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## Baseball and the Antitrust Laws

### Cover Page Footnote

Special Attorney with the Antitrust Division of the United States Department of Justice. The views and opinions expressed herein are the author's and do not purport to represent Justice Department thought in any way.

## BASEBALL AND THE ANTITRUST LAWS

JOHN W. NEVILLE†

JOHNSTOWN had its flood, Chicago its fire, and San Francisco its earthquake, but disaster visited Brooklyn late the morning of April 9, 1947, when Branch Rickey, president of the fabulous Dodgers, announced laconically to his manager and firebrand extraordinary of the baseball diamond "Leo, you've been suspended from baseball for a year."<sup>1</sup> At least that was the impression at that time. Subsequent events have proven the suspension not to have been so terrifying in its effects as was first anticipated. Revolutionary forces did not take over in Brooklyn, Durocher did not become a recluse in ascetic protest against his wrongdoers, and last but not least the Dodgers did not collapse, the 1947 World Series notwithstanding, as so many tin soldiers, once deprived of the leader generally believed to be almost exclusively responsible for any baseball mettle they possessed.

The Durocher incident was significant, however, in that it marked another instance of organized baseball's self-government in operation, which, through the medium of a commissioner<sup>2</sup> and an elaborate set of mutually binding agreements, regulates the activities of all and sundry connected with the national pastime. The commissioner in organized baseball is the law. His code is the so-called Major League Agreement and Rules between the two major leagues and their constituent clubs, the Major-Minor League Agreement and Rules between the major leagues on the one part and the minor leagues on the other, and the National Association Agreement, that is, the contract between the different minor leagues. Under these agreements he derives the power to investigate any act, transaction or practice considered detrimental to the best interests of baseball, to mete out punishment for infractions, and to settle any and all disputes between the leagues, clubs or individuals.

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1. N. Y. Herald Tribune, April 10, 1947, p. 1, col. 2. The suspension was the result of an investigation of a feud between the New York Yankees and the Brooklyn Dodgers in which Larry MacPhail charged Branch Rickey, Chuck Dressen and Harold Parrott with conduct detrimental to baseball.

2. The office of commissioner was inaugurated in 1921 with Judge Kenesaw Mountain Landis as the first commissioner. One of his first official acts was to bar from baseball for life the players involved in the Black Sox scandal, among whom was the illustrious Hal Chase. The present commissioner, ex U. S. Senator from Kentucky, Albert Benjamin (Happy) Chandler took office April 24, 1945. ENCYC. BRIT. Y. B. 1946.

There is no appeal from his decisions. The leagues and clubs enjoy territorial rights to give exhibitions of baseball within predetermined areas and to exclude others from so doing. The signing, transfer and release of players, their eligibility to participate in organized baseball, promotions and suspensions, minimum and maximum salaries are just a few of the items receiving detailed attention.<sup>3</sup>

The agreements as a whole, serve a two-fold purpose. They maintain law and order within the official family, an accomplishment not without appeal to the fans who view the commissioner as a sort of a quasi-public overseer dedicated to preserving the game for them on a high plane. They also enable those who are "in" baseball, and this may well be where the agreements speak the loudest, to administer the game as a closed corporation, and to exclude at will from their ranks those who are "out." In all fairness it must be recognized, however, that thanks in no small measure to the vigilance of the commissioner and to the agreements, organized baseball, with the stigma of the Black Sox scandal constantly haunting it in the background, has emerged with a reputation for honesty on the playing field which is unparalleled in sportsdom and justly deserving of the respect and confidence which it commands of all who follow the game. Anomalous as it might seem, it is nevertheless against these same agreements, as enforced by the commissioner, that a goodly portion of the criticism of the game's administration may be levelled. Under prevailing conditions, new team participation or club expansion in the major leagues is a practical impossibility. The proof is that in 26 years, or since 1921 when Judge Landis took office as the first commissioner, the number and location of teams in both leagues has remained unchanged. Cities like Boston, and St. Louis, for instance, have maintained four teams between them over the years (two teams in each league), while Detroit with a population which exceeds the total inhabitants of those two cities combined, goes along with its lone American League entry. Thus it will remain so long as the ownership of the Detroit Club, or any of the other owners, wants it that way. Earlier this year, President Veeck of the Cleveland Indians, in a quarrel with the Mayor of Cleveland over the use of the Cleveland stadium, threatened to move his team elsewhere. This prompted a bid from Borough President Burke of Queens to bring the Indians to Queens, but commented the Associated Press significantly: "Burke, however, didn't say how the Indians might get around the question of territorial rights held by the three major league clubs here [New York]."<sup>4</sup>

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3. See HEILBRONER'S BLUE BOOK ON BASEBALL 1947.

4. N. Y. Times, May 25, 1947, § 5, p. 3, col. 2. Under "Daniel's Dope" in the N. Y. World Telegram, June 6, 1947, p. 29, col. 5, appears the following on the same subject:

The agreements, to be sure, are no stronger than the man entrusted with their enforcement. So well has the Commissioner been able to keep his charges in tow, that only once has his authority been questioned and sustained in the courts.<sup>5</sup> Generally speaking, disputants in baseball have shied away from the court room. Exceptions, for the most part, have come from the ranks of the players, seeking adjudications of the so called "reserve clause" in their contracts.<sup>6</sup> Last season Larry

"Sam Breadon once was said to have offered Walter O. Briggs, Sr. a cool million to let the Cardinals share the Detroit park with the Tigers. But Briggs refused to talk business. If he had entertained the proposition, the rest of the American League would have voted him down. Take that from William Harridge, who should know. Transfer of the Cardinals to Detroit would be a tremendous benefit to the National League, and would help to solve the Browns' problem, as well. But it just isn't happening."

5. *Milwaukee Am. Ass'n v. Landis*, 49 F. 2d 298 (N. D. Ill. 1931). This had to do with the interclub machinations of former owner Ball of the St. Louis Browns. Ball had so planned the baseball career of a player by the name of Fred Bennett, that Bennett spent more time transferring from club to club (of which Ball had control) and league to league, than he did on the playing field. Judge Landis loosed him from Ball's hold by application of the "detrimental to baseball" clause. Judge Landis, it must be said, was a unique personality in baseball. He was in every sense of the word the proverbial *pater familias* who demanded and received complete subservience from those he governed. An incident during the 3rd game of the 1934 World Series, between the Detroit Tigers and the St. Louis Cardinals, played in Detroit, illustrates the point rather picturesquely. On a close play at 3rd base, Detroit's Marvin Owen was almost put on the sidelines as a result of the Cards' Ducky Medwick's erratic base running. When Medwick took his position in left field for Detroit's batting half of the inning, the irate bleacher fans greeted him with a barrage of fruit and vegetables that soon had the hapless Medwick ankle-deep in produce. No sooner would the field be cleared than the attack on Medwick would begin anew, until the Judge, from his box, summoned Medwick and ordered him from the game. Without a word of protest from any one on the St. Louis club, Medwick, a key man in their line-up, obeyed and the game was resumed. The Commissioner had spoken.

6. The "reserve clause" gives to the owner the right to the player's services for the ensuing year, which upon successive renewals, means that the owner can retain the player indefinitely. The player on the other hand can be dismissed upon ten days' notice. So provided the early contracts which were attacked for lack of mutuality and generally declared void for that reason. *Weegham v. Killifer*, 215 Fed. 168 (W. D. Mich. 1914); *Brooklyn Baseball Club v. McGuire*, 116 Fed. 782 (C. C. E. D. Pa. 1902); *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198 (C. C. S. D. N. Y. 1890); *Allegheny Baseball Club v. Bennett*, 14 Fed. 257 (C. C. W. D. Pa. 1882); *Cincinnati Exhibition Co. v. Johnson*, 190 Ill. App. 630 (1914); *American League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6 (Sup. Ct. 1914); *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. Supp. 779 (Sup. Ct. 1890). *But cf.* *Cincinnati Exhibition Co. v. Marsans*, 216 Fed. 269 (E. D. Mo. 1914); *Philadelphia Baseball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973 (1902).

The more recent contract has changed in form but little in substance. An innovation is a recital on the part of the player that his services are of an "extraordinary character which give them peculiar value," the doctrine of *Lumley v. Wagner* thereby being incorporated as part of the contract. The contract is now scheduled for judicial review in

MacPhail of the New York Yankees instituted proceedings (since dismissed) for an injunction against Señor Jorge Pasquel of Mexico for alleged attempts to pirate players, but Pasquel, it is to be noted, was an outsider well without the scope of the agreements, who could not be otherwise reached.<sup>7</sup>

In 1946, Robert Murphy, attorney of Boston, Massachusetts, tried to insinuate himself into the baseball picture as labor relations director of the American Baseball Guild. Regarded as an intruder he was vigorously opposed by the owners and his plan failed, but not without leaving traces.<sup>8</sup> The management, recognizing that the die had been cast for player representation, this time took the initiative themselves and sanctioned the formation of the joint Player-Management Committee, wherein the player has an official voice. Further evidence of mollifying the player was the major leagues' announcement in April of this year, of the adoption of a pension plan for the benefit of the players, coaches and trainers.<sup>9</sup>

That organized baseball is a monopoly, there can be little doubt. It was so labelled as early as 1914 when it had yet to attain its present day magnitude and perfect the system of self discipline which now enables it to control and dominate the field so completely.<sup>10</sup> Organized

proceedings instituted in federal court by Daniel L. Gardella, former New York Giants outfielder. Gardella, presently under five years suspension from the major leagues for having played in the Mexican League, seeks \$300,000 damages, alleging the contract to be in violation of the antitrust laws. See N. Y. Herald-Tribune, October 3, 1947, p. 27, col. 5. For comprehensive notes on baseball contracts and related matters see 46 YALE L. J. 1386 (1937), and 32 VA. L. REV. 1164 (1946).

7. American League Baseball Club of N. Y. v. Pasquel, 187 Misc. 230, 63 N. Y. S. 2d 537 (Sup. Ct. 1946), *motion to strike out defense of illegal restraint of trade denied*, 188 Misc. 102, 66 N. Y. S. 2d 743 (Sup. Ct. 1946).

8. Evidence of Mr. Murphy's capitulation to baseball forces is the dismissal for lack of prosecution, on June 6, 1947, of his complaint of unfair labor practices, filed last year against the New York Yankees, the New York Giants and the Brooklyn Dodgers. The complaint charged that the three clubs had interfered with self organization and collective bargaining of the players. N. Y. Times, June 10, 1947, p. 34, col. 5. Similar charges, filed against the Pittsburgh Pirates, were likewise dismissed by the Pennsylvania Labor Relations Board, on July 2, 1947. See N. Y. Herald-Tribune, July 3, 1947, p. 19, col. 5. Other attempts to unionize ball players have been short lived. In 1887 the Brotherhood of Players was organized and went out of existence four years later. A second Brotherhood emerged in 1900 and lasted exactly two years. The Baseball Players Fraternity organized in 1912 was no longer active after 1917. SPALDING'S OFFICIAL BASEBALL GUIDE 342-343 (1937).

9. N. Y. Times, April 5, 1947, p. 5, col. 4.

10. American League Baseball Club v. Chase, 86 Misc. 441, 149 N. Y. Supp. 6 (Sup. Ct. 1914). Quoting from the opinion, "It is apparent from the analysis already set forth of the agreement and rules forming the combination of the baseball business, referred to

baseball today means the major leagues represented by teams from ten metropolitan cities, the minor leagues with teams in practically every state in the Union and the provinces of Canada, a Commissioner of Baseball paid at a yearly stipend of \$50,000, transportation across the breadth of the land, radio, television, the All-Star game, the World's Series.<sup>11</sup> It all adds up to big business, as the expression is commonly understood, but is it "trade" or "commerce," is it subject to the provisions of the Sherman Act directed against monopolies and restraints of trade? Some twenty-five years ago the Supreme Court answered "No."<sup>12</sup> Would the Supreme Court give the same answer today? That is the question.<sup>13</sup>

### *The Case*

*National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*<sup>14</sup> marked the culmination of a prolonged battle between rival forces seeking to rule over major league baseball. The plaintiff, a baseball club incorporated in Maryland, was a member of the Federal League of Professional Baseball Clubs, an organization which became defunct because of defendants' conspiracy, it was alleged, to monopolize the baseball business; this the defendants (the National League of Professional Baseball Clubs, the American League of Professional Baseball Clubs, composed of groups of eight incorporated baseball clubs, the officers of the two leagues and sundry other persons) accomplished by buying up some of the constituent clubs of the Federal League, and otherwise reducing the League to a "one team league," namely the plaintiff. A judgment trebling a verdict for plaintiff for \$80,000 recovered in the District of Columbia Supreme Court under Section 7 of the Sherman Act,<sup>15</sup> was reversed by the court of appeals, with which the United States Supreme Court concurred on appeal.

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as 'organized baseball' that a monopoly of baseball as a business has been ingeniously devised and created in so far as a monopoly can be created among free men."

11. The 1947 World Series broke 17 all-time records, including a new attendance high of 389,703 for the seven games, with receipts exceeding anything heretofore realized from the classic. Gross receipts were \$2,377,549, leaving a net of \$2,021,348.92 (including radio \$175,000 and television \$65,000.) See N. Y. Herald-Tribune, October 7, 1947, p. 28, col. 5.

12. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U. S. 200 (1922), *affirming* 269 Fed. 681 (App. D. C. 1921).

13. The *Federal Baseball* case concerned itself with baseball, but the decision and its reasoning would have been equally applicable to football, basketball, hockey or other forms of sport exploited inter-statewise for commercial purposes. This paper therefore may be considered as treating of the applicability of the antitrust laws to organized baseball specifically and professional sports in general.

14. 259 U. S. 200 (1922), *affirming* 269 Fed. 681 (App. D. C. 1921).

15. 26 STAT. 209 (1890), 15 U. S. C. § 1 *et seq.* (1940). The relevant sections of the Act for our purposes, read in part as follows:

Justice Holmes rendering the opinion of the Court, in effect adopts as his own, the opinion of the court of appeals which "went to the root of the case," and is content to state his views really in one paragraph.

"The business is giving exhibitions of baseball, which are purely state affairs, It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the League must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California*, 155 U. S. 648, 655, the transport is a mere incident, not the essential thing. 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 the 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."<sup>16</sup>

#### *Application of a Legal Formula*

Since Justice Holmes lays such emphasis on the decision of the District of Columbia Court of Appeals, we shall use that decision as a

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- § 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 hereby declared to be illegal . . . .
- § 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .
- § 3. "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal . . . .
- § 7. "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."
16. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U. S. 200, 208, 209 (1922).



spring-board for discussion. It stands for the proposition, of course, that baseball is not commerce and is therefore not within the provisions of the Sherman Act. The court, after defining trade and commerce variously as traffic, as the act or business of bartering, trading, buying or selling goods or commodities, finally concludes that the definitions include traffic in persons and intelligence, as well as commodities. Indeed it was already well settled that trade or commerce concerned itself with intangibles as well as tangibles, with inanimates as well as animates.<sup>17</sup>

One would not imagine at this stage that there are any real distinctions to be made between intangibles as such, and that one type of intangible would call for different judicial treatment from another, yet that is precisely what occurred in the *Federal Baseball* case. While the court readily adapts itself to the concept of "commerce" applied to "intelligence" it balks at an exhibition of baseball which it claims "is local in its beginning and in its end," and is not susceptible of being transferred in trade or commerce. As a matter of current sports expression, games are "transferred" from one location to another every day, games are "bought," games are "sold," games are "thrown."

The connotation of trade or traffic in games or sports is inescapable. But aside from any conclusions suggested by sports lingo, does not the transfer of a game of baseball, what with players and equipment to be transported from one place to another, entail more traffic in the concrete sense of the word, than a telegram sent over the same route? The court notes that major league baseball involves the transportation of players and paraphernalia, but argues that such transportation is incident to the main purpose of the enterprise, the production of the game, "it was for it they [the defendants] were in business." Parenthetically it might be said that the main purpose of the enterprise was not to produce a game but to seek financial gain, as in the case of any other commercial undertaking.

When the court speaks in terms of "local" and "incident to the main purpose," it sets aside for the time being the immediate problem in so far as it directs itself to commerce alone; rather it poses the more complex question of whether an unknown quantity, as it were, is so related to a known quantity as to take on the latter's characteristics. It is as if the court asked the question "Without attaching to a particular activity (in our case baseball) the label of commerce, is it so much a part of another activity which is unquestionably interstate commerce (trans-

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17. *United States v. Simpson*, 252 U. S. 465 (1920); *Hoke v. United States*, 227 U. S. 308 (1913); *Lottery Case*, 188 U. S. 321 (1903); *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347 (1887); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1 (1877).

portation across state lines for instance) as to be interstate commerce itself?" Thus it is that the decisions are not always clear on the immediate issue being "commerce" alone, or "interstate commerce" inclusive of an activity of uncertain limitations. In the last analysis, however, interstate commerce is always the ultimate target, so the manner in which the target is sighted is perhaps of second importance. A legal formula of some kind was bound to emerge, and so it was that the courts began to determine whether a particular activity is "incident" to interstate commerce, whether it is a "substantial" part of interstate commerce, or whether it affects interstate commerce "directly" or "indirectly."<sup>18</sup>

The Supreme Court has adhered more or less faithfully to the formula, but with its judicial eye focussed quite receptively on the relative disposition of Congress and the States to assert themselves in the exercise of their respective legislative powers. When the State has assumed full responsibility over the field and Congress has done little or nothing, the policy has been to construe the commerce clause strictly;<sup>19</sup> conversely, when Congress has purported to play a major role, and this has been so during recent years especially, the commerce clause has received a much broader interpretation.<sup>20</sup> The commerce clause therefore has not remained static in meaning, and what might have been "indirect" or "incidental" and consequently not interstate commerce in 1890 or even 1921, would not necessarily be so today.

It was not until 1887, with the enactment of the Interstate Commerce Act,<sup>21</sup> that Congress exercised, in any important measure, its prerogatives under the commerce clause. In 1890 the Sherman Act became law. Until that time the Supreme Court had considered the commerce clause from the standpoint of state activity which possibly infringed on interstate commerce,<sup>22</sup> but never from the point of view of Congress usurping its powers to the detriment of states rights. By the time *Swift*

18. See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 511 (1940); *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466-467 (1938); *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457 (1928); *Standard Oil Co. v. United States*, 221 U. S. 1, 66-69 (1911); *Northern Securities Co. v. United States*, 193 U. S. 197 (1904).

19. *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895); See also *Anderson v. United States*, 171 U. S. 604 (1898); *Hopkins v. United States*, 171 U. S. 578 (1898).

20. *United States v. Patten*, 226 U. S. 525 (1913); *Baltimore & O. R. R. v. Interstate Commerce Commission*, 221 U. S. 612 (1911); *Second Employers' Liability Cases*, 223 U. S. 1 (1911); *Southern Ry. v. United States*, 222 U. S. 20 (1911); *Loewe v. Lawlor*, 203 U. S. 274 (1908).

21. 24 STAT. 379, 380 (1887), 49 U. S. C. § 1 *et seq.* (1940).

22. *Kidd v. Pearson*, 128 U. S. 1, 20-22 (1888); *Veazie v. Moor*, 14 How. 567, 573-574 (U. S. 1852).

*& Co. v. United States*<sup>23</sup> reached the Supreme Court, sustaining the exercise of national power over interstate activity, Justice Holmes was able to state for the Court that “. . . commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.” This was the new commerce clause trend in operation, which subsequently found expression in a number of cases where federal regulation was pitted against states immunities.<sup>24</sup> The test even now is no longer whether the interference is “direct” or “indirect,”<sup>25</sup> but what its economic effects are upon interstate commerce, and in what degree.<sup>26</sup> The all purpose legal formula is in disfavor.

Federal revision of state-fixed railroad rates of an admitted intrastate character, was sustained on this theory in *Houston & Texas Ry. v. United States*<sup>27</sup> where Justice Hughes upheld federal intervention on all “. . . matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.”

#### *Wickard v. Filburn*

If there were any doubts regarding the Supreme Court's views on the so called formula, they most certainly could not have survived the decision in *Wickard v. Filburn*.<sup>28</sup> There the Court had before it the application of wheat marketing quota and attendant penalty provisions of the Agricultural Adjustment Act of 1938,<sup>29</sup> as amended, to wheat not intended in part for commerce, but wholly for consumption on the farm. Wheat grown for purely local consumption, has in itself not even the

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23. 196 U. S. 375, 398 (1905).

24. Note 20 *supra*.

25. For a very comprehensive note on the concept of interstate commerce as defined by the antitrust laws see Note, 35 COL. L. REV. 1072 (1935), wherein the author illustrates the varying attitude of the Supreme Court on what constitutes a “direct” burden on interstate commerce.

26. In *Santa Cruz Fruit Packing Co. v. Labor Board*, 303 U. S. 453, 466 (1938) Chief Justice Hughes said: “. . . ‘direct’ has been contrasted with ‘indirect’, and what is ‘remote’ or ‘distant’ with what is ‘close’ and substantial’. Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulac. But such formulae are not provided by the great concepts of the Constitution such as ‘interstate commerce’, ‘due process’, ‘equal protection’.”

27. 234 U. S. 342, 351 (1914).

28. 317 U. S. 111 (1942).

29. 52 STAT. 31 (1938), 7 U. S. C. § 1281 *et seq.* (1940), as amended, 55 STAT. 203 (1941), 7 U. S. C. § 1340 (Supp. 1946).

slightest connection with interstate commerce, still when considered in the light of its effect upon the wheat market as a whole, the activity was deemed subject to federal legislation under the commerce clause. The Court stresses that mechanical applications of legal formulas are no longer feasible and to emphasize its position states that "Whether the subject of the regulation in question was 'production', 'consumption' or 'marketing' is, therefore, not material for purposes of deciding the question of Federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional Action it would be permissible for the state to exact its power on the subject matter, even though in so doing it to some degree affected interstate commerce. *But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exacts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some time earlier have been defined as 'direct' or 'indirect'.*"<sup>30</sup>

*United States v. American Medical Ass'n*

"Suppose a law firm in the city of Washington sends its members to points in different states to try lawsuits; they would travel, and probably carry brief cases and records, in interstate commerce. Could it be correctly said that the firm, in the trial of the lawsuits, was engaged in trade or commerce?" The court in the *Federal Baseball* case merely asks the question assuming that a negative answer is self-evident, but is the answer so self evident as it is made to appear?

In *United States v. American Medical Ass'n*,<sup>32</sup> the United States Court of Appeals for the District of Columbia reversed a lower court judgment sustaining a demurrer to an indictment for conspiracy in restraint of trade, in violation of Section 3 of the Sherman Act. In its

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30. (Emphasis supplied). *Wickard v. Filburn*, 317 U. S. 111, 124 (1942); *cf. Parker v. Brown*, 317 U. S. 341, 362, 363 (1942), where Chief Justice Stone says, "Such regulations by the state are to be sustained not because they are 'indirect' rather than 'direct' . . . not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operation. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may be appropriately regulated in the interest of safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress."

31. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 Fed. 681, 685 (App. D. C. 1921), *aff'd*, 259 U. S. 260 (1922).

32. 110 F. 2d 703 (App. D. C. 1940), *cert denied*, 310 U. S. 644 (1940).

general terms the indictment charged that the American Medical Association, representing a membership of 116,000 of the country's 145,000 physicians, and others, had conspired to destroy the business and activities of Group Health Association, Inc., a cooperative non-profit association, organized for group medical practice on a risk sharing basis. The trial court was of the opinion that the practice of medicine and the business of Group Health did not constitute trade within the intent of the Statute. The court of appeals, proceeding on the broad theory that any contract unenforceable at common law because in restraint of trade, was within the inhibitions of the antitrust laws, held that in so far as Section 3 of the Sherman Act was concerned, the practice of medicine was trade.<sup>33</sup>

It is important to bear in mind that the decision, in its application, is limited to Section 3 of the Act, that it recognized the difference between an exercise of legislative power under the commerce clause of the Constitution and the plenary power of Congress to legislate for the District of Columbia,<sup>34</sup> but it served to rebut any foregone conclusion,

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33. As early as the 15th century, it was a reprehensible thing to agree to limitations on one's means of earning a livelihood. There is the case of the weaver who agreed not to practice his craft within the town for a certain time. Miscalculations in his food and board requirements compelled him to return to his loom before the time was up, whereupon he was sued for breach of contract. The court not only pronounced the contract void, but would have gleefully given the plaintiff added care had he been present, as testified to by its statement that "The obligation is void as being contrary to the common law and by God if the plaintiff were here he should go to prison until he paid a fine to the King." *Diers Case*, 2 Henry V pl. 26 (1414). The court's indignation was subsequently approved in *Mitchell v. Reynolds*, 1 Peere Williams 181, "tho' not his manner of expressing it."

34. The Court relies on *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427 (1932), wherein a combination of cleaners and dyers were held to be engaged in trade, in violation of Section 3 of the Sherman Act. Quoting from the decision at page 434: "Section 1 [of the Sherman Act] having been passed under the specific power to regulate commerce, its meaning necessarily must be limited by the scope of that power; and it may be that the words 'trade' and 'commerce' are there to be regarded as synonymous. On the other hand section 3, so far as it relates exclusively to the District of Columbia, could not have been passed under the power to regulate interstate or foreign commerce, since that provision of the section deals not with such commerce but with restraint of trade purely local in character. The power exercised, and which gives vitality to the provision, is the plenary power to legislate for the District of Columbia, conferred by Art. 1, § 8, cl. 17, of the Constitution. . . . In passing section 1 Congress could exercise only the power conferred by the commerce clause; but in passing section 3 it had unlimited power, except as restricted by other provisions of the Constitution. We are therefore, free to interpret section 3 dissociated from section 1 as though it were a separate and independent act, and thus viewed, there is no rule of statutory construction which prevents our giving to the word 'trade' its full meaning, or the more extended of two meanings, whichever will best manifest the legislative purpose." See *Sacramento Nav. Co.*

as expressed in the *Federal Baseball* case, that the learned professions and inferentially other lines of personal endeavor, are *ipso facto* without the scope of legislation applicable to trade and commerce.<sup>35</sup> It is also clear that had the *Federal Baseball* case been instituted under Section 3 of the Sherman Act, the same arguments could have applied and similar results been achieved.<sup>36</sup>

### Related Cases

Pursuing its technique of argument by contrast and comparison, the Court, in the *Federal Baseball* case, observes that college football, notwithstanding the fact that a price of admission is charged to view the game, is sport and not trade or commerce. In the first place, college football and professional baseball are two different things, but taken in its most literal sense the concept of sport in itself does not necessarily exclude that of trade or commerce. The precise question is whether a game of professional baseball, definitely a form of sport, is trade or commerce, and to conclude categorically that sport is not trade or commerce or vice versa, is mere statement of negations. And it would take considerable argument to convince Mr. MacPhail of the New York Yankees, for instance, that his baseball club was merely a hobby or pastime,<sup>37</sup> or to have Bob Feller subscribe to the notion that his pitch-

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v. Salz, 273 U. S. 326, 329, 330 (1926); *United States v. Hartwell*, 6 Wall. 385, 396 (U. S. 1867).

It is interesting to note that the *Federal Baseball* case was cited by the defendants in *Atlantic Cleaners & Dyers v. United States* but ignored by the Court, presumably for the reason that the former case involved Section 1 of the Act.

35. At least one prominent authority is prone to speculate on the status of the law profession in the District of Columbia. Former Chief Justice Stone, commenting on the practice of law, in his noted dissenting opinion in *United States v. Southeastern Underwriters Ass'n*, 322 U. S. 533, 573 (1944) says: "The practice of law is not commerce, nor, at least outside the *District of Columbia*, is it subject to the Sherman Act. . . ." (Emphasis supplied.)

36. Under the theory of the *Medical* case and prevailing law, the Washington Club, of the American League, would hold a position apart from other interests in major league baseball, in that restraints of trade affecting baseball in the District of Columbia could perhaps be prosecuted successfully, whereas similar restraints outside the District could not.

37. The New York Yankees were acquired by a syndicate comprised of Messrs. Larry MacPhail, Dan Topping and D. E. Webb, in 1945, at a reported purchase price of \$2,800,000. See *N. Y. Times*, Jan. 27, 1945, p. 1, col. 2.

Mr. MacPhail's alertness to the business possibilities of baseball, was perhaps best demonstrated by his recent disposal of his interest in the club, to the other syndicate members, for a reported \$2,000,000, which is said to be ten times the amount he contributed to the original purchase price in 1945. See *New York Herald-Tribune*, Oct. 8, 1947, p. 1, col. 3.

ing was purely for recreational purposes.<sup>38</sup> The truth of the matter is that organized baseball is more than just sport.

Both the plaintiff and the defendant were able to draw on cases in the entertainment field to support their respective positions.<sup>39</sup> The defendant had the advantage of a decision rendered by the New York Supreme Court,<sup>40</sup> the main features of which were analogous to the *Federal Baseball* case; the decision held squarely that exhibitions of baseball did not constitute trade or commerce. The plaintiff laid great stress on two cases, *Marienelli v. United Booking Offices of America*<sup>41</sup> and *International Textbook Co. v. Pigg*.<sup>42</sup>

In the *Marienelli* case, the owners of the "Keith" and "Orpheum" vaudeville circuits were alleged to have conspired with their booking agents to boycott an actor's representative, who imported artists from abroad to perform in the United States. The proposition of trade and commerce was predicated upon the traveling of the performers from state to state, their acting, the carrying of their paraphernalia and stage properties, and provisions in their contracts so providing. Judge Learned Hand who rendered the opinion, and was confronted with the usual arguments of "direct" and "indirect," "essential" and "incidental" restraints of interstate commerce, spoke thus:

"It may well be that the results of a monopoly of the playhouses within a single state would not come within the statute, though it were shown inevitably to afford the entrance or exit from the state of performers and their accoutrements, and though that result were obvious to the parties concerned from the outset. Here there is no such case, because here the contracts of hiring involve for their performance the transit quite as much as the performance. I cannot say that this feature is so inconsiderable a part of the business that it must be disregarded; I must say that it is within the necessary consequences of their acts."<sup>43</sup>

Judge Hand, on the strength of the real test being a proportion of the interstate as against the intrastate features as a whole, found that under the facts of the *Marienelli* case at least, restraint of

38. Bob Feller was reported signed to a year's contract with the Cleveland Indians calling for \$80,000, including bonuses. See *TIME*, Sept. 15, 1947, p. 44, col. 2.

39. *Marienelli v. United Booking Offices of America*, 227 Fed. 165 (S. D. N. Y. 1914); *Metropolitan Opera Co. v. Hammerstein*, 162 App. Div. 691, 147 N. Y. Supp. 532 (1st Dep't 1914); *American League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6 (Sup. Ct. 1914).

40. *American League Baseball Club of Chicago v. Chase*, *supra* note 39.

41. 227 Fed. 165 (S. D. N. Y. 1914).

42. 217 U. S. 91 (1910).

43. 227 Fed. 165, 169 (S. D. N. Y. 1914).

interstate commerce was involved. The rule, he urged, was "not so much a constitutive principle as a regulative guide." The court in the *Federal Baseball* case, by way of distinguishing *Marienelli v. United Booking Offices of America*, states that "The entire business consisted in the negotiation of a contract to travel and perform. The brokers were not interested in the service rendered or the skill exhibited by the performers."<sup>44</sup> The inconsistency of the court's position is patent on its face. How can it be said that the brokers were not interested in the services to be rendered under a contract that looked to travel and *performance*? And the further question may be asked, does not the contract of a big league ball player contemplate travel as an essential adjunct to his playing on the baseball field, in just the same if not greater degree than the performer in the *Marienelli* case?

*International Textbook Co. v. Pigg*<sup>45</sup> the court considered either completely irrelevant or too unwieldy to process; in any event it was dismissed summarily in one sentence, with no attempt at serious analysis. In the *Pigg* case the dominant theme was the communication of intelligence through instrumentalities of commerce. Briefly the plaintiff, a correspondence school incorporated in Pennsylvania, entered into a contract in Kansas, through a local solicitor, with a resident of that State. The solicitor who maintained his own office in Kansas, at his own expense, solicited students and collected installment payments which he forwarded through the mails to the main office in Pennsylvania. The plaintiff would send instructions and textbooks through the mail from Pennsylvania direct to the defendant in Kansas. Plaintiff sued to recover installment payments but was met with the defense that since it had failed to comply with certain provisions of the statutes of Kansas it was not entitled to relief in the Kansas courts. Hence the question of whether the plaintiff was engaged in interstate commerce, whether the Kansas statutes were unconstitutional as a burden on interstate commerce. The court held in the affirmative.<sup>46</sup>

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44. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 Fed. 681, 686 (App. D. C. 1921). *aff'd*, 259 U. S. 200 (1922).

45. 217 U. S. 91 (1910).

46. *Id.* at 106. Mr. Justice Harlan, speaking for the Court, expressed himself thus: "It is true that the business in which *International Textbook . . .* is engaged . . . was, in its essential characteristics, commerce among the States within the meaning of the Constitution of the United States. It involved, as already suggested, regular and, practically, continuous intercourse between the *Textbook Company*, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars . . . this mode [of imparting education] . . . looking at the contracts between the *Textbook Company* and its scholars—involved the transportation from the State where the school is located to the



The case stands for an extension of the principles set out in the original "telegraph" cases. In the "telegraph" cases it was intelligence transmitted by means of telegraph. In the *Pigg* case it was intelligence communicated by means of books mailed across state lines. In the *Federal Baseball* case it was an exhibition of baseball provided by means of players and equipment transported in interstate commerce. The three cases have all the earmarks of being *de meme famille* but the Court in the *Federal Baseball* case was not inclined to see the resemblance.

Even at the time of the *Federal Baseball* decision, the personal feature of contracts looking to entertainment as the ultimate objective, did not in itself exclude the idea of interstate commerce. Shortly before the *Federal Baseball* case was decided in the Supreme Court, a bill was filed in the District Court for the Southern District of New York, alleging that the Keith and Orpheum vaudeville circuits were combining to ruin plaintiff's business as an actor's agent. The district court dismissed the bill for want of jurisdiction on the basis of the *Federal Baseball* case as decided by the Supreme Court, but the Supreme Court promptly reversed the dismissal in contemplation of the fact that what is incidental in one instance might not be so in another.<sup>47</sup> Hence even in a personal performance contract, the interstate features might be so substantial as to make the whole undertaking interstate for statute purposes. In the last analysis the plaintiff had no better luck on his second try but the Supreme Court served notice that each case was to be decided on its facts.<sup>48</sup>

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State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing. . . Intercourse of that kind, between parties in different States—particularly when it is in execution of a valid contract between them—is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph . . . 'a new species of commerce'. . ."

47. *Hart v. B. F. Keith Vaudeville Exchange*, 262 U. S. 271, 274 (1923). Said the Court: "The bill was brought before the decision of the *Base Ball Club Case*, and it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently."

48. *Hart v. B. F. Keith Vaudeville Exchange*, 12 F. 2d 341 (C. C. A. 2d 1926), *cert. denied*, 273 U. S. 703 (1926). The court stressed that the main business was essentially personal, that ". . . singers, sketch teams, comedians, and the like were required to carry no scenery or property, because the theaters possessed such . . . animal act and flash acts are exceptions. . . The great majority . . . give merely their personal services . . . in 1920-21 the Keith Vaudeville Exchange booked 3800 vaudeville acts, and 11% carried paraphernalia in boxes and crates." Plaintiff cited *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291 (1923), wherein a combination to restrain the showing of motion picture films shipped from New York to Nebraska was held to be in restraint of interstate commerce; the case was distinguished in that the personal element was absent, that ". . . the films were leased, transported and delivered in interstate commerce, and to forbid the lessor to continue leasing them was a restriction of that commerce."

A recent case which exemplifies the current train of thought on the matter is *Ring v. Spina*.<sup>49</sup> The defendants were the authors of a theatrical production, called "Stovepipe Hat," and the Dramatists Guild of Author's League of America, Inc., an association said to include virtually all the playwrights in the country. According to the articles of the association, no member of the Guild could grant production rights to a play, except under the terms of a so called Basic Agreement which the producer or manager must sign, and which provided in part for minimum royalties, and negotiations limited to managers and members "in good standing" with the Guild. The agreement also provided for arbitration of disputes. The plaintiff, known in the industry as an "angel," invested some \$125,000 in "Stovepipe Hat," incident to which he signed, against his wishes, he alleged, the Guild's Basic Agreement. The play opened in New Haven, and then went to Boston, preparatory to an eventual opening on Broadway. A dispute arose over changes in the play, suggested by plaintiff, whereupon the authors took the position that the production contract had been broken and terminated. The play closed, the authors requested arbitration under the Basic Agreement, and plaintiff countered by a suit for treble damages under Section 7 of the Sherman Act. A temporary injunction, enjoining enforcement of the Basic Agreement pending trial, was vacated on the theory that there was no restraint of interstate commerce. Plaintiff appealed and the district court was reversed.

The court, manifestly, had before it the question of a "personal services" contract involving commerce, or interstate commerce. Defendants' heavy ammunition, of course, was *Hart v. B. F. Keith Vaudeville Exchange* and the *Federal Baseball* case; but now it would appear that these cases had in effect spent themselves and lost their authoritative charm.<sup>50</sup> Said the court:<sup>51</sup>

"The District Court, however, stressed the point that there can be no recovery under the Sherman Act where the restraint fails to involve transactions in interstate commerce. But we disagree with the conclusion below that the restraint in question was not of commerce among the several states. The District Court relied particularly upon the cases of *Hart v. B. F. Keith Vaudeville Exchange* . . . and *Federal Baseball Club of Baltimore v. National League*. . . These cases held that the contracts for the personal services for exhibition purposes of

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49. 148 F. 2d 647 (C. C. A. 2d 1945).

50. Professor Powell in 57 HARV. L. REV. 937 (1944) at 960 alludes to the questionable weight of the *Federal Baseball* case as legal authority today, when he says, "These two cases on advertising (*Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436 (1900)) and baseball contracts are not shaken by any later decisions prior to the *South-Eastern Underwriters* case."

51. *Ring v. Spina*, 148 F. 2d 647, 650 (C. C. A. 2d 1945).

vaudeville and baseball artists were not in interstate trade or commerce, even though the actual exhibitions were to take place in different states.

"Even if we thought that this present case concerned only a musical play being prepared in the provinces for Broadway, we should doubt the presently controlling force of these precedents . . . there is no doubt of the steadily expanding content of the phrase 'interstate commerce in recent years; and hence there is no longer occasion for applying these earlier cases beyond their exact facts.'"<sup>52</sup>

Moreover the court refused to concede that in the entertainment field, the "personal" element, *i.e.*, the fact that personal services are involved, should be a controlling factor in determining whether an activity constitutes commerce or not.<sup>53</sup>

*United States v. South-Eastern Underwriters Ass'n*

What was perhaps one of the most controversial and momentous pronouncements of law to come from the Supreme Court in the past decade, was the High Court's decision, handed down June 5, 1944, holding that "insurance" was "commerce" and therefore subject to the antitrust laws.<sup>54</sup> The decision rendered by a divided and partially manned Court

52. *Ibid.* The Court's appraisal of *Hart v. B. F. Keith Vaudeville Exchange* and the *Federal Baseball* cases, is somewhat tempered by the observation (p. 650) that ". . . employment contracts for separate exhibitions seem to us quite different from the substantial business of readying a musical comedy through tryouts on the road for New York production." The Court goes on to explain that a Broadway production involves the hiring of actors and actresses, attention to scenery, music, rehearsals, advertising, preparations ". . . so extensive in fact that it seems not unusual for a single play to be separately incorporated as a business corporation." Road tryouts are stressed as an essential part of the finished product. The distinction, it is submitted, is superficial. But for fanfare and elaborate preparations, the opening of the baseball season compares with any Broadway musical, what with contract negotiations with such luminaries as Joe Di Maggio, Hank Greenberg and Ted Williams, the establishment of training camps so far South as Havana, Cuba, pre-season games in Mexico and the Southern States, plane travel, radio broadcasts, national news coverage, and last but not least the President of the United States "pitching the first ball."

53. "The Supreme Court has not hesitated to regard the distribution of motion picture films as interstate commerce . . . and it may seem invidious to draw a different conclusion as to a stage production." *Ring v. Spina*, 148 F. 2d 647, 651 (C. C. A. 2d 1945). See *Interstate Circuit Inc. v. United States*, 306 U. S. 208 (1938); *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30 (1930); *United States v. First Nat. Pictures*, 282 U. S. 44 (1930); *Binderup v. Pathe Exchange Inc.*, 263 U. S. 291 (1923). See also Note, 35 COL. L. REV. 1072, 1090 (1935); *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940); *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255 (1940); *Charles A. Ramsay Co. v. Associated Bill Posters of United States and Canada*, 260 U. S. 501 (1922).

54. *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944). For our purposes the facts of the case are not so important. Suffice it to say that the South-

reversed an unbroken line of cases, covering a span of 75 years,<sup>55</sup> which stood for the proposition that insurance was a personal contract and could not be the subject of commerce.<sup>56</sup> The decision is significant in that it gives a slant on how far the Court will go to reorient the law,<sup>57</sup> to meet new and changing conditions, and more particularly to acknowl-

Eastern Underwriters Ass'n, composed of stock companies handling 90% of the fire insurance and "allied lines" in six states, was accused of being a monopoly and conspiring to fix premium rates and agents commissions, and of boycotting and intimidating non-members. A judgment of the District Court for the Northern District of Georgia, sustaining a demurrer to an indictment for violation of the Sherman Act, is reversed.

55. Justice Black delivered the majority opinion in which he was joined by Justices Douglas, Murphy and Rutledge. Chief Justice Stone and Justices Frankfurter and Jackson dissented, each writing an opinion. Justices Roberts and Reed took no part. Professor Charles Warren of Harvard Law School quarreled with the fact that a minority of the Court had ruled on a constitutional question. *N. Y. Times*, June 8, 1944, p. 16, col. 2, wherein the professor is quoted as saying, "It should be noted that the decision on a constitutional question of vast importance was rendered by a minority of the full court. This decision, therefore, reverses a wise practice of the Court instituted by Chief Justice Marshall's Court 110 years ago, in 1834, whereby the Court then voluntarily asserted that it would not decide any case involving a constitutional question unless a majority of the whole court should concur." But *quaere* on whether a constitutional question was actually involved. See Note, 44 *COL. L. REV.* 772 n. 10 (1944). For an energetic criticism of the majority opinion in the *Underwriters* case see Powell, 57 *HARV. L. REV.* 937 (1944). See, also, Lyon, *Old Statutes and New Constitutions*, 44 *COL. L. REV.* 599 (1944).

56. The Supreme Court held that insurance is not commerce in *Bothwell v. Buckbee*, *Mears Co.*, 275 U. S. 274 (1927); *National Ins. Co. v. Wanberg*, 260 U. S. 71 (1922); *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U. S. 132 (1918); *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495 (1913); *Nutting v. Massachusetts*, 183 U. S. 553 (1902); *New York Life Ins. Co. v. Cravens*, 178 U. S. 389 (1900); *Noble v. Mitchell*, 164 U. S. 367 (1896); *Hooper v. California*, 155 U. S. 648 (1894); *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110 (1886); *Ducat v. Chicago*, 10 Wall. 410 (U. S. 1870); *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566 (U. S. 1870); *Orient Insurance Co. v. Daggs*, 172 U. S. 557 (1869); *Paul v. Virginia*, 8 Wall. 168 (U. S. 1868). See, also, *Doyle v. Continental Ins Co.*, 94 U. S. 535 (1876), *overruled on other grounds*, *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922).

57. The Court's treatment of *Paul v. Virginia* in the framework of *United States v. South-Eastern Underwriters Ass'n* is singular in that first it is sought to distinguish the case (at p. 544): "... in all cases in which the Court has relied upon the proposition that the business of insurance is not commerce, its attention was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. . . . Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress . . ."; and then to criticize it (at p. 545): "Furthermore, the reasons given in support of the generalization that 'the business of insurance is not commerce' and can never be conducted so as to constitute 'Commerce among the States' are inconsistent with many decisions of this Court which have upheld federal statutes regulating interstate commerce under the Commerce Clause." The Court then goes on to enumerate the different arguments in support of *Paul v. Virginia* and to dispose of them in order.

edge that commerce today does not necessarily mean what it meant in the last century or even 25 years ago. Indeed the court in the *Federal Baseball* case cited insurance cases in support of its position,<sup>58</sup> so that the *Underwriters* case is of special interest here. And for purposes of argument let us approach the problem from the angle of what the Supreme Court had to hurdle in order to arrive at its decision in the *Underwriters* case, compared to the difficulties which would confront it upon consideration of a "new" *Federal Baseball* case, if, as, and when such an event occurs.

Consider at the outset that *United States v. South-Eastern Underwriters Ass'n* meant the reversal of a doctrine which had endured for 75 years. The *Federal Baseball* case with but some 25 years back of it, might be classed as being of the generation before last. It does not have that "weight of authority" acquired only through usage and the capacity to be cited with approval through the years. Neither is it so new as to make abandonment or disavowal judicially embarrassing or immoral. And lest there be any doubt about the Court's opinion in *United States v. South-Eastern Underwriters Ass'n* being a departure from precedent, because it does not speak of reversal in so many words, let us bear in mind that two of the dissenting justices, at least, Chief Justice Stone and Justice Jackson, when face to face with realities, recognize most emphatically that some heretofore respectable law is going by the boards.<sup>59</sup>

Both the Chief Justice and Justice Jackson are considerably disturbed by the far reaching effects of this new interpretation of the law. Not that they consider precedent sacrosanct, for the Chief Justice says the opposite,<sup>60</sup> but because of the confusion they anticipate will ensue

58. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 Fed. 681, 685 (App. D. C. 1921), *aff'd*, 259 U. S. 200 (1922).

59. *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533, 578, 579 (1944). Chief Justice Stone observed: "This Court, throughout the seventy-five years since the decision of *Paul v. Virginia*, has adhered to the view that the business of insurance is not interstate commerce. Such has ever since been the practical construction by the other branches of the Government of the application to insurance of the commerce clause of the Sherman Act. . . . The decision now rendered repudiates this long-continued and consistent construction of the commerce clause and the Sherman Act."

Justice Jackson at p. 587: "Instead of overruling our repeated decisions that insurance is not commerce . . ."; at p. 589: "But the Court now is not following, it is overruling an unequivocal line of authority reaching over many years."

60. *Id.* at 579, the Chief Justice speaking: "This Court has never committed itself to any rule or policy that it will not 'bow to the lessons of experience and the force of better reasoning' by overruling a mistaken precedent. . . . To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of this Court which do not accept that view." See *Smith v. Allwright*, 321 U. S. 649, 665 (1943), note 10, for cases wherein the Supreme Court overrules itself.

as a result of changing this most fundamental of insurance doctrines.<sup>61</sup> From the time of *Paul v. Virginia*,<sup>62</sup> the States have undertaken, by elaborate legislation, to regulate the insurance business, and they have maintained that position successfully despite resistance on the part of the insurance companies on occasion.<sup>63</sup> By the same token Congress has pursued a hands-off policy with regard to insurance. The dissenting justices grieve over the prospect of the States relinquishing their responsibilities to an unprepared and unequipped federal entity. Would the same situation prevail if the *Federal Baseball* case were reversed? Obviously not.

In the State of New York, for instance, there is specific legislation on the organization of a State Insurance Department, the appointment of a State Insurance Department Superintendent, the licensing of insurers, directives on assets, investments and deposits, agents, brokers, and other matters *ad infinitum*.<sup>64</sup> Under sports, the New York State statute books carry an item on bribery of participants in professional sports, one on the Bethpage Park Authority, and two on Sunday sports.<sup>65</sup> The situation is typical.<sup>66</sup>

When Senator Sherman's original bill, which subsequently became law as the Sherman Act, was discussed in committee and on the floor, there is no indication that baseball came up as a topic, but insurance was an entirely different matter. Insurance already was an important business, the Supreme Court had 20 years prior decided that it was not commerce, and it was so noted in debate.<sup>67</sup> Yet no steps were taken to

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61. *Id.* at 580, 581, 582, 589, 590. Justice Jackson's stand is all the more unique when we take notice that he frankly is of the opinion that insurance is commerce and if the question were being considered for the first time he would have no compunctions in so holding. See *Id.* at 585, 586.

62. 8 Wall. 168 (U. S. 1868).

63. *New York Life Ins. Co. v. Deer County*, 231 U. S. 495 (1913).

64. N. Y. INS. LAW.

65. N. Y. PUB. AUTH. LAW § 204 (10); N. Y. PENAL LAW §§ 382, 2145; N. Y. VILLAGE LAW § 139-e.

66. It is true that a number of states, including New York, have comprehensive legislation on boxing and horse racing, to preserve the health, morals and safety of the participants and their followers. It is not all-inclusive legislation aimed at the business and commercial features of these sports.

67. "The Senator from Missouri (Mr. West) spoke the other day about the difficulty of defining the word 'commerce', especially as contained in the phrase 'interstate commerce'. I recollect one judicial decision upon the subject very definitely. The Supreme Court has decided that insurance is not commerce, and I suppose by following the circle of negations long enough and excluding all the things not commerce we should come at last to the residuum, which must be commerce because it can be nothing else. . . ." 21 CONG. REC. 2556-2557 (March 24, 1890).

redefine commerce so as to include insurance within its orbit, the inescapable inference being that the Act would apply to it.

Efforts of President Theodore Roosevelt in 1904 and 1905,<sup>68</sup> in which he was joined by the American Bar Association,<sup>69</sup> to determine whether Congress should legislate on interstate transactions in insurance, bills introduced between 1902 and 1906<sup>70</sup> for the very purpose of regulating various aspects of the insurance business, all went for naught for the reason, as stated by the House Committee, that ". . . commerce has passed beyond the realm of argument, because the Supreme Court of the United States has said many times for a great number of years that insurance is not commerce."<sup>71</sup> Again in 1919, when Congress by the Clayton Act,<sup>72</sup> amended the Sherman Act, and defined the term commerce, there was no evidence that insurance had taken on new characteristics, while on the other hand there were expressions to the contrary, notably that of Representative Webb in charge of the bill in the House, who stated: ". . . insurance companies are not reached as the Supreme Court has held that their contracts or policies are not interstate commerce."<sup>73</sup>

It is evident therefore that each time antitrust legislation has been passed, the question of insurance has been in the foreground, and each time it was considered beyond the pale of the law. If the Supreme Court, in the *Underwriters* case, was able to override all this legislative history, how much easier would it not be to redefine baseball, on which the Congressional Record is no more silent, as commerce, in the light of present day conditions?

Last but not least there is the all-important Court personnel factor, the who's who in personalities that make up the supreme body. And here, of course, we speak of legal abstractions as they are inevitably tempered by the diversity of thought behavior which is part and parcel of the Court's composite state of mind. Chief Justice Hughes expressed

68. MESSAGES OF THE PRESIDENTS, 6901, 6986, 6987. See, also, the Report of the Commissioner of Corporations, 5 (1905) and SEN. DOC. NO. 333, 59th Cong., 1st Sess. 5365-5466 (1906).

69. See, e.g., 29 A. B. A. REP. 538 (1906); 24 ANNALS OF AM. ACAD. OF POL. AND SOC. SCIENCES 69, 78-83 (1904); 26 *Id.* 681 (1905); Dryden, *An Address on the Regulation of Insurance by Congress* (1904); 1 MOODY 271 *et seq.* (1905-6); 38 AM. L. REV. 181 (1904).

70. H. R. REP. NO. 7054, 58th Cong., 2d Sess. 147 (1903); *Id.* 13791, 58th Cong., 2d Sess. 3158 (1904); *Id.* 16274, 58th Cong., 3d Sess. 183 (1904); SEN. REP. NO. 7277, 58th Cong., 3d Sess. 3467 (1905); H. R. REP. NO. 15092, 59th Cong., 1st Sess. 2705 (1906); *Id.* 417, 59th Cong., 1st Sess. (1906).

71. H. R. REP. NO. 2491, 59th Cong., 1st Sess. 13 (1906).

72. 38 STAT. 730 (1914), 15 U. S. C. § 12, *et seq.* (1941).

73. 51 CONG. REC. 9390 (May 28, 1914).

it by saying that the Constitution is "what the judges say it is." The *Underwriters* case was decided by a divided Court. What is the composition of the Court today, and what could the judicial crystal gazer predict in the way of a line-up on a "new" *Federal Baseball* case decision?

Chief Justice Stone has passed away since *United States v. South-Eastern Underwriters Ass'n*, and has been replaced by Chief Justice Vinson. Justice Roberts, retired, has been succeeded by Justice Burton. The rest of the Court remains the same.

The Justices Black, Douglas, Murphy, Rutledge block, maintaining a consistent position, would form the nucleus of a majority opinion holding that big league baseball is interstate commerce subject to the antitrust laws. Messrs. Justices Frankfurter and Jackson, dissenters in the *Underwriters* case, could be considered as doubtfuls, at most, if not new additions to the majority team. Justice Frankfurter, it must be borne in mind, felt compelled to join with Chief Justice Stone on considerations of legislative history and the "grave dislocations" which a reversal of *Paul v. Virginia* would engender;<sup>74</sup> Justice Jackson had no illusions about the "fiction that insurance is not commerce" but he too feared the possible chaos resulting from reversal.<sup>75</sup> These factors would be absent in the "new" *Federal Baseball* case. Chief Justice Vinson, and Justices Reed and Burton would be unknowns. All in all, however, and without venturing a guess on numerical majorities, the odds would be in favor of new law, a holding that baseball is commerce, and in its interstate features, subject to the provisions of the antitrust laws.<sup>76</sup>

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74. There is authority for the proposition that a decision reversing prior law would affect transactions taking place after the decision only. *Great Northern Ry. v. Sunburst Co.*, 287 U. S. 358 (1932). This would obviate any great harm to those acting on the strength of the old law, and serve notice that in the future the new law would govern. The "grave dislocations" anticipated in the *Underwriters* case would have been guarded against, to this extent.

75. Justice Jackson, as was Chief Justice Stone, was concerned with the application of the Criminal Appeals Act, under which the *Underwriters* case came to the Supreme Court, in that the appeal was limited in scope to the construction of the business of making insurance contracts only, not the business of insurance as a whole. Had Justice Jackson felt so constrained in his deliberations, as indeed the majority was not, he would have remanded the case to the lower court for determination of whether the business, considered commerce or not, interfered with interstate commerce in commodities or interstate transportation. *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533, 583, 589 (1944).

76. The writer has endeavored throughout, to maintain the line between a construction of the Sherman Act proper and the powers of Congress generally to legislate under the commerce clause. The problem specifically is not what Congress was empowered to do, but what it actually did when passing the Sherman Act. All of the dissenters in the



### Conclusion

The *Federal Baseball* case is a decision on baseball of another age. It antedates the era of nationally sponsored coast to coast broadcasts, television, million dollar gate receipts, and \$80,000 salaries. It represents the legalistic approach rather than the realistic appreciation that organized baseball is a business and not merely a spectacle. It is not representative of *Wickard v. Filburn* which looks to the substance of the law rather than the application of legal formulas.

In keeping with changing times, new philosophies in government, and new techniques in business, the Supreme Court has also evolved, and so has the law. If *Wickard v. Filburn* and *United States v. South-Eastern Underwriters Ass'n* are any portents of things to come, then *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, affords little *appui* to those who would maintain that baseball is not commerce, and is therefore exempt from antitrust law enforcement.

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*Underwriters* case were apparently of the opinion that Congress has the constitutional authority to regulate the business of insurance. See 562, 563, 583, 588, of the opinions in the *Underwriters* case.