



CSU
College of Law Library

1998

Baseball and the Rule of Law

Paul Finkelman

University of Tulsa College of Law

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Rule of Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Paul Finkelman, *Baseball and the Rule of Law*, 46 Clev. St. L. Rev. 239 (1998)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol46/iss2/4>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

BASEBALL AND THE RULE OF LAW

PAUL FINKELMAN¹

I. BASEBALL AND THE CREATION OF LITTLE LEAGUE LITIGATORS	239
II. BASEBALL AND AMERICAN LEGAL CULTURE	240
III. BASEBALL, LEGAL SCHOLARSHIP, AND THE COURTS	246
IV. BASEBALL AND INTEGRATION	248
V. INEQUALITY OFF THE PLAYING FIELD	253
VI. BASEBALL, LAW AND TWENTY-FIRST CENTURY	255
VII. BASEBALL AND BUSINESS LAW	257

Most cultures have a new year of some kind; a season of beginning. For lawyers who are baseball fans, there are two beginnings, two seasons. The first season begins in April, and begins to wind down in October. That is of course, the baseball season.

Fortunately, just as our main season is drawing to a close, the second season begins, on the First Monday in October. It is always a very slow season at first, and does not distract us from playoffs and the World Series. But, with baseball finished, we can turn to the Court, and watch it with a keen eye. The Court's season continues to build to its climax in the Spring. Just as the baseball season is beginning its slow opening, the Court overwhelms us in the spring with what sometimes seems to be an avalanche of opinions. And, the Court closes down just in time for baseball to pick up again.

And, so, year after year, except when there is a strike or a lock-out, the rhythm of baseball and the law continue to shape our world.

While there is some coincidence in the timing of these two seasons, I think it is no coincidence that most lawyers and law professors I know are avid baseball fans. Indeed, I believe that our legal culture, perhaps the very rule of law itself in the United States, is to some extent tied to our national past time.

I. BASEBALL AND THE CREATION OF LITTLE LEAGUE LITIGATORS

I begin with two large propositions: first, that Americans, whatever we may think of the "government" or "authority," develop an abiding respect for judges and the courts through our national pastime. Second, that the game of baseball,

¹Copyright, 1999 Paul Finkelman. Chapman Distinguished Professor, University of Tulsa College of Law. This article was originally presented as the Baker & Hostetler Lecture at Cleveland-Marshall College of Law in October 1997. I thank Dawn S. Kostuik, Edwin Butterfoss, Lloyd Snyder, Melissa Day, Schuyler Cook, Laura Ray, and Bae Smith for their ideas, suggestions, and research help.

as played and watched in the United States, fosters both an understanding of the rule of law and a respect for that system. Baseball fans who have never heard of common-law adjudications or constitutional jurisprudence nevertheless have an appreciation for both.

Before elaborating on these themes, and others, first consider two illustrations of these points.

The batter stands with a potentially lethal weapon in his hand; the umpire, says strike three. The batter sits down; he may argue about the call, but the argument is not serious, because he knows he will lose. He also knows that the rule of law has prevailed, and he is "out." On very rare occasions a player in anger or frustration will touch the umpire in some way. The results are suspensions and fines. Players can do and say much in the game, but they may not touch the judge, who rules on every pitch and every play. Similarly, in the courtroom, lawyers and litigants understand that the judge is supreme. An abiding respect for the judge is central to our legal system. This respect is enforced by the power of the contempt citation in the courtroom, just as it is on the field with the power of the umpire to expel a player from the game.

Next, consider three umpires discussing their profession. "I call 'em as I see 'em," the first says. "I call 'em as they are," says the second. "They ain't nothing till I call 'em," says the third.² In laying out their approach to each pitch, the umpires suggest the range of judicial philosophies in American law. We learn, at an early age, that rules, however carefully written down, are flexible and never wholly certain. Each judge is slightly different in his approach.

The very idea that a pitch may be a ball or a strike, depending on the view of the umpire—or that a statute might be constitutional or not, depending on the view of the Judge—may seem contrary to the concept of "the rule of law." But, in this country at least, the "rule of law" is in part the rule of judges, skilled and trained, who interpret and apply sterile statutes and codes to the realities of life.

Baseball prepares Americans for this legal and social reality. Baseball produces players, fans, and citizens who accept the rule of law, promulgated by judges who enforce a code of conduct and a book of rules. The game prepares us for a society that is rule-bound and law-oriented, but at the same time, modified by the eye of the umpire. This helps explain why as citizens we accept the competing readings of the Constitution by justices as different as Burger and Blackmun or Scalia and Brennan. Perhaps because we grew up playing and watching a game in which law matters and rules count, we have learned to accept the different views of judges and the finality of their decisions.

II. BASEBALL AND AMERICAN LEGAL CULTURE

Americans are a peculiarly legalistic people. We lead the world in the production of lawyers and in litigation. We use courts to resolve our private

²See Douglas O. Linder, *Strict Construction and the Strike Zone*, 56 UMKC L. REV. 117 (1987), reprinted in SPENCER WALLER ET AL., *BASEBALL AND THE AMERICAN LEGAL MIND* 477 (1995). [Hereinafter cited as WALLER ET AL.]

dealings and our public problems. Other cultures turn to members of the clergy, tribal elders, or even civil service bureaucrats to resolve social conflict, mediate family disputes, or even to secure land transactions. We turn to lawyers and judges.

One of the first public documents of the colonial period—the Mayflower Compact—was a cross between a contract and a Constitution.³ Our most sacred cultural document, the Declaration of Independence, is a brief against King George III of Great Britain, written by a team of lawyers.⁴ Our central political document is a Constitution, to which we turn to solve almost all public and many private disputes.

Despite the plethora of lawyer-jokes, law practice has traditionally been a key to political and economic success; as a nation we show great respect for individuals trained in the law. As Alexis de Tocqueville, the brilliant French observer of American culture, noted in the 1830s, lawyers came the closest to constituting an aristocracy in the United States.⁵ This makes sense in a nation where, as Thomas Paine put it, "THE LAW IS KING."⁶

Thus, it is not surprising that the great American pastime—our national sport—intersects with law in a variety of ways. Most obviously, baseball is itself a highly legalistic game.⁷ It has an elaborate set of rules, far more so than most other games. At the professional level it requires a highly trained⁸ multi-judge panel of umpires to implement and interpret the rules. Every pitch requires a

³BRADFORD'S HISTORY OF PLYMOUTH PLANTATION 107 (W.T. Davis, ed., 1908) (stating the Mayflower Compact was a compact "[i]n the name of God" for a "civill body politick," with power to enact, constitute, and frame such just and equall lawes . . . [which may be] meete and convenient for the generall good.").

⁴The two most important authors of the Declaration were Thomas Jefferson and John Adams, both lawyers.

⁵"In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and bar." Alexis de Tocqueville, *Democracy in America* (Henry Reeve, trans., 1945).

⁶THOMAS PAINE, *COMMON SENSE* 57 (Philadelphia 1776). ("[L]et a day be solemnly set apart for proclaiming the Charter; let it be brought forth placed on the Divine Law, the Word of God; let a crown be placed thereon, by which the World may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is Law, so in free Countries the law ought to be king; and there ought to be no other.").

⁷Margaret Robb, *Running Bases, Winning Cases: Why the Grand Old Game of Baseball is Much Like the Legal Profession*, 82 A.B.A. J. 140, 140 (Aug. 1996).

⁸It is worth noting that baseball umpires are carefully and extensively trained professionals, unlike football referees, who put on their stripped suits only once a weekend, as sort of a part-time job.

legal ruling.⁹ Every time a ball is hit, one of the umpires must make a ruling on whether it is fair or foul. As with our legal system, each umpire has a jurisdiction. The home plate umpire calls a hit ball fair or foul *before* it reaches a base; the first or third base umpires make the call after the ball is beyond their bag. In the World Series extra umpires are on the field, creating a mini-Supreme Court which provides new pairs of eyes to scrutinize plays in the outfield.¹⁰

Many of the rules of baseball seem to have evolved much like the common law. To paraphrase Oliver Wendell Holmes, Jr., the rules of baseball, are not so much the result of logic, as experience.¹¹ There is no logical reason for the infield fly rule, but it developed like the common law, out of experience.¹² Likewise, the ground rule double, might just as easily have been a single or a triple. Similarly, the rules on fan interference with a ball in play are not a result of logic. There is certainly nothing logical about the "ground rule triple" with the opportunity to continue on home.¹³ It is clear that the experience of baseball, rather than some logic of rule-making, led to these common-law developments.

Two other examples of the rules of baseball illustrate how experience trumps logic in baseball. There is nothing inherently logical about the distance from home to first. Ninety feet makes no sense; why not an even hundred?¹⁴ Or a more common figure of seventy-five? But, experience shows that ninety feet works; any longer would give the fielder an advantage; any shorter would unfairly help the base runner. Ninety feet seems just right to make it possible

⁹See generally the official rules of *Major League Baseball*, most easily found at: www.majorleaguebaseball.com at "official rules."

¹⁰Unlike the statue of justice, the umpires examine the evidence with their eyes open, even though most fans, players, coaches, and managers sooner or later, assert the opposite.

¹¹"The life of the law has not been logic; it has been experience." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881) 1 (Mark DeWolfe Howe ed., 1963).

¹²Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1477 (1975), see also, John J. Flynn, *Further Aside: A Comment on "The Common Law Origins of the Infield Fly Rule,"* 4 J. OF CONTEMPORARY L. 241 (1978) and Mark W. Cochran, *The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside*, 29 W. & M. L. REV. 567 (1988); Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FEDERAL SENTENCING REPORTER 96 (1992). All four are reprinted in WALLER et al., *supra* note 2, at 4-32.

¹³"Rule 7.05 Each runner including the batter runner may, without liability to be put out, advance . . . b) Three bases, if a fielder deliberately touches a fair ball with his cap, mask or any part of his uniform detached from its proper place on his person. The ball is in play and the batter may advance to home base at his peril; (c) Three bases, if a fielder deliberately throws his glove at and touches a fair ball. The ball is in play and the batter may advance to home base at his peril." <http://www.majorleaguebaseball.com/library/rules7.sml>.

¹⁴Both football (100 yards for the field) and basketball (100 feet for the court) are hung up on "logical" numbers, rather than the needs of the game. Clearly, basketball with seven foot players of the modern era might need longer courts and higher baskets.

for almost any ball hit in the infield to be a close play at first. Nor is there anything logical about the height of the pitcher's mound, which has been changed more than once, as the "felt necessities"¹⁵ of baseball have required.

Like common law jurists, the umpires shape baseball according to the written rules, but with their own spin on the statutes. Just as some judges are known as hard sentencers, and some known to be more lenient, so too, some umpires allow a slightly higher, lower, or wider strike-zone than others.¹⁶ Some judges will allow great leeway in the antics of attorneys; others are quicker to threaten a contempt citation or to actually issue one. Similarly, some umpires allow greater flexibility than other umpires in the language and antics they allow before they send a complaining player or manager back to the dugout or all the way to the showers.

Sometimes, the umpire moves from his judge-like role to one more or less like a cop on the beat. The manager or pitching coach runs out to the mound for a short time-out. It is like sitting in your car with the engine running in the no-parking zone; slowly the officer ambles over to your car; as you see him approach you ease out into traffic. Similarly, the umpire strolls toward the pitcher and miraculously the conference on the mound ends, and the manager trots back to his dugout. The common-law of baseball, as applied by each umpire, dictates how long the manager can be on the mound before the umpire will tell the players and manager to get on with the game.

Just as umpires are much like judges, and occasionally like police officers, managers and players often resemble litigants and lawyers. Where else but in a baseball game do we see a coach charge on to the field waving a rule book in his hand. The argument is often not only about how two observers, the umpire and the manager, saw the play but also how the "rule" should be applied to the play. Every manager is a rule-bound formalist, while most umpires are common law judges. In baseball, as in the American court system, there is even the possibility of appeal. Often enough a first base or third base umpire will reverse the judge at the plate on whether the batter swung at the ball. But, like our court system, the "higher court" judge only says something if an appeal has been made. The batter or catcher who foolishly fails to appeal the plate umpire's call will not be able to do so once the next pitch is thrown. The statute of limitations in baseball is short and final. Even if the umpire clearly blows the call—as happened when a Cincinnati Reds player bunted and then blocked out the Boston Red Sox catcher in the 1975 World Series—once the next play begins, the ruling, even if erroneous, is *res judicata*.¹⁷

¹⁵HOLMES, *supra* note 12, at 1.

¹⁶Michael J. Yelnosky, *If You Write It, (S)He Will Come: Judicial Opinions, Metaphores, Baseball, and "the Sex Stuff"*, 28 CONN. L. REV. 813, 826 (1996).

¹⁷Of course, it is always possible to appeal to the commissioner of baseball. See *Commentary: In re Brett: The Sticky Problem of Statutory Construction*, 52 FORDHAM L. REV. 430 (1983); Christopher H. Clancy and Jonathan A. Weiss, *A Pine Tar Gloss on Quasi-Legal Images*, 5 CARDOZO L. REV. 411 (1984). Both are reprinted in WALLER ET AL., *supra* note 2, at 34-74.

Unlike football or basketball, where time is of the essence, baseball is like a legal case. Both a legal case and a baseball game have a unique pace, unrestricted by arbitrary notions of time. Each side gets to present its position, although in baseball it happens nine times or more. There is no clock in either forum; there is time to approach the bench, time for side bars, time to talk to your clients or your players. And, like a trial, the baseball game continues until both sides have had their say. A ball game can go into extra innings, as can a trial. Like Yogi Berra, the great baseball philosopher-catcher,¹⁸ every litigator understands "it ain't over 'til it's over."¹⁹

Both law and baseball have canons of ethics, which can lead to disciplinary sanctions, including permanent disbarment or banishment. The rules are different to be sure; lawyers may gamble; in fact gambling is at the heart of contingency based litigation. Ball players, on the other hand, cannot bet on their own teams or any others. Just ask Pete Rose.²⁰ But, the concept is the same. Break the ethical canons and you are no longer permitted to play or practice.

If the British Empire won its victories on the playing fields of Eton, American culture grew on thousands of sandlots and playground diamonds. Americans learn from childhood to respect the call of the umpire, just as we come of age abiding by the rules of judges. We see the rule of law in action everytime the batter with a potential weapon in hand—a lethal stick—argues with the umpire and then meekly returns to the bench after a called third strike.²¹

The culture of baseball is emphatically the culture of the rule of law. It turns every batter and base-runner into a litigator. We learn at an early age to argue the call and appeal to another umpire. We know we will rarely win an argument with the umpire (judge) but we believe that the next time we will get a more favorable ruling. Furthermore, there is always something therapeutic about arguing with the umpire. No wonder America leads the world in the production of lawyers. No wonder we bring our egos and our personal complaints to court. We start to learn the process in pee wee league and grammar school softball!

We also learn, through baseball, a deep respect for rules. No other game has so many rules or such complicated ones. We also learn to manipulate the rules to our advantage. The "double switch" was surely the invention of some brilliantly legalistic manager.

Like American legal culture, baseball has its famous folk heroes who are also outlaws. Fans often adore pitchers known for their spitballs, knowing full well they are violating both the spirit and the letter of the law. Not a few pitchers have been the Pretty Boy Floyds and Bonnie Parkers of the mound—violating

¹⁸39 Authors, *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697 (1997).

¹⁹PAUL DICKSON, *BASEBALL'S GREATEST QUOTATIONS* 43 (1991); *see also* DAVID H. NATHAN, *BASEBALL QUOTATIONS* 185 (1993).

²⁰ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* (1998) 151-172.

²¹*See, e.g.,* State v. Miller, 608 P.2d 595 (Or. Ct. App. 1980); State v. Fuller, 155 S.E.2d 268 (N.C. 1967).

the law and being heroes for it. Other players and managers have skirted just inside the rules to win the hearts of the fans. Bill Veeck's sending a midget to the plate, thereby guaranteeing a walk, did not violate the rules of the game, but it certainly seemed to flirt with contempt for them. Similarly, Reggie Jackson's ability to be hit on the hip by a throw to first during a World Series game, thus stopping a double play, did not violate any rule.²² Rather, Jackson showed that a heads-up player can manipulate the law for the benefit of his team. No litigator ever used the rules of civil procedure better than Mr. October did that day.

There is one play in baseball that conjures up the legal system by its very name: stealing a base. Our legal system does not allow people to steal. But the law of adverse possession does suggest an analogy. The base stealer finds the base sitting out there empty in the field, and though he has no legal claim to the base, he openly and notoriously takes possession of it. Similarly, the pick off play may be the equivalent of evicting a trespasser, who has no right to be wandering about the basepath, away from the base he is legally entitled to occupy. Alternatively, the pick-off play might be analogized to vagrancy laws. Runners wandering aimlessly between bases can be "arrested" by a throw from the pitcher or catcher, and once picked off, or in police parlance, "picked up," the runners can be sent back to where they belong: their bench.

Because base-stealing is permissible, the successful "thieves" are truly heroes. To steal the game itself, however, as members of the Chicago White Sox did in 1919 (earning the nickname the Black Sox), is a different matter.²³

The response to the "Black Sox" scandal is instructive for the way baseball developed its own internal common law. At least six White Sox players threw the 1919 series after being paid off by gamblers. Chicago prosecutors indicted eight players, but in 1921 all were acquitted. Meanwhile, the major leagues appointed Kenesaw Mountain Landis, a federal judge, to be the new commissioner. He demanded almost absolute power, as well as life tenure, to take the job.²⁴ He then immediately banned the eight acquitted players from baseball. At least one, "Shoeless Joe" Jackson, was surely innocent of the charge against him, but that mattered little to the authoritarian Landis, who showed little regard for due process.

²²Jackson was on first base. A ground ball was hit and the fielder threw to second base, forcing Jackson "out." The fielder who caught the ball at second base then threw to first base, in an attempt to also get the hitter out, thus making a "double-play." Jackson, in-between first and second base, shifted his body slightly and was able to deflect the throw with his hip. The only penalty for this interference was that Jackson was "out." But, since he was already "out" nothing more could be done to him, and the batter was thus safe at first base.

²³See Allen Boyer, *The Great Gatsby, the Black Sox, High Finance, and American Law*, 88 MICH. L. REV. 328 (1989), reprinted in WALLER ET AL., *supra* note 2, at 436-450.

²⁴Norm Rosenberg, *When the Commissioner was the Law or When Czardom was in Flower*, 21 MINNEAPOLIS REV. OF BASEBALL 21 (1986), reprinted in WALLER ET AL., *supra* note 2, at 265-70.

Since then the law-making powers of the commissioner—when there is one—have been enormous. He (so far it has always been a he, but that will surely change one day) acts more like a judge in equity, bound by few statutes or procedural rules, than like a common-law judge or a legislator. The commissioner has been called a czar, but so too have judges who exerted their authority. The conflicting metaphors—common law, equity, czar—seem to stumble over each other, as we try to sort out the layers of connections between law and the administration of professional baseball.

III. BASEBALL, LEGAL SCHOLARSHIP, AND THE COURTS

The internal dynamics of baseball have led many scholars to use the game as a metaphor for the legal world. Thus we find law review articles on the "infield fly rule," the "designated hitter," the "strike zone," and the home run. The late Yale Law Professor Robert Cover once published a "Law-Baseball Quiz" in the *New York Times*, in which he compared Earl Warren to Yogi Berra, Louis Brandeis to Lou Gehrig, and John Marshall to Babe Ruth. Most intriguing of all, Cover compared Oliver Wendell Holmes, Jr. to Casey Stengel, arguing that both men "achieved immortality for his use of the English language."²⁵

In the first Supreme Court case dealing with baseball, *Federal Baseball Club of Baltimore v. National League*,²⁶ Justice Oliver Wendell Holmes compared baseball players to lawyers. In his opinion Justice Holmes held that professional baseball was not an aspect of interstate commerce, but rather he declared that "the business of giving exhibitions," as Holmes called baseball games, was "purely" a "state affair." Holmes asserted that the interstate travel of ballplayers to compete against the home team in another state was a "mere incident" to the game and "is not enough to change the character of the business." Arguing from analogy, Holmes asserted that the travel of a baseball player from one state to the next was the same as "a firm of lawyers sending a member out to argue a case." In such a situation the lawyer did not "engage in ... [interstate] commerce because" he went "to another state." Thus, Holmes ruled that professional baseball was exempt from antitrust laws.²⁷

Holmes was clearly wrong in *Federal Baseball Club*. Professional baseball was surely a business involved in interstate commerce, then, just as it is today. Ballplayers are not like lawyers who might occasionally argue a case in a different state. Interstate travel is an integral part of professional baseball. Without this travel, there would be no playoffs or World Series—indeed, life as we know it would not exist. Nevertheless, despite the universal belief that Holmes is wrong, baseball has remained exempt from the antitrust laws.²⁸

²⁵Robert M. Cover, *Your Law-Baseball Quiz*, NEW YORK TIMES, Apr. 5, 1979, reprinted in WALLER ET AL. *supra* note 2, at 431-33.

²⁶259 U.S. 200 (1922).

²⁷*Id.* at 208, 209.

²⁸*Curt Flood Act of 1998*, 112 Stat. 2824, (Oct. 27, 1998). Section 2 states "this Act does not change the application of the antitrust laws in any other context or with respect to

Indeed, in January 1998 Congress reaffirmed baseball's general exemption from the antitrust laws, while at the same time applying antitrust laws to "major league baseball players" for purposes of contract negotiations.²⁹

At first glance this seems to be one of the great mysteries of American law. How can a multimillion dollar business, carried on in numerous states, not be part of interstate commerce? Holmes asserted that baseball was not "trade or commerce in the commonly accepted use of those words."³⁰ Justice Holmes's opinion in *Federal Baseball Club* was probably not motivated by his love of the sport.³¹ Rather, it seems to have been based on either a curious and narrow misreading of the antitrust laws and/or his utter misunderstanding of the nature of the business of baseball.³² Holmes may be one of the few great lawyers and jurists in America who failed to understand baseball or its significance for our society.

Despite Holmes's odd opinion, the Supreme Court has consistently upheld *Federal Baseball Club* in cases involving professional baseball.³³ The fact that the Court has refused to apply the logic or implications of *Federal Baseball Club* to any other sport³⁴ suggests that the Court fully understands that Holmes's decision was erroneous. Indeed, in subsequent cases numerous judges have made this clear. Thus, in a case involving professional football, Justice Tom Clark noted that *Federal Baseball Club* "was at best of dubious validity"³⁵ and that if the court were "considering the question of baseball for the first time upon a clean slate," the theory of the case would be rejected as "unrealistic, inconsistent, or illogical."³⁶

Why then, has the Court not overturned *Federal Baseball Club*? One possibility is that the Court wants to provide law professors with the perfect example of a "mindless" implementation of *stare decisis*. Who can resist such an opinion

any other person or entity."

²⁹*Id.* at § 2 and § 3.

³⁰*Id.*

³¹There is no indication Holmes enjoyed any organized sports, either as a fan or a player, or for that matter that he even understood sport in any serious way.

³²See *Baseball and the Antitrust Laws: The Unique Antitrust Status of Baseball*, WALLER ET AL. *supra* note 2, at 75-78; see also Spencer Weber Waller, *The Antitrust Philosophy of Justice Holmes*, 18 S. ILL. U. L. REV. 283 (1993).

³³*Gardella v. Chandler*, 172 F.2d 402 (2nd Cir. 1949); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

³⁴See *Radovich v. National Football League*, 352 U.S. 445 (1957).

³⁵352 U.S. at 450, 450-52.

³⁶*Id.*

and its progeny,³⁷ when attempting to teach the concept of *stare decisis* to law students.

However, the Court is rarely so solicitous of the professorate. Other, strictly legal explanations are perhaps more plausible, including the assertions by two different courts that Congress should overturn *Federal Baseball Club* by statute, or that *stare decisis* and the certainty it creates trumps logic and common sense, at least for baseball.

But, of course, when it comes to baseball, common sense or logic are rather irrelevant, but precedent does matter. How else could one explain why otherwise sane, rational, and well-educated people—including most of the faculty of the University of Chicago School of Law—continue to root for the Chicago Cubs?³⁸

There is also an important cultural explanation for the Court's behavior. The Supreme Court continues to hold that baseball is not a form of "interstate commerce," because to do otherwise would imply that the national pastime—the national game—is not a game at all. In a world of self-conscious fictions, as law often is, it makes perfect sense to assert that professional baseball is just a sport. The Court notes that Congress is of course free to change the antitrust laws, and has invited Congress to overrule *Federal Baseball*. But Congress, like the Court, seems reluctant to undermine the special status of the national pastime.³⁹

IV. BASEBALL AND INTEGRATION

Perhaps baseball deserves special treatment, because at one crucial moment in our history, baseball stood-up and did the right thing. The reintegration of major league baseball by the Brooklyn Dodgers altered the landscape of the sport.⁴⁰ More importantly, it helped alter the landscape of American culture and law. Branch Rickey, an honors graduate of Michigan Law School, hired Jackie Robinson nearly a decade *before* the "*Brown Revolution*" of 1954. No court or judge ordered the integration of the sport. Rickey claimed he hired Robinson only because he thought his new player would help the hapless Dodgers finally

³⁷*Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees*, 346 U.S. 356 (1953).

³⁸In 1998 the Cubs once again failed to make it to the World Series, despite the presence of Sammy Sosa who hit 66 home runs and Kerry Wood who struck out 20 in one game, tying a major league and setting a new National League record. Cub fans shrug all this off, noting that any team can have a bad century.

³⁹*Curt Flood Act of 1998*, 112 Stat. 2824 (Oct. 27, 1998).

⁴⁰Blacks played professional baseball in the 19th century, before the whites forced them out of the emerging major leagues in the 1890s. Blacks, of course, also played in their own professional leagues throughout the first half of the 20th century. There were also "barnstorming" exhibitions between white and black stars in the 1920s and 1930s. See for example, Michael Santa Maria, "One Strike and You're Out," 5 *American Visions* 16-21 (No. 2, 1990).

win a World Series. Robinson helped them do just that.⁴¹ Brooklyn won pennants, and finally in 1955, a championship, in the years after Robinson, Roy Campanella, and other black players arrived. Significantly, the other first team to integrate—the American League's Cleveland Indians—also began winning with blacks. Larry Doby and Satchel Paige did for the Tribe what Robinson and Campanella did for "dem bums."⁴² Ironically, the Dodgers almost signed Doby, and might have, except that Branch Rickey wanted the "other league" to integrate because it would "help the movement."⁴³ By the end of the decade other teams had started to benefit from the infusion of black talent; Willie Mays and Hank Aaron helped bring a World Series victory to the Giants and Braves in the decade after Robinson put on Dodger Blue.

Both Rickey and Cleveland's Bill Veeck claimed that integration was purely a business decision—to bring in more fans and to win games. But, it is hard to believe the religious Rickey or the crusading Veeck were not also motivated by a common understanding of the immorality of segregation. Rickey had apparently absorbed notions of equality while in law school. In his heart and his head he understood that segregation was just plain wrong, and anyone who cared to read the Constitution knew that. He understood that integrating baseball could be an example of doing well by doing good. Robinson would boost ticket sales. Black fans would spend green dollars to boost the value of Dodger blue. Indeed, in 1947 the Dodgers set a new attendance record, and in every National League city but Cincinnati the home team recorded a new single game attendance record when Robinson's Dodgers were in town.

Whatever the motivations, the reintegration of baseball was a central event for American society.⁴⁴ It preceded the integration of almost everything else in America. In 1947, when Jackie came out to play, America was a thoroughly segregated world.

In the South *everything* was segregated. From birth in a black hospital, to education in Jim Crow schools, to work in (usually) menial jobs reserved for blacks, to burial in a segregated cemetery, southern blacks lived their lives surrounded by whites—often working for whites—but never beside whites. Schools, restaurants, jail cells, churches, hotels, buses, drinking fountains, public toilets, swimming pools, and of course baseball fields—were only the obvious places where segregation prevailed.

⁴¹The best study of the integration of baseball is JULES TYGIEL, *BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY* (1983).

⁴²So too, of course, did the New York Giants, with their early black players, including Willie Mays and Monte Irvin. The 1954 World Series between the Indians and the Giants suggests the impact of integration on both teams and on the sport as a whole.

⁴³TYGIEL, *supra* note 41, at 213.

⁴⁴Blacks had played on integrated teams until 1895. The following year—1896—saw the final segregation of professional baseball. It was the same year the Supreme Court blessed the separate-but-equal doctrine in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Baseball was right in step with the rest of America.

The nature of segregation was limited only by the imaginations of the state legislators. Louisiana required that apartment buildings rent only to one race, although white landlords were allowed to have black custodians living in their buildings. During the summer vacations in Florida books from black schools could not be stored in the same building with books from the white schools. North Carolina required that "Books shall not be interchangeable between the white and colored schools, but shall be continued [sic.] to be used by the race first using them."⁴⁵ In Oklahoma fishing on public waters was segregated—one lake for whites another for blacks. That state also segregated its telephone booths. Georgia segregated its pool halls. In Texas blacks and whites were not allowed to compete with each other in boxing matches. Indeed, nothing was color blind in the South: even the state schools for the blind were segregated!⁴⁶

The national government was hardly better. The Army had blacks—but virtually all were in segregated units.⁴⁷ Virtually all of the Navy's African-American sailors were in the mess corps, serving food to their white compatriots. The Marines had no blacks at all.⁴⁸ No black had ever served in a Presidential Cabinet, on the Supreme Court, or in very many other places of honor. The nation did have a black federal judge—off in the Virgin Islands, where no one could see him.⁴⁹

But, if blacks could play in the National League on an integrated basis, they could serve in the national army on an integrated basis. If African-Americans could play in the American League, surely they could go to any American school.

Most baseball owners were aghast at Rickey's action.⁵⁰ Integration was the last thing they wanted. Some teams resisted integration for more than a decade.⁵¹ But, in the end baseball showed all Americans, on the new techno-

⁴⁵PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 331 (1951, reprinted with introduction by Davison M. Douglas, 1997).

⁴⁶C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 98-102 (3d rev. ed. 1974).

⁴⁷Captain Holly O'Grady Cook, *Affirmative Action: Should the Army Mend It or End It?*, 151 MIL. L. REV. 113 (1996) (discussing history of discrimination in Army against blacks). See also, RICHARD M. DALFUME, DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS 1939-1953 (1969).

⁴⁸HENRY I. SHAW, JR. AND RALPH N. DONNELLY, BLACKS IN THE MARINE CORPS (1975); see also, Samuel A. Marcoosson, *A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intrusiveness*, 64 UMKC L. REV. 59 (1995) (noting that Marines excluded blacks).

⁴⁹In 1937 President Franklin D. Roosevelt appointed William Henry Hastie, Jr. (1904-1976), America's first black federal judge, to serve on the U.S. District Court for the Virgin Islands. GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE (1994).

⁵⁰TYGIEL, *supra* note 41, at 79.

⁵¹In 1958, the Boston Red Sox still did not have a black player. *Id.* at 329.

logy of black and white television, that blacks and whites could play together and cooperate with each other.⁵²

Ironically, then, in two ways baseball helped set the stage for our legal system to overcome segregation.

First, integrated baseball undermined segregation in other areas of society. Atlanta opened its minor league field to black fans because the Dodgers played there; the first black guest at the Hotel Statler in Washington, D.C. was Larry Doby.⁵³

Beyond these little victories against Jim Crow hotels and ball parks—and it is important not to over-state how many there were—the integration of baseball was a major blow against America's culture of racism. Jackie Robinson, Satchel Paige, Larry Doby, Branch Rickey, and Bill Veeck were, in their own ways, as critical to the civil rights revolution as Thurgood Marshall, Spottswood Robinson, Jack Greenberg, and Linda Brown. While other sports—football, basketball, boxing—had long been integrated, baseball made a difference. It was the national sport. In an age before the super bowl or televised NBA playoffs, the World Series was *the* sporting event of the year. Thus, black players on World Series teams brought integration into most American homes.

As a sport, baseball was also the perfect vehicle for teaching Americans about racial harmony. Baseball requires team-work and cooperation; but more than most team sports, baseball allows for individual effort that is clearly distinct from team play. The batter, the pitcher, the fielder, and the base-stealer are all in a position to display stunning individual effort. This combination of individualism and team effort is something of a metaphor for much of American culture: as a society we praise teamwork and the "team player," but we love and worship the individual hero. Baseball allows both. Thus, the earliest black players—Robinson, Paige, Doby, Campanella—proved they could be both team players and individual heroes. In other words, they demonstrated to the entire nation that blacks could be equal in both team spirit *and* individual effort. By the time Congress debated the 1964 Civil Rights Act, a generation of white Americans had emotionally accepted equal rights by adopting the next generation of black players—Willie Mays, Ernie Banks, or my own boyhood favorite, Hank Aaron, as their personal heroes.

The best argument for baseball retaining a privileged place in American culture and law may be rooted in this history. Baseball was the first great national institution—private or public—to dismantle segregation following World War II. It would be too much to argue that baseball set the stage for Truman's civil rights plank of 1948, the integration of the Army, or *Brown v. Board of Education of Topeka*.⁵⁴ But, it is nevertheless clear that Branch Rickey

⁵²One commentator noted: "I guess most good citizens of Arkansas and Virginia and other states as well refrained from tuning in their TV to the [1958] World Series for fear of scarring their eyeballs before a flagrant act of interracial fraternizing." *Id.* at 333.

⁵³TYGIEL, *supra* note 41, at 317-18, 217.

⁵⁴*Brown v. Board of Educ.*, 347 U.S. 483 (1954).

and Bill Veeck, Jackie Robinson and Larry Doby, and through his silent support, Baseball's Commissioner "Happy" Chandler, certainly deserve more credit than they have been given for helping America move from a segregated society to one where all people have full legal equality. Historian Jules Tygiel says "one can best describe Chandler's role as endorsement by abstinence."⁵⁵ However, compared to Commissioner Landis's adamant opposition to integration, the silent support of Chandler, a former Senator of a segregating state (Kentucky), may have been just what was necessary. By doing nothing, Chandler allowed integration to take place.

For Rickey the Negro Leagues represented a vast pool of untapped talent. Rickey fully understood that the first team to hire blacks would be able to get the best of this pool. Rickey eventually did so, snaring Robinson, Roy Campanella, and Don Newcombe. Robinson and his black teammates helped make "Dem Bums,"⁵⁶ as Brooklynites called their team, a World Series regular, finally winning the Series in 1955.⁵⁷ Other teams quickly learned from the Dodgers. The great baseball genius Bill Veeck brought blacks to Cleveland in 1948, and promptly won the World Series with Satchel Paige and Larry Doby on the team. Between 1947 and 1953 blacks won the Rookie-of-the-Year award in the National League five out of six times.⁵⁸ A year later America caught up with baseball, as the Supreme Court declared that segregation in the public schools was unconstitutional.⁵⁹

Branch Rickey and Jackie Robinson, Bill Veeck and Larry Doby, helped set the stage for the Civil Rights revolution. Before television brought us the images of Bull Connor's dogs and fire houses, it brought us the image of Willie Mays catching a ball that no one could catch, of Satchel Paige throwing a ball no one could hit, of Hank Aaron swinging a bat with matchless grace, accuracy, and power, and of Jackie Robinson turning the basepaths into a one man track and field event.⁶⁰

In essence, American saw that integration could be successful. This was accomplished by a shrewd lawyer who used his talents outside of the courtroom.

The message of baseball's integration is complex but useful for Americans today. First, it suggests that social change can be brought about by private enterprise, as well as by courts or legislatures. Rickey developed his own

⁵⁵William J. Marshall, *A.B. Chandler as Baseball Commissioner, 1945-51: An Overview*, 82 REG. OF THE KY. HIST. SOC'Y. 358 (No. 4, 1984). TYGIEL, *supra* note 41, at 82.

⁵⁶Susan H. Anderson & Maurice Carroll, *New York Day by Day: Remembering the Bums*, N.Y. TIMES, Oct. 19, 1984, at B3.

⁵⁷See generally, ROGER KAHN, *THE BOYS OF SUMMER* (1972).

⁵⁸TOTAL BASEBALL: THE ULTIMATE ENCYCLOPEDIA OF BASEBALL 288 (John Thorn & Peter Palmer, eds., Harper Perennial 1993).

⁵⁹*Brown*, 347 U.S. at 483.

⁶⁰See generally STEVEN A. RIESS, *TOUCHING BASE: PROFESSIONAL BASEBALL AND AMERICAN CULTURE IN THE PROGRESSIVE ERA* (1980).

affirmative action program with Jackie Robinson because he knew integration would bring new talent to his organization. It is a message that law firms and corporations might heed well, not only on issues of race, but also on issues of gender. In an age of increasing competition no law firm or company can afford to ignore Rickey's example to seek talent where no one else is looking. Similarly, Rickey, who also invented the farm team, understood that you have to seek out talent early and nurture it from the beginning.

V. INEQUALITY OFF THE PLAYING FIELD

Baseball integrated because Branch Rickey was able to ignore the wishes of the owners and bring Robinson up from his Montreal farm team. The baseball owners, an independent lot, could not or dared not stop a fellow owner from playing Robinson. The obvious success of the experiment led other owners, enthusiastically and reluctantly, to integrate their teams. Perhaps a strong and determined Commissioner might have delayed integration, but Happy Chandler was neither. Although a southerner, and no great friend of integration, he nevertheless told Branch Rickey, "I'm going to have to meet my maker someday. If he asks me why I didn't let this boy play and I say it's because he's black, that might not be a sufficient answer."⁶¹

If the actions of Rickey, Veeck, and Chandler gave baseball a claim to special treatment, the actions of baseball's officialdom in the last decade have undermined that claim. When Rickey brought Robinson to the majors, the owners attacked him.⁶² Led by the Yankee's Larry MacPhail, the "Report of the Major League Steering Committee" offered classical racist arguments, economic arguments (which proved to be totally wrong), and cold war appeals to patriotism implying that supporters of integration were subversive.⁶³

The owners lost in the late 1940s, and the field was integrated. But the attitudes of many owners seems to have changed little. From the dugout to the front office baseball leadership remains overwhelmingly white.⁶⁴ Moreover, in the past few years there have been more racist statements emanating from baseball's front offices than at any time since Robinson left the playing field.⁶⁵

In a 1987 interview on the ABC program *Nightline*'s Ted Koppel asked Al Campanis, the third-highest ranking member of the Los Angeles Dodger's organization, why at the time there were no black managers and so few black

⁶¹Marshall, A.B. *Chandler as Baseball Commissioner*, 376.

⁶²TYGIEL, *supra* note 41, at 71-86.

⁶³*Id.* at 82-86.

⁶⁴Claire Smith, *Too Few Changes Since Campanis*, N.Y. TIMES, Aug. 16, 1992 at A1.

⁶⁵Bob Nightengale & Ross Newhan, *Robinson Plus 50 Adds Up to Discontent Sports: Some African Americans Wonder if Teams are Trying to Weed Them Out*, L.A. TIMES, Apr. 15, 1997, at A1.

executives in professional baseball.⁶⁶ Campanis answered, "I don't believe it's prejudice. I truly believe that they may not have some of the necessities to be, let's say, a field manager or perhaps a general manager."⁶⁷ Two days later Campanis resigned from the Dodgers. While the Dodgers and baseball executives distanced themselves from Campanis's remarks, no one in major league baseball seemed to have a good answer to Koppel's question. Perhaps this is because, as Frank Robinson, baseball's first black manager, noted: "Someone from the inner circle had let out what we had known all along" about the attitudes of baseball's highest echelon of power.⁶⁸

In response to Campanis's statements, professional baseball promised to do better. But five years later the *New York Times* correctly titled an article on minorities in baseball "Too Few Changes Since Campanis."⁶⁹ The article noted that in the previous five years 48 different managers had been hired, but only six were minorities.⁷⁰ While blacks and hispanics made up 32 percent of all players, they were only 19 percent of all managers, coaches, scouts, trainers and instructors.⁷¹ Moreover, only one black had ever been the general manager of a major league team and only three had made it to assistant general manager.⁷² Clearly, the ideology of Al Campanis mirrored the reality of hiring decisions by baseball's owners.

Then came the revelations of what one owner believes and says. In 1992 complaints surfaced about the language, views, and attitudes of Marge Schott, the owner of the Cincinnati Reds. Schott referred to some players as "millions-dollar niggers" and to some agents and lawyers as "money-grubbing Jews."⁷³ She kept Nazi paraphernalia in her home and showed no remorse for her views or her statements.⁷⁴ She had no apology for the fact that only one of her 45 front-office employees was black. She more than echoed Campanis: "I once had a nigger work for me" she said, "I would never hire another nigger. I'd rather have a trained monkey working for me than a nigger." When asked if she had made such statements she answered "Sure."⁷⁵

⁶⁶Claire Smith, *Too Few Changes Since Campanis*, NEW YORK TIMES, Aug. 16, 1992, at A1.

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰Smith, *supra* note 66, at 2.

⁷¹*Id.*

⁷²*Id.*

⁷³*Winking At Baseball's Racism*, N. Y. TIMES, Feb. 5, 1993, at A26.

⁷⁴*Baseball's Very Big Problem*, N. Y. TIMES, Dec. 3, 1992, at A24.

⁷⁵*Id.*

Faced with a call for a boycott of baseball by blacks, the owners responded. They barred Schott from the game for a year and a day.⁷⁶ She came back, mouthed off, and was barred again, this time indefinitely.⁷⁷ But, she is still the majority owner of the Cincinnati franchise and it is hard to imagine an owner not participating, in some way, in her team.⁷⁸

The statements of Al Campanis and Marge Schott could be attributed to a few racist individuals. But, baseball's dismal record on hiring minorities cannot be dismissed so easily. More than any other profession, major league sports have proved that racial integration can work. On the field, race seems not to matter. The percentage of blacks and hispanics in major league baseball more-or-less reflects their percentage in society.⁷⁹ Moreover, blacks and hispanics have been among the greatest stars of the game. In the eleven years from 1949 (when there were only a handful of blacks playing) to 1959, blacks won the National League's most valuable player award nine times. Many of the first generation of black players—Robinson, Mays, Aaron, Banks, Paige—are now in the Hall of Fame. But, despite their skill, their baseball knowledge, their savvy, black players don't go on to become black managers, scouts, and general managers. Thus, the record of professional baseball at hiring blacks suggests a kind of systematic discrimination.

VI. BASEBALL, LAW AND TWENTY-FIRST CENTURY

As we look toward the 21st Century baseball remains the national game, despite the occasional challenge from basketball or football.⁸⁰ Perhaps its antitrust status will change by statutory enactment or through intelligent judicial interpretation of existing statutes.⁸¹ Or, perhaps the game will continue to keep its special status.

The game also remains a crucible for social change. The ball field will still be a place for dreams that integrate our increasingly diverse society. The major leagues will probably gradually move towards integration of its front offices and its field staffs.⁸² And, it is likely that legal scholars will continue to see important connections and parallels between baseball and law.

⁷⁶*Schott to be Suspended/Newspaper Report Says Reds Owner to be Barred for One Year*, S.F. CHRON., Feb. 1, 1993, at E1.

⁷⁷*Schott Barred Indefinitely from Riverfront Stadium*, FIN. POST, July 18, 1996 at 49.

⁷⁸The fact that Schott can be suspended from the game, despite her ownership of a team, raises fascinating questions about the nature of property in a baseball team.

⁷⁹This may be changing. In 1997 the Los Angeles Dodgers had no African-Americans in the starting line-up or the pitching rotation. Nightengale, *supra* note 65, at A1. See also Grace Cornelius, *Whatever Happened to the White Athlete?*, SPORTS ILLUSTRATED, Dec. 8, 1997, at 30.

⁸⁰*Basic Baseball Beckons*, ADVERTISING AGE, Mar. 14, 1994, at 22.

⁸¹*Curt Flood Act of 1998*, 112 Stat 2824 (Oct. 27, 1998).

⁸²See Michael Dobie, *Sports Defend Their Hiring*, NEWSDAY, Sep. 14, 1995, at A73.

Baseball is also the perfect game for an age of growing international trade, commerce, and contact. Baseball has gained a far greater hegemony over the world than the British Empire—or that weird cousin of baseball, cricket—ever did.⁸³ Baseball is not just the national pastime in the United States. It has often followed the flag or traveled with visiting Americans. American merchants and sailors brought baseball to the Kingdom of Hawaii in the 1860s and American soldiers brought it to Italy and Korea in the 1940s.⁸⁴ From capitalist Japan to communist Cuba baseball reigns as the King of sports. Soccer may be more universally common, but interest in baseball is surely expanding faster. To paraphrase the great baseball philosopher, Satchel Paige, if soccer looks back it will find baseball gaining ground.⁸⁵ American athletes play throughout North America, as well as in Asia, Europe, the Caribbean, and South America; meanwhile players from all over Latin America and the Caribbean, as well as from Australia, Canada, Germany, Ireland, Scotland, Wales, Czechoslovakia, Holland, Poland, Switzerland, Japan, and Korea have internationalized the sport at home.⁸⁶

Just as American concepts of law and the proliferation of lawyers have affected international business and law, so has baseball affected international sports. Baseball is now part of the Olympics. In 1992 and 1993 an American League team, from a *Canadian* city, won the World Series. It is possible that someday there will be a truly international World Series. Fans around the world gleefully contemplate the possibilities of a series between the San Francisco Giants and the Yomiuri Tokyo Giants or the Detroit Tigers against the Hanshin Osaka Tigers. Or perhaps a contest between the New York Yankees and some team from "old" York, in Great Britain.⁸⁷

⁸³While Cricket also has an "umpire," the British game seems to create a culture of blind obedience to the rule-maker, rather than the legalistic and litigious culture of American baseball. An author recently attributed the late Michael Manley's "vehement defiance of this British headmaster" to the fact that "he hadn't been raised playing cricket, and felt no bonding to its code of instant obedience to the umpire," Jervis Anderson, *Two Giants of Literary Cricketism*, NEW YORK TIMES BOOK REVIEW, Sep. 2, 1997, at 23.

⁸⁴GAVAN DAWS, *SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 184* (1968).

⁸⁵Paige's famous quotation is: "Never look back—something may be gaining on you," quoted in Sol M. Linowitz, *Speeches from the Cornell Law School Centennial Celebration, April 15-16, 1988*, 73 CORNELL L. REV. 1255 (1988).

⁸⁶As early as 1964 and 1965 Masanori Murakami, a native of Japan, compiled a 5-1 record with 9 saves as a relief pitcher for the San Francisco Giants. Today of course we have Hideo Nomo as a regular for the Los Angeles Dodgers.

⁸⁷At another level, however, the "rule of law" fostered by American baseball has not apparently taken root in Japan, where umpires are given little or no respect, and where deference is not extended to those who call balls and strikes. See Frank Gibrey, Jr., *Yankee You're Out: An American Umpire Learns a Lot About Japanese Baseball—And a Culture Still Closed to Outsiders*, TIME, June 23, 1997, at 46.

VII. BASEBALL AND BUSINESS LAW

So far I have focused on the role of baseball as a fixture of our culture, and the way the law interacts with that fixture. But, despite Justice Holmes's assertions in *Federal Baseball Club*, the game, at the professional level, is a business. Phil Wrigley, the former owner of the Chicago Cubs, believed baseball "was too much of a sport to be a business and too much of business to be a sport."⁸⁸ But, that is no longer true. Today, teams are owned by corporations. The Los Angeles Dodgers franchise was just sold for \$350 million.⁸⁹

Baseball is clearly big business. As with any business, there is a law that goes with it. Similarly, despite its exemption from the antitrust laws, as an industry baseball has spawned its own law. Cases involving player status, collective bargaining, team mobility, the meaning of antitrust, and even the "ownership" of the names of defunct teams,⁹⁰ show that baseball is as much a business as a sport.

Nevertheless, the response of courts to many suits emanating from baseball shows how our jurists have been overwhelmed by their reverence for the national game. Supreme Court opinions abound with references to the game. Justices have even taken time to dress up their opinions with lists of great players, something that no other sport or cultural institution has achieved.⁹¹

A Lexis or Westlaw search of the term "baseball" turns up far more cases than one would want to read on the business law of baseball. In 1997 there are over 3,600 federal cases with the word "baseball" in them and about one-and-a-half-million reported state cases. True, many are not about baseball but simply mention a baseball bat or a baseball cap. But, there are enough baseball cases to teach a good deal of first year torts, contracts, and property, as well as labor law.⁹² These cases illustrate the way law has shaped the game. To offer one example, the protective screens at most ball parks are doubtless a

⁸⁸See Roy S. Johnson, *Take Me Out to the Boardroom*, FORTUNE, July 21, 1997, at 42 (Peter O'Malley, former owner of the Los Angeles Dodgers, quoting Wrigley).

⁸⁹*Id.*

⁹⁰*Major League Baseball Properties v. Sed Non Olet Denarius*, 817 F.Supp 1103 (S.D.N.Y. 1993) (holding that the Los Angeles Dodgers could not prevent a restaurant in Brooklyn from calling itself "The Brooklyn Dodger").

⁹¹For example, I know of no court opinions listing great musicians, artists, author, or hockey, football, or basketball players. For such a list, see Justice Blackmun's majority opinion in *Flood v. Kuhn*, 407 U.S. 258 (1972), listing great baseball players at note 3 of his opinion. Note that Justice Byron White, either because he did not like baseball or disagreed with Blackmun's list (or perhaps felt the serious nature of the Court precluded such a list) specifically refused to concur in Part I of Blackmun's opinion. Perhaps, as a former professional football player, White could not endorse a list of great baseball players.

⁹²For a good survey of the many ways in which baseball has impacted on various legal issues, including collective bargaining, contracts, and antitrust, see, ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* (1998).

function of tort law intruding on the field, as are batting helmets and other protective gear.⁹³

Baseball has also had its share of labor problems, including strikes, lock-outs, and complicated negotiations over free agency. These have led to fan resentment and a growing perception of greed on the part of owners and players alike. In all these negotiations, there are armies of lawyers, sometimes making things worse, but more often, trying to get the players and owners to act like grown-ups, not always an easy task when dealing with people who have turned a game into a life's calling.

In some ways it is ironic that the "business" of baseball, has become so important. But that is also a function of our culture, and so it is natural that the business and the business law of the sport have become an integral part of the game.

In fact, of course, it has always been there. As early as 1882 the Allegheny Baseball Club sued a player who jumped to a Detroit team.⁹⁴ The business issues remain, as teams and players fight over contracts, and as team owners contemplate the possibility of moving from one place to another in order to obtain better facilities. As someone with roots in Brooklyn, I know only too well what can happen when a city does not facilitate the creation of a new stadium to support the changing economic needs of a team.⁹⁵ While the exodus of the Brooklyn Dodgers was, "the most notorious abandonments in this history of sports,"⁹⁶ the best scholarship on the subject shows that the failure of the political and legal leadership of New York to create the conditions for building a new stadium was a major factor in causing the move.⁹⁷

How important is it to maintain a sports franchise and perhaps to provide a new stadium when one is needed? That is a question for political and economic analysis. Surely, the revitalization of downtown Baltimore with Camden Yards, downtown Cleveland with Jacobs Field or Akron's now downtown minor league Aero's stadium, Canal Park, illustrate the value of planners, economists, and armies of lawyers working out the details, creating the capital through banks loans and bonds, and maintaining public support for the enterprise.

⁹³Yates v. Chicago National League Base Ball Club, Inc., 595 N.E. 2d 570 (Ill. Ct. App. 1992) (fan recovers for injuries from foul ball while sitting in improperly screened area in Wrigley Field). See also Maytnier v. Rush, 225 N.E.2d 83 (Ill. Ct. App. 1967) (plaintiff wins judgment after being hit by a ball thrown by a pitcher warming up in the Chicago Cubs bull pen).

⁹⁴Allegheny Baseball Club v. Bennett, 14 Fed. 257 (W.D. Pa. 1882).

⁹⁵Robert M. Jarvis, *When the Lawyers Slept: The Unmaking of the Brooklyn Dodgers*, 74 CORNELL L. REV. 347 (1989) reprinted in WALLER ET AL. *supra*, note 2, at 335-346; see also NEIL SULLIVAN, *THE DODGERS MOVE WEST* ix (1987).

⁹⁶Major League Baseball Properties v. Sed Non Olet Denarius, 817 F.Supp 1103, 1111 (S.D.N.Y. 1993).

⁹⁷Jarvis, *supra* note 95.

Indeed, it seems likely that in the future the practical connections to law and baseball may well turn on issues of urban planning, economic growth, and large capital transactions. Thus, in the spirit of the business of baseball it is appropriate to end this article with the soon-to-be classic baseball poem for the modern age: *Jacobs at the Bank*.⁹⁸

Jacobs at the Bank

The Outlook wasn't pretty, for the Cleveland Nine that year,
 Revenue was down, and management lived in fear.
 The stadium was decrepit, the ball field was a wreck,
 No wonder all the seats were empty in the upper deck.
 Top brass hired consultants, but they didn't have a clue.
 "Move the team to Tampa," was the best that they could do.
 But there had to be another way, Cleveland's fate was not yet sealed.
 The team lawyers had the answer: let's build a brand new field.
 The accountant stared in disbelief and gave them dismal looks.
 "Can't afford it," he moaned sadly, "just examine the books."
 "A stadium is too expensive, its a cost we cannot face."
 The lawyers said "No problem, Let's get Jacobs on the case."
 Now, there is no joy in Brooklyn, where the Dodgers used to play,
 And in Washington the Senators have long since gone away.
 The A's abandoned Philly and did the same to Kansas City.
 Owners break hearts all the time, without remorse or pity.
 But, in Cleveland baseball fans are happy, and they're grinning.
 Their beloved Indians are at the Jake, and winning.
 Yes, in Cleveland the Tribe is safe at home, and brightly shines the sun.
 The lawyers wrote the contracts, and Jacobs, Mighty Jacobs,
 Mighty Jacobs got it done.⁹⁹

⁹⁸With apologies to Earnest Thayer, author of *Casey at the Bat*, and to Ernest Lawrence Payer, author of *Casey at the Bank*, MAD MAGAZINE, No. 64 July, 1961, at 31, from whom I borrowed, and of course altered, the title.

⁹⁹*Jacobs at the Bank*, (c) 1998, Paul Finkelman.

