); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528-29 (1947).

106. United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943). The antitrust law abounds with court-created rules of construction and exemptions from the application of the Sherman Act, necessitated by the broad, far-reaching nature of the statute. For example, the "rule of reason" was created to give the courts some guidelines in determining what restraints of trade are reasonable and therefore not illegal. Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911). However, the courts determined that some types of restraints were so patently inconsistent with a free market system that Congress would have accepted no justification for them. Thus, the "per se" rule of illegality developed. *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596, 606-12 (1972).

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court was called upon to decide if the Sherman Act was intended to apply to anticompetitive actions of a state. *Id.* at 344. The so-called state action exemption that resulted has created a great deal of confusion in the lower federal courts and a large amount of discord among commentators. *Compare* Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U.L. REV. 71 (1974), *with* Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1 (1976). *See generally* L. SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 12-15 (4th ed. 1972).

Thus, the Supreme Court in *Federal Baseball* was fulfilling its proper function, even though one might question the merit of the decision. It is a small step to assert that the Court should be able to review and revise its previous decisions when dealing with the broad, ongoing directives of Congress incorporated in laws such as the Sherman Act. A statute so broad in scope and effect will necessarily not be uniformly applied to varying activities in different times. If courts are to respond to the changes occurring in different facets of our society and are to ensure that the development of the law keeps pace with these changes, they should review and reevaluate prior statutory interpretations in light of contemporary needs. Judicial deference to legislative silence and the strict application of stare decisis to statutory precedent prohibits the courts from participating, particularly when dealing with broad directive legislation, in the continued formulation and reevaluation of large areas of the law. While courts are initially free to close the gray areas or gaps in the law,[107] they are precluded from reviewing and improving the gray areas in light of current considerations once the initial decision is made.

IX. The Penumbra and Formalism

H.L.A. Hart has stated that legal rules emit a "core of settled meaning" and "a penumbra of debatable cases."[108] The core consists of the standard instances of application of the rule. For example, there can be little doubt that the transportation of goods by a railroad from one state to another comes within the interstate commerce standard of the Sherman Act. But other factual situations are not axiomatic in their application to the standard. Certainly the interstate commercial nature of organized baseball that was the subject of the *Federal Baseball* decision was questionable, at least in the 1920s. These cases, according to Hart's positivist view, make up the penumbra in which the legal rule is "neither obviously applicable or obviously ruled out."[109] These situations typically include features in common with the standard instances and either lack or have additional features not contained in the standard case.

When judges decide cases in the penumbral situation they are by necessity legislating.[110] By the same token, they are participating in the development and refinement of the law. In Hart's terms, they are determining what the law ought to be.[111] Hart characterizes any conception of

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107. B. Cardozo, The Nature of the Judicial Process (1921).
108. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 607 (1958).
109. *Id.*
110. Austin stated: "I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated . . . ." J. Austin, Lectures on Jurisprudence (Lecture V), at 224 (rev. 4th ed. R. Campbell 1873).
111. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 608 (1958).

the judicial process that ignores the problems presented by the penumbra as "formalism" or "literalism."[112]

Austin was an outspoken critic of judicial formalism. He had little patience with judges who relied blindly on the past instead of responding to the developing needs of society.[113] He believed that:

> [I]t is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future) . . . [T]he Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.[114]

In his view, Blackstone engaged in "childish fiction" when he posited that judges only find and never make law.[115]

Strict adherence to statutory interpretations can thus be characterized as formalistic. Since the transformations that society undergoes can effect the application of a set of facts to a particular statute, the courts should be free to review and reevaluate the penumbral issues. But if the courts defer to the legislature, they cannot respond to the penumbral issues of statutory interpretation. The strict application of stare decisis mandates that penumbral issues be solely within the legislative province when the judiciary has once spoken. Thus, the judicial function, as seen by Hart and Austin, is restricted.[116]

The legal history of organized baseball illustrates a more extreme result of the uniform use of statutory precedent because, although the case presented by organized baseball and the antitrust laws may have been within the penumbra when decided, the same situation is almost assuredly within the "core of settled meaning" now. Organized baseball is engaged in interstate commerce by all standards adhered to by present-day courts and by the general understanding of the meaning of the term "interstate commerce." The stand taken by the Supreme Court in *Flood* exemplifies that the strict application of precedent to prior statutory interpretations may not only preclude courts from deciding penumbral issues in accord with contemporary social beliefs and goals but may actually prevent decision making in the core. This, taken together with the very real possibility of legislative inaction, means that statutes are not applied to the

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112. *Id.* For a criticism of Hart's use of core and penumbra, see Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958).

113. *See* J. AUSTIN, LECTURES ON JURISPRUDENCE (Lecture XXXVIII), at 668 (rev. 4th ed. R. Campbell 1873).

114. *Id.*

115. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 610 (1958).

116. For a comparison of the legal theories of Hart and Austin, see Note, *Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions*, 84 YALE L.J. 584 (1975). Hart's complete views are expressed in H. HART, THE CONCEPT OF LAW (1961).

"standard instances" but rather are relegated to the decision-making and societal constraints of a different time.

X. CONCLUSION

The demonstrable changes in the character and position of organized baseball since 1922 strongly suggest that the judiciary adopt a philosophy that takes cognizance of the effects that change can have on the propriety of prior statutory interpretations. A strict application of stare decisis or rigid adherence to the belief that congressional silence evinces legislative approval of the initial judicial statutory construction delegates decision making to the past and disregards changes in social, political, and economic values.[117] Predictability, stability, and continuity in the law overshadow any existent need for flexibility or progression.[118]

Courts are obliged to reach the merits of any dispute when feasible to fulfill their role as arbitrators of disputes and to ensure the progression of the law. Courts, by reaching the merits, may affirm earlier decisions or interpretations as well as reverse them. But, by failing to view the merits, whether because of scrupulous adherence to the doctrine of stare decisis or submission to the edict of legislative silence, courts affirm existing interpretations without regard for their worth. When broad, policy-directing statutes like the Sherman Act are involved, judicial inaction is even more nonsensical. The failure of the courts to make decisions based on the merits of the dispute means that many litigants will turn to nonjudicial resolutions, such as collective bargaining.[119] Respect for the judicial process cannot be upgraded under these circumstances.

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117. Note, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. IND. & COM. L. REV. 737, 745 (1971); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859 (1971).

118. It is interesting to note that under the recent settlement between the club owners and the Major League Baseball Players Association, Curt Flood would have obtained all of the relief he desired when he filed suit. He could have played out his option, become a free agent, and participated in the special free-agent draft. Further, because of his seniority he would have been able to reject any attempt by his parent club to trade him to a team for which he did not want to perform. Refer to note 97 *supra*. For Flood's personal account of his struggle against the reserve clause, see C. FLOOD, THE WAY IT IS (1971).

119. Of course, professional football and professional basketball have been the subject of collective bargaining as well. But in both instances the reserve systems had been watered down by court decisions holding the sports subject to the Sherman Act. Refer to notes 46 and 51 *supra*. *See generally* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

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