

# Villanova University Charles Widger School of Law

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## TRULY SOVEREIGN AT LAST: C.B.C. DISTRIBUTION v. MLB AM AND THE REDEFINITION OF THE CONCEPT OF BASEBALL

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MITCHELL NATHANSON\*

## Truly Sovereign at Last: *C.B.C. Distribution v. MLB AM* and the Redefinition of the Concept of Baseball

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As evidenced perhaps most obviously by Major League Baseball's antitrust exemption, our national pastime has received special treatment by the federal judiciary in a myriad of ways.<sup>1</sup> Because of baseball's exalted status, federal courts at all levels have frequently

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<sup>1</sup> Interestingly, the case that created the exemption, *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), *reh'g granted*, 42 S. Ct. 587 (1922) [hereinafter *Federal Baseball*], was perhaps less obviously a product of judicial special treatment than has been historically assumed. See Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Players*, 38 *The Baseball Research Journal* 86 (Fall 2009). As Justice Alito shows, the *Federal Baseball* decision was, in many ways, a product of its time—a time when the Supreme Court had a very different understanding of Congress's power to legislate pursuant to the Commerce Clause. *Id.* However, the more modern Supreme Court baseball antitrust decisions of *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam), and *Flood v. Kuhn*, 407 U.S. 258 (1972), rendered in eras wherein Congress's sweeping power pursuant to the

done their best to consider the impact their rulings could have on our national pastime, deferring time and again to those who run the game, perhaps out of fear for how their rulings could potentially impact this civic institution. “[B]aseball cannot be analogized to any other business or even to any other sport or entertainment,”<sup>2</sup> wrote the Seventh Circuit in 1978, expanding upon Justice Blackmun’s opinion in *Flood v. Kuhn*, the Supreme Court’s final word to date on the game’s antitrust exemption.<sup>3</sup> So more often than not, it has not been analogized as such. Instead, it usually has been treated as an exception—as an entity unique unto itself—as legal concepts such as due process, fundamental fairness, and the Sherman Act have all taken turns being pushed to the side as the concept of baseball was protected above all else.<sup>4</sup> As the Seventh Circuit likewise noted in 1978, the legal business of baseball was something best left to those who ran the game. “Any other conclusion,” a court held in a ruling typical of the nature of judicial deference to our national pastime, “would involve the courts in not only interpreting often complex rules of baseball to determine if they were violated but also . . . the ‘intent

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Commerce Clause had already been well recognized, are clearly instances of the Court’s special reverence for and treatment of our national game.

<sup>2</sup> *Finley v. Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978).

<sup>3</sup> *Floyd v. Kuhn*, 407 U.S. 258 (1972). In considering baseball’s historically unique status, Justice Blackmun reached, among other things, the following four conclusions:

1. Professional baseball is a business and it is engaged in interstate commerce.

2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* [346 U.S. 256 (1953)] have become an aberration confined to baseball.

3. Even though others might regard this as ‘unrealistic, inconsistent, or illogical,’ see *Radovich* [352 U.S. 445, 452 (1957)], the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert* [348 U.S. 222 (1955)], *International Boxing* [348 U.S. 236 (1955)], and *Radovich*, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court’s expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball’s unique characteristics and needs.

4. Other professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt.

*Id.* at 282–83 (internal footnotes omitted).

<sup>4</sup> See generally Mitchell Nathanson, *The Sovereign Nation of Baseball: Why Federal Law Does Not Apply to “America’s Game” and How It Got That Way*, 16 VILL. SPORTS & ENT. L.J. 49 (2009). This Article is the second in a series of articles that analyzes the relationship between baseball and federal law. *The Sovereign Nation of Baseball* is the introductory article that lays the historical foundation for the discussion of the topics tackled in this Article.

of the (baseball) code,' an even more complicated and subjective task."<sup>5</sup> Of course, there exists no shortage of examples of courts injecting themselves into the affairs of other organizations with similar, Byzantine codes of conduct. To the federal judiciary, however, baseball was, and is, different. Courts appear to be more willing to defer to or suspend the normal rules that would otherwise dictate the resolution of legal issues in order to protect our national game. In the end, a sovereign nation of baseball emerged: an entity that grew to become either officially (as in the case of its antitrust exemption) or, more often, unofficially exempt from federal law on a whole host of issues due to its unique status within American society.<sup>6</sup>

The Eastern District of Missouri's 2006<sup>7</sup> and the Eighth Circuit's 2007<sup>8</sup> decisions in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, LP* were, at first blush, little more than continuations of this longstanding practice. In rulings that were much anticipated by fantasy baseball players everywhere, the courts once again justified the suspension of the normal rules of law that most likely would have otherwise dictated the outcome and held that baseball's elevated status necessitated a different result in the interest of protecting this national asset. However, this time there was a twist: despite the suspension of rules in order to pave the way toward a ruling that protected "baseball," both courts nevertheless held against the traditional protectors of the game, Major League Baseball. This holding, although certainly not the rationale that underpinned it, flew in the face of nearly a century of federal court decisions. For decades, as courts bent over backward in deference to the game, there was an implicit assumption that a ruling for Major League Baseball was necessarily a ruling for "baseball" itself—after so many years of Major League Baseball holding itself out as the obvious and natural guardian of the game, Major League Baseball and the concept of "baseball" had become inexorably intertwined. With these two decisions, perhaps, this nexus can no longer be so blithely assumed. This Article examines the causes of this shift in perception.

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<sup>5</sup> *Finley*, 569 F.2d at 539 (alteration in original) (quoting *Milwaukee Am. Ass'n. v. Landis*, 49 F.2d 298, 302 (N.D. Ill. 1931)).

<sup>6</sup> See generally *id.* (discussing the evolution of Major League Baseball's effective exemption from federal law).

<sup>7</sup> *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, LP*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007).

<sup>8</sup> *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007).

As this Article will discuss, post–World War II societal changes, some directly impacting baseball and others with an indirect, but no less forceful, impact, have led to a societal and, therefore, judicial, separation of the traditional connection between Major League Baseball and the larger, more symbolic, concept of “baseball,”<sup>9</sup> all of which led up to the *C.B.C. Distribution* decisions that sought to protect the game but no longer entrusted Major League Baseball with this role. The rise of the Players Association, the diminishing status of club owners as a result of the corporate revolution of the sixties, and the public demonization of both that occurred as a result of nearly four decades of labor unrest (including, most notably, the cancellation of the 1994 World Series) will all be discussed to show that, although the symbolic pull of the concept of baseball may still be as strong as ever, the power of Major League Baseball as a cultural force is clearly on the wane. As a result, although federal courts are just as likely now as they ever were to alter the legal rules of the game to protect baseball, the *C.B.C. Distribution* decisions perhaps signal a shift in judicial deference toward Major League Baseball, as opposed to the

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<sup>9</sup> As used in this Article, the concept of “baseball” refers to the notion that baseball is not merely a game; instead, it speaks to the American way of life and informs American values. Sometimes referred to as the “baseball creed,” it posits that baseball stands in for America in name as well as in concept and is a valuable tool in the teaching and promotion of American values and ideals. See STEVEN A. RIESS, *TOUCHING BASE: PROFESSIONAL BASEBALL AND AMERICAN CULTURE IN THE PROGRESSIVE ERA*, 7–32 (rev. ed. 1992). In its most overt and cheerleading form (which was its earliest incarnation, in evidence from the late nineteenth century through the early decades of the twentieth century), the hyperbole was particularly thick: Baseball was promoted as “building manliness, character, and an ethic of success;” it molded youngsters, helping boys become better men not only through playing but also through simply watching the game; it contributed to the public health and was an agent for democratization. *Id.* at 17. All of this was neatly summed up by a journalist in 1907 who wrote, “[a] tonic, an exercise, a safety-valve, baseball is second only to Death as a leveler. So long as it remains our national game, America will abide no monarchy, and anarchy will be slow.” Allen Sangree, “*Fans and Their Frenzies: The Wholesome Madness of Baseball*,” 17 *EVERYBODY’S MAG.* 378, 387 (1907), quoted in RIESS, *supra* note 9, at 22. In later years, baseball events, such as the integration of the game in 1947, were painted on a larger canvas as the concept of baseball was used to demonstrate American ideals with regard to the end of segregation. See JULES TYGIEL, *PAST TIME: BASEBALL AS HISTORY*, 158 (2000) [hereinafter *PAST TIME*]. In fact, shortly after Jackie Robinson broke the color line in Major League Baseball, a group of promoters sought to send the Brooklyn Dodgers and Cleveland Indians—baseball’s two most integrated teams—on a world tour to promote American ideals through the concept of baseball. One promoter stated that it was “most important that the Negro race be well represented, as living evidence of the opportunity to reach the top which America’s No. 1 sport gives all participants regardless of race.” *Sporting News*, July 16, 23, 1952, quoted in JULES TYGIEL, *BASEBALL’S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY* 335 (1983).

game itself. From now on, perhaps the federal judiciary will be more likely to rule as the *C.B.C. Distribution* courts did and to recognize that the sovereign nation of baseball is truly sovereign, not even answerable to Major League Baseball itself. For decades, such a conclusion would have been unthinkable. Now, perhaps, it has finally become a reality.

## I

*C.B.C. DISTRIBUTION AND MARKETING, INC. v. MAJOR LEAGUE  
BASEBALL ADVANCED MEDIA, LP*

The facts of the *C.B.C. Distribution* litigation were relatively straightforward. The litigants were Major League Baseball Advanced Media (MLB AM), an entity created by Major League Baseball (MLB) to control the Internet and interactive media aspects of Major League Baseball, and C.B.C. Distribution and Marketing, Inc. (C.B.C.), a corporation that provided a variety of products, including the statistics, that facilitated fantasy baseball games over the Internet.<sup>10</sup> MLB AM signed a five-year \$50 million deal with the Major League Baseball Players Association in 2005 in order to acquire what it believed to be the exclusive rights to the players' names and statistics for use in fantasy baseball as well as other forms of online content.<sup>11</sup> In order to protect what it considered to be its property right, MLB AM charged a licensing fee to online companies involved in fantasy baseball and issued cease and desist letters to those companies that refused to pay up. C.B.C. balked at the fee, contending that, because the statistics were within the public domain—available to anyone who picked up a newspaper or any of the myriad of baseball publications available on the newsstand—it had a First Amendment right to use the statistics.<sup>12</sup> MLB AM disagreed, reiterating that it had purchased exclusive rights to them irrespective of the reality that they were otherwise publicly available.

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<sup>10</sup> Surina Mann, Comment, *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.: The First Amendment Versus the Right of Publicity in the Eighth Circuit*, 31 HASTINGS COMM. & ENT. L.J. 303, 313 (2009).

<sup>11</sup> Stacey B. Evans, Comment, *Whose Stats Are They Anyway? Analyzing the Battle Between Major League Baseball and Fantasy Game Sites*, 9 TEX. REV. ENT. & SPORTS L., 335, 339 (2008).

<sup>12</sup> *Id.*

As such, MLB AM contended that it was entitled to enforce those rights.<sup>13</sup>

Several years earlier (and prior to the agreement between MLB AM and the Players Association), in 1995, C.B.C. entered into licensing agreements with the Players Association that permitted C.B.C. to use “the logo, name, and symbol of the Players’ Association, identified as the Trademarks, and the ‘names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player . . . for sale . . . advertising, promotion, and distribution of certain products,” including, obviously, its online fantasy baseball games.<sup>14</sup> These agreements expired on December 31, 2004.<sup>15</sup> Interestingly, and as the District Court noted, “[b]etween 2001 and January 2004, Advanced Media [MLB AM] offered fantasy baseball games on MLB.com without obtaining a license and without obtaining permission from the Players’ Association.”<sup>16</sup> In 2005, however, MLB AM and the Players Association reached the above-stated agreement and, on February 4, 2005, the joint venture approached C.B.C., proposing that C.B.C. promote MLB AM’s fantasy baseball games on C.B.C.’s Web site in exchange for a percentage of the resulting profits. C.B.C. then filed for declaratory relief, seeking a ruling that declared its First Amendment right to use the names and statistics of Major League players without obtaining a licensing agreement.<sup>17</sup> MLB AM counterclaimed, alleging that such use would violate the players’ rights of publicity.<sup>18</sup> Thus the stage was set for the showdown between the First Amendment and the right of publicity within the context of online fantasy baseball games.

Ironically, MLB had been on the other side of this argument just a few years earlier when Al Gionfriddo, along with fellow Major League players from the thirties and forties, Pete Coscarart, Dolph Camilli, and Frankie Crosetti, sued Major League Baseball in California state court for using their likenesses without their consent in the Major League Baseball All-Star Game and World Series

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<sup>13</sup> C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, LP, 443 F. Supp. 2d 1077, 1092, 1101–02 (E.D. Mo. 2006), *aff’d*, 505 F.3d 818 (8th Cir. 2007).

<sup>14</sup> *Id.* at 1080–81.

<sup>15</sup> *Id.* at 1080.

<sup>16</sup> *Id.* at 1081.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1082.

programs, as well as on the MLB Web site.<sup>19</sup> There, the players alleged that their statutory and common law rights of publicity were violated, while Major League Baseball defended itself by invoking the First Amendment. With regard to the common law claim, after balancing the players' rights against "the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press,"<sup>20</sup> the California Court of Appeal held that the balance tipped in favor of Major League Baseball and the First Amendment, noting that the public interest in baseball was significant: "Major league baseball is followed by millions of people across this country on a daily basis. Likewise, baseball fans have an abiding interest in the history of the game. The public has an enduring fascination in the records set by former players and in memorable moments from previous games."<sup>21</sup> As such, "[b]alancing plaintiffs' negligible economic interests against the public's enduring fascination with baseball's past, we conclude that the public interest favoring the free dissemination of information regarding baseball's history far outweighs any proprietary interests at stake."<sup>22</sup> The court went even further with regard to the plaintiffs' statutory claim, stating that "[b]aseball . . . is, after all, 'the national pastime.' In view of baseball's pervasive influence on our culture, we conclude that the types of uses raised in the record before us are among the 'public affairs' uses exempt from consent [under the statute]."<sup>23</sup> Once again, and consistent with the treatment of the game by its brethren in the federal judiciary, the California appellate court held that baseball, being baseball, necessitated a different outcome than otherwise might have been the case.

The district court in the *C.B.C. Distribution* case did not even need to engage in a balancing of interests, holding that the players did not meet their burden of proving that their rights of publicity under Missouri law had been violated.<sup>24</sup> On appeal, the Eighth Circuit went even further in protecting the interest of "baseball" by disagreeing

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<sup>19</sup> *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 310–11 (Cal. App. 1 Dist. 2001).

<sup>20</sup> *Id.* at 313 (quoting *Gill v. Hearst Publ'g. Co.*, 253 P.2d 441, 444 (Cal. 1953)).

<sup>21</sup> *Id.* at 315.

<sup>22</sup> *Id.* at 318.

<sup>23</sup> *Id.* at 319.

<sup>24</sup> *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, LP*, 443 F. Supp. 2d 1077, 1089 (E.D. Mo. 2007), *aff'd*, 505 F.3d 818 (8th Cir. 2007).

with the lower court in its ruling with regard to the players' rights of publicity. Here, the court held that the players did indeed meet all three prongs of Missouri's right of publicity test, but nevertheless held that this was irrelevant.<sup>25</sup> Even though the court held that C.B.C. used the players' names as symbols of its identity without their consent and with the intent of obtaining a commercial advantage, it was allowed to do so under the First Amendment given the national interest in baseball. Consistent with the *Gionfriddo* court, the C.B.C. court held that, because the information at issue was already within the public domain, "it would be strange law that a person would not have a first amendment right to use information that is available to everyone."<sup>26</sup> Further, the court rested its decision with regard to the balance between private and public interest by reciting the familiar litany of the national obsession with baseball: "Courts have also recognized the public value of information about the game of baseball and its players, referring to baseball as 'the national pastime.'"<sup>27</sup>

Quoting *Gionfriddo*, the court concluded by noting that the "'recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball's Web site] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.' We find these views persuasive."<sup>28</sup> Like the *Gionfriddo* court, here the Eighth Circuit ruled that, regardless of the private rights at issue (which were perhaps insubstantial in the *Gionfriddo* case, as the court noted the limited instances in which these old-time ballplayers' likenesses were in fact used by Major League Baseball,<sup>29</sup> but which were certainly much more substantial in the C.B.C. litigation, given that fantasy baseball is an industry that generates several hundred million dollars each year that could not exist without the players involved in that

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<sup>25</sup> C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, LP, 505 F.3d 818, 822 (8th Cir. 2007) ("In Missouri, 'the elements of a right of publicity action include: (1) That defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage.'" (quoting *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003))).

<sup>26</sup> *Id.* at 823.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 823–24 (alteration in original) (internal citation omitted).

<sup>29</sup> See *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 316–17 (Cal. App. 1 Div. 2001). The court noted that although the plaintiffs alleged that Major League Baseball affixed their names or images to merchandise such as T-shirts, lithographic prints, or other baseball souvenirs, "they were unable to present any evidence to the trial court of such uses by Baseball." *Id.* at 317.

case<sup>30</sup>), these personal interests would most likely never be significant enough to trump the public interest in protecting our national pastime. Unlike *Gionfriddo*, however, here the decision was one that went against Major League Baseball. In a departure from historical precedent, the Eighth Circuit held that it was Major League Baseball that was impeding the public interest in baseball, not protecting it. Such a conclusion would have been unheard of just a generation or two earlier. For decades, Major League Baseball and the club owners who dominated the game prior to the ascension of the Players Association in the seventies and eighties were larger-than-life figures who were not shy about promoting their role as guardians of our national game. And the public, as well as the judiciary, compliantly deferred to them largely without question. As such, rulings in favor of Major League Baseball were unquestionably considered rulings in furtherance of the concept of baseball as well. The two were inseparable, both in the public's eye as well as the judiciary's.

## II

### MAJOR LEAGUE BASEBALL AND BASEBALL AS SYNONYMS

This national deference has its roots in the birth of the National League (also known as the NL) back in 1876. This new league, an answer to the player-run National Association that had become overrun with allegations of gambling, cheating, and player "revolving" (jumping from one team to another in search of higher wages), was tightly controlled by the club owners—the self-proclaimed "magnates" who took it upon themselves to solve professional baseball's problems by subordinating the role of the players and by providing themselves with virtually unlimited power and, in the process, prestige.<sup>31</sup> By 1879, all league owners agreed upon the "reserve rule," which prevented revolving by permitting club owners to control their players from one year to the next into eternity unless or until the owner decided to release them.<sup>32</sup> They likewise refused to allow the players any voice in league governance and instilled various league rules and policies that aspired to appeal to the

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<sup>30</sup> See Mann, *supra* note 10 (noting that, in 2006, approximately sixteen million adults played fantasy sports, spending an average of about \$500 each).

<sup>31</sup> See Mitchell Nathanson, *Gatekeepers of Americana: Ownership's Never-Ending Quest for Control of the Baseball Creed*, 15 NINE: A JOURNAL OF BASEBALL HISTORY AND CULTURE 68, 71 (2006).

<sup>32</sup> *Id.*

White Anglo-Saxon Protestant (WASP) elites, who ran the country at the time, in the hope that these national leaders would see in the league owners individuals worthy of respect and, accordingly, deference.<sup>33</sup> In its earliest incarnation, the newly formed National League was a bastion of Victorian values, embracing and emulating the “blue laws” enacted by the Northeastern WASP elites who dominated local legislatures and who considered such laws crucial, particularly in the wake of the immigration boom in the late nineteenth century, to the preservation of their heritage and way of life.<sup>34</sup> As such, the National League banned Sunday baseball and the sale of alcohol at league games.<sup>35</sup> In addition, admission prices were kept high precisely to encourage the “respectable classes” to attend and to discourage attendance by lower-class fans.<sup>36</sup> Together, all of this resulted, in the opinion of Chicago owner Albert Spalding, in crowds “composed of the best class of people . . . and no theater, church, or place of amusement contains a finer class of people than can be found in our grandstands.”<sup>37</sup>

Once established, these club owners were not shy about informing the American public of their accomplishments in service to the Victorian values they helped to protect and promote. They

nourished the legend that the NL saved professional baseball from utter ruin. Had it not been for the timely creation of the NL and the sagacious decisions of its leaders, so the fable went, the national pastime would have continued its downward slide into complete degradation. . . . [T]he NL ostentatiously presented itself as the national pastime’s main moral guardian.<sup>38</sup>

In this way, by rescuing the game “from its slough of corruption and disgrace,” as they boasted, the owners presented themselves to the public as nothing less than American heroes.<sup>39</sup> With the game proudly and firmly in their hands, it was only natural that the public would see the club owners as benevolent “magnates,” operating their clubs in the public interest.<sup>40</sup> In such an atmosphere, deference to

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<sup>33</sup> See BENJAMIN G. RADER, *BASEBALL: A HISTORY OF AMERICA’S GAME* 44 (2d ed. 2002).

<sup>34</sup> See RIESS, *supra* note 9, at 138–39.

<sup>35</sup> HAROLD SEYMOUR, *BASEBALL: THE EARLY YEARS* 92 (1989 ed.).

<sup>36</sup> See RIESS, *supra* note 9, at 33.

<sup>37</sup> *Id.*

<sup>38</sup> See RADER, *supra* note 33, at 50.

<sup>39</sup> See SEYMOUR, *supra* note 35, at 81.

<sup>40</sup> See PAST TIME, *supra* note 9, at 48. In reality, the club owners were far from magnates, particularly the earliest ones. Instead, they were more often self-made, well-to-

these “selfless philanthropists” (as they were sometimes referred to by a fawning media)<sup>41</sup> was inevitable.

For decades, their hold upon the game remained firm as their power only tightened. Once the American League joined the National League in 1901, forming the structure of Major League Baseball that remains today, the cabal of sixteen club owners not only ran the game from the inside but, in many ways, represented its conscience. For over five decades the game remained largely unchanged: the Major Leagues of the fifties looked very much like the Major Leagues that had existed at the turn of the twentieth century. Although a few teams had recently relocated (to Milwaukee, Baltimore, Kansas City, Los Angeles, and San Francisco), the essence of the cabal that was Major League Baseball ownership remained unchanged—there were still sixteen clubs—no more. And the players were as powerless in 1960 as they had been in 1876. Notwithstanding the minor annoyances of relocation, Major League Baseball was still very much an owners’ game. The players were a necessary inconvenience but little more; it was the owners who made nearly every decision relevant to the game. The players were subservient: a secondary concern in all areas apart from the nine innings or so they trotted on and off the field 154 times each season. The owners’ status as the moral conscience of our national pastime seemed perpetual, as their fraternity was so entrenched in the national consciousness that several of them were household names: Topping, Webb, Wrigley, Stoneham, Crosley, Carpenter, Yawkey, O’Malley, and so on. They were in many ways larger-than-life figures. By their very presence, they demanded respect. And more often than not they got it.

Because they represented the game’s moral conscience, they were entrusted, by both the players as well as the public, to act without self-interest in running, and in the process protecting, the game. As such, the concept of benevolent paternalism ran deep. Club owners, as well as team and league management, hammered this theme home time and again whenever challenges to the structure of the game were raised. Trust us, they exhorted, we have everyone’s best interest at

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do merchants or moderately prosperous businessmen. They were certainly successful when viewed within the context of their era, but they were hardly magnates on par with the industrial and financial giants (e.g., Rockefeller, Carnegie) who more appropriately went by that title. *Id.*

<sup>41</sup> See RIESS, *supra* note 9, at 55.

heart.<sup>42</sup> As the nascent Players Association began to rumble from below, the owners pleaded for deference. And for many years, the players complied. In 1958, Cleveland Indians General Manager Frank Lane warned his players of the evils of unionization by reminding them of the “ghost towns” in New England that he asserted were created by union greed, cautioning that similar results could very well come about in baseball if the union influence seeped in there as well. He pleaded for his players’ trust, assuring them that he was “your general manager, as well as for the clubs. You have to have confidence in me.”<sup>43</sup>

Lane’s plea was typical of the stance that management had taken toward the game and of how they expected to be viewed by both their players as well as the American public. Owners had acted as manor lords for generations, doling out privileges to “their” players on their whim, and withholding the privileges likewise, all in the name of protecting the national pastime. Gussie Busch of the St. Louis Cardinals was perhaps one of the more notable in this regard, but he was not much different from most of his brethren, offering perks to his favored players, such as a restaurant for Stan Musial, a beer distributorship for Roger Maris, and a yacht for Lou Brock.<sup>44</sup> To Busch, patronage and paternalism were the defining characteristics of his job description. Most players, whether they played for Busch’s Cardinals or elsewhere, were lulled into complacency for decades by management’s oft-repeated phrase: “we’ll take care of you.”<sup>45</sup> Longtime Dodgers General Manager Buzzie Bavasi often talked publicly about “his” boys and used the trust that this mindset engendered to his advantage come contract time, when his players became unknowing stooges in his financial shell game. In fact, in a series of 1967 *Sports Illustrated* articles, he even boasted of his ability to take advantage of the trust he worked so hard to engender come contract time. He bragged of his trick of pulling out fake contracts, misrepresenting the salaries of other players in his attempt to convince the player in his office to accept his lowball offer.<sup>46</sup> “Some

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<sup>42</sup> See CHARLES P. KORR, *THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION, 1960–81*, at 242 (2002).

<sup>43</sup> *Fans Tired of Bickering, Lane’s Warning to Players*, SPORTING NEWS, Jan. 7, 1956, at XX, quoted in KORR, *supra* note 42, at 242.

<sup>44</sup> JOHN HELYAR, *LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL 96–99* (1994).

<sup>45</sup> See KORR, *supra* note 42, at 37.

<sup>46</sup> *Id.* at 62–64 (discussing Bavasi’s 1967 series of articles in *Sports Illustrated*).

ballplayers just don't understand money at all," he said, "or they don't stop to figure things out . . . [and] you could take advantage of them something frightful."<sup>47</sup>

I've pulled that phony-contract stunt a dozen times, and I'll do it every chance I get, because this war of negotiations has no rules . . . [and] the easiest players to deal with are the ones who leave it all up to you. They have enough faith in me to know that they are going to be paid what they're worth.<sup>48</sup>

The players were not the only ones to fall under management's spell. Most baseball writers likewise preached deference to the owners' sensibilities, concluding that, as the obvious guardians of the game, they would take care of everyone within their orbit. When it came to labor issues, there was no issue to many of them; the owners would naturally take care of "their boys."<sup>49</sup> As a result of this mindset, even before Marvin Miller ascended to the head of the Players Association and led a more aggressive union, sympathy from most writers, and consequently most fans, lay with the owners.<sup>50</sup> This sympathy found its way into the federal courts, which oftentimes deferred to those who ran the game<sup>51</sup> under the assumption that the owners not only understood baseball better than the courts did (in which they were most likely correct) but also that the owners would naturally do whatever they could to selflessly protect baseball (in which, judging by the comments of Lane and Bavasi, they most likely were not). To most interested spectators, either within the game or on the outside, Major League Baseball and the concept of baseball were one and the same, with trust and power granted to the former inevitably inuring to the latter. Over time, however, many of these spectators would start to see things differently. Among the first were the players themselves, the ones most directly impacted by this culture of deference.

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<sup>47</sup> Buzzie Bavasi, *Money Makes the Player Go*, SPORTS ILLUSTRATED, May 22, 1967, at 44.

<sup>48</sup> *Id.*

<sup>49</sup> See KORR, *supra* note 42, at 60.

<sup>50</sup> *Id.* at 9, 93; see also HELYAR, *supra* note 44, at 10 (discussing popular sympathy for owners during salary disputes).

<sup>51</sup> See generally Nathanson, *supra* note 4, at 75–90 (discussing the various federal court opinions throughout the twentieth century that deferred to the judgment of Major League Baseball in the interest of protecting the national pastime).

## III

## THE RISE OF THE PLAYERS

It was Aristotle, not Marvin Miller, who first recognized “that authority in any society is always in danger of degenerating into a cynical and manipulative power struggle . . . whenever ‘persons of great ability, and second to none in their merits, are treated dishonorably by those who enjoy the highest honors.’”<sup>52</sup> Aristotle may have never met Tom Yawkey, Walter O’Malley, or their cohorts, but it was as if he had them in mind. For decades, despite their selfless public stance to the contrary, it seemed as if it was the owners’ primary responsibility to degrade and denigrate their players whenever and however possible in their perpetual quest to maintain control over them and keep salaries low. Once the players began to recognize their own worth, however, they began to fight back by drawing public attention to the disparity between the owners’ public and private faces. In the process, the owners began to suffer a decline in respect as more and more people began to question whether the owners were as benevolent as they had always proclaimed themselves to be.

Irrespective of their public proclamations, club owners always considered it of utmost importance to beat into their players that, despite their talents on the field, it was the owners who constituted the essence of the game. As such, they were justly entitled to deference in practically any issue that pertained to baseball. Although much of their blather was in furtherance of the owners’ pursuit of status, there were obvious financial benefits to this tactic as well. If the players could be convinced that they were fortunate just to be playing ball for a living and that they could easily be replaced at any moment, salary negotiations would be a breeze in most cases. Much of ownership’s treatment of players served to confirm this supposition and bludgeon the players into a subservient role. For decades, most players were paid only during the season; during the winters they were on their own.<sup>53</sup> This treatment was consistent with the notion that professional ball playing was a privilege; when the privilege ended every October, so did the paychecks. What the players did for rent and food money during the off-season could not be the owners’ concern. Until “Murphy money”—spring training stipends—came

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<sup>52</sup> E. DIGBY BALTZELL, *THE PROTESTANT ESTABLISHMENT: ARISTOCRACY AND CASTE IN AMERICA* 380 (1964) (quoting Aristotle).

<sup>53</sup> WILLIAM MARSHALL, *BASEBALL’S PIVOTAL ERA: 1945–1951*, at 301–03 (1999).

along in the late forties (the result of the near unionization of the Pirates in 1946 by labor lawyer Robert Murphy), players were responsible for their own spring training expenses even though they were required to attend.<sup>54</sup> They were also expected to purchase their own gloves and shoes.<sup>55</sup> Travel was brutal, with road trips *averaging* between twenty-one and thirty days at a clip, thereby putting tremendous emotional strain on young families, leading to the dissolution of many marriages and families.<sup>56</sup> All of this for the privilege of playing Major League baseball. Although life in the minors was far worse in some respects, occasionally a promotion to the Major Leagues represented a step down for a player: after starring for Baltimore in the International League in 1949, pitcher Al Widmar's 1950 contract was purchased by the St. Louis Browns—complete with a \$2000 pay cut.<sup>57</sup> Widmar's situation was hardly unique. When players finally made it to the big leagues, they were immediately disavowed of any notion that they had achieved any sort of stature within the game.

And then came the yearly contract negotiations. Regardless of the season a player had just completed, the message was the same: just be glad you're still on the roster. St. Louis Browns owner William O. DeWitt could seemingly never be impressed; his team finished in the basement regardless of the performance of any one player. From his perspective, no one player could have any particular worth to him at all and he was not shy in informing them of this. Players requesting a salary boost on the basis of recent performance were quickly set straight: DeWitt would find a way to disparage their talents anyway. And if he couldn't, he fell back on the old reliable: the sorry financial state of the Browns that, he claimed, made significant raises impossible.<sup>58</sup> DeWitt's strategy was a familiar one, as most clubs tried similar tricks. The underlying goal was always the same: to convince the player that regardless of his salary he was overpaid. Brooklyn Dodgers President Branch Rickey was a master at the art of contract negotiation, going so far as to boast that actual negotiations were occurring, despite the presence of the reserve clause that left

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<sup>54</sup> *Id.* at 308.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 309.

<sup>57</sup> *Id.* at 266. Widmar threatened to sue baseball if he did not receive a raise upon his promotion to the Major Leagues. Eventually, Commissioner Happy Chandler intervened on Widmar's behalf, and Widmar did indeed receive his raise. *Id.*

<sup>58</sup> *Id.* at 299.

players ultimately with no option other than to accept whatever their club offered. One witness to Rickey's act considered him nothing less than an "ethical fraud" come contract time.<sup>59</sup> Even players on the few teams making healthy profits were abused at the so-called bargaining table. After winning the 1956 Triple Crown, Mickey Mantle approached Yankee General Manager George Weiss seeking a significant raise. Weiss replied that Mantle ought to keep his mouth shut and threatened that, if he did not accept the team's offer, Weiss would have no choice but to turn over to Mantle's wife the findings of the private detective Weiss had hired to follow Mantle and teammate Billy Martin.<sup>60</sup> Whether a player suited up for the woeful Browns or the majestic Yankees, the message was unchanged: the owners deserved their positions within the game; the players did not. The concept of privilege was constantly drummed into their heads.

It was true that, despite the harsh realities of professional ball playing in the forties, fifties, and sixties, the life of a Major League baseball player was a comfortable one, relatively speaking. Even though they were squeezed during contract time and unpaid during the off-season, many players were relatively well off (although certainly not the hordes earning salaries at or near the four-figure Major League minimum that existed throughout that era) as compared with society overall. In 1950, the average Major League salary was \$11,000; U.S. Senators earned \$12,500, physicians earned on the average \$12,324, attorneys earned \$8349, dentists earned \$7436, and schoolteachers earned \$2794.<sup>61</sup> However, with farm systems now so large and so many minor league players seemingly ready to take their place (26.7 for every major league position as compared with only 5.9 in 1990),<sup>62</sup> players had no job security and, hence, no rights. Soon, the mere privilege of playing Major League ball for a living was no longer enough.

There had always been sporadic player uprisings, dating back to the nineteenth century with the formation of John Montgomery Ward's Brotherhood of Professional Base Ball Players and the creation of the Players League in 1890 (formed as a rebellion against the oppressive National League).<sup>63</sup> However, none of these earlier movements could be sustained over the long haul; eventually, the

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<sup>59</sup> PAST TIME, *supra* note 9, at 95.

<sup>60</sup> See KORR, *supra* note 42, at 240.

<sup>61</sup> MARSHALL, *supra* note 53, at 300.

<sup>62</sup> *Id.*

<sup>63</sup> See HELYAR, *supra* note 44, at 3–5.

aggrieved players would come back to the fold, and the business of Major League Baseball would continue as it always had. By the forties, a more sustained movement began to take root, although it certainly seemed toothless and harmless for many years.

The near unionization of the Pirates in 1946 was an early example of the awakening of the players, and although the movement failed, albeit barely, the rumbles of discontent began to brew. The owners realized that they needed to pass at least superficial reforms in order to quell the murmurs of discontent, so in 1946, along with the Murphy money, they created a pension plan for the players, complete with player representatives on the pension committee.<sup>64</sup> Their input was consistently ignored, however. After requesting modest increases to the pension plan and being turned down flat, player representatives Ralph Kiner and Allie Reynolds decided to hire a lawyer, J. Norman Lewis, and bring him to the December 1953 winter meetings.<sup>65</sup> The owners then agreed to meet with the players but instructed them to leave Lewis out in the hotel's foyer.<sup>66</sup> The frustrated player representatives then met with each other and agreed to form what was to be known as the Major League Baseball Players Association when it became operational on July 12, 1954.<sup>67</sup>

Although the received wisdom holds that the Players Association was an impotent body prior to the arrival of Marvin Miller, it was successful in laying the foundation necessary for Miller to succeed. From the outset, the Players Association was effective, at least occasionally, as an information-gathering and dissemination body. This was crucial in enlightening the players as to the realities of their situation. In 1958, the law firm retained by the Players Association (the retention of a law firm being, by itself, a monumental step by the players) released its "Salary Report for Major League Baseball Players," which was distributed to the representative of each team.<sup>68</sup> Although its conclusion—that the players were underpaid—was hardly surprising, its significance lay in the methods used to demonstrate precisely why and how this was so. By showing the

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<sup>64</sup> See LEONARD KOPPETT, *KOPPETT'S CONCISE HISTORY OF MAJOR LEAGUE BASEBALL* 260 (Carroll & Graf 2004) (1998).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *Major League Baseball Players' Association Constitution, Bylaws, and Articles of Association*, in *LATE INNINGS: A DOCUMENTARY HISTORY OF BASEBALL, 1945–1972*, at 82, 82–84 (Dean A. Sullivan, ed. 2002).

<sup>68</sup> See *Salary Report for Major League Baseball Players*, in *LATE INNINGS*, *supra* note 67, at 131, 131–34.

players how they were being taken advantage of rather than merely telling them what they already knew, the report empowered the players to speak with authority and specificity on the financial side of the game rather than in the general platitudes (e.g., “I was ripped off.”) that were common to earlier eras and easy to brush aside. For instance, the report discussed relative cost of living standards as a means to compare salaries across eras. By doing this, it was able to clearly convey just why it was that, although the minimum salary had recently been raised from \$6000 to \$7000, the players were nevertheless in worse financial shape than they had been in just a few years earlier.<sup>69</sup> It also pointed out that, in 1929, team salaries accounted for 35.3% of Major League expenses whereas by 1956 that percentage had dropped to 12.9%.<sup>70</sup> The implications of this were clear: the owners were making more money than ever before but were pocketing all of the profits. As it was, the players *were* being ripped off; only now they knew the particulars of the theft. With knowledge comes power, and the Salary Report provided the theoretical foundation for what was to come later. If the presence of the farm system and reserve clause thwarted the players from acting individually, they finally were coming to the realization that they would have to band together and attack the problem as a collective.

By the sixties, the “Depression-era mindset” of the players, where they were happy just to be in the big leagues, was disappearing. Red Sox owner Tom Yawkey once boasted, “[t]o me the greatest example of American democracy is the right a player has to sit down with a general manager and negotiate his contract.”<sup>71</sup> Buzzi Bavasi’s 1967 *Sports Illustrated* article exposed Yawkey’s fiction, as would the series of events that followed that would be viewed, at least in retrospect, as the turning point in the balance of power within the game—the 1966 appointment of Marvin Miller as Executive Director of the Players Association. That spring, he toured spring training camps and was educated as to the players’ developing mindset. Later he encouraged players to attend bargaining sessions with the owners so they could see for themselves what they were up against.<sup>72</sup> Very quickly, players became extremely well informed. They witnessed firsthand the stonewalling and evasive tactics used by the same owners who had always told the players to trust them because they

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<sup>69</sup> *Id.* at 132.

<sup>70</sup> *Id.* at 132–33.

<sup>71</sup> KORR, *supra* note 42, at 20.

<sup>72</sup> See KOPPETT, *supra* note 64, at 367.

had the players' best interests in mind. A few minutes in a bargaining session disavowed them of that belief. They saw how the owners were willing to use any weapon available to them against the players, no matter how trivial the point at issue was. The unreasonableness of the owners was perhaps never so clearly demonstrated than in the reaction of Giants General Manager Chub Feeney to an offhand remark made by pitcher Jim Bouton. When Bouton suggested, facetiously, at a bargaining session that a player be granted free agency at age sixty-five, Feeney growled in response, "No, because that would give you a foot in the door."<sup>73</sup>

In one sense, Feeney's reaction was to be expected. For what was being contested during these bargaining sessions was the point made by the owners for decades: that they, not the players, constituted the essence of the game and, as such, were rightfully entrusted with the role of deciding what was in the best interests of the game. This mindset was behind much of what Commissioner Bowie Kuhn imparted to the media throughout the turbulent bargaining sessions that defined his tenure (1969–84). "I will say," he remarked in a typical comment uttered in 1980, "that the greatest long-term interest in the game is held by the club people. Their financial interest is longest and deepest. They'll still be around as the generations of players pass."<sup>74</sup> Reds General Manager Bob Howsam sounded a similar theme in 1973 when he pitted the players not only against management but against America in general. In his view, management protected the game and its American ideals (i.e., the concept of baseball), whereas the players wanted to destroy "the institution that reflects all that is America . . . the freedoms we cherish and the liberties we defend."<sup>75</sup> In short, the owners looked out for baseball whereas the players looked out only for themselves.

Miller, obviously, saw things differently. Through time, he was able to convince the players that it was they, not the owners, who defined the game of baseball. Soon, the players were issuing statements of their own, challenging the owners', and consequently the public's, worldview. In 1967, Mets pitcher Jack Fisher addressed his fellow players as well as the owners present at a bargaining session: "It's a matter of taking pride in your profession. . . . We don't

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<sup>73</sup> *Id.* at 339.

<sup>74</sup> Thomas Boswell, *Why Do People Say All Those Terrible Things About Bowie Kuhn: A Revisionist View of Baseball's Commissioner*, *INSIDE SPORTS*, July 31, 1980, at 96, 100 quoted in *KORR*, *supra* note 42, at 6.

<sup>75</sup> *KORR*, *supra* note 42, at 5 (omission in original).

think we'd be fighting for ourselves. We'd be fighting for baseball."<sup>76</sup> As this mindset took hold among the players, they began speaking of their baseball careers as professions that came with rights and not merely privileges. This theme particularly hit home with Curt Flood and other black players, given the civil rights and black power movements that provided the backdrop to the era.

In his December 24, 1969, letter to Kuhn requesting free agency, Flood turned the owners' arguments on their head, implying that, when it came to doling out rights and privileges, the owners had things backward. He wrote:

After 12 years in the major leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system that produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and the several states.<sup>77</sup>

According to Flood, if anything, it was the owners who should have considered themselves privileged simply to maintain an association with our national pastime; all that was required of them was a sufficiently fat wallet. The players, on the other hand, due to their unique skills, were entitled to their presence in the game on merit alone. For that reason, a generous cut of the profits derived from the game was rightfully theirs as well. Flood continued to hammer away at the owners throughout his battle. The following year, in an interview, he remarked: "They say baseball is the all-American sport. When you think of all-American, you would think of something democratic, something free."<sup>78</sup> The decades of blather by the owners about their role as protectors of our national pastime had finally come back to bite them. If they truly meant what they said, they would have to set the players free. As players such as Flood pointed out, any other result would be absurd.

The modicum of integration that had occurred in the two decades or so since the debut of Jackie Robinson in 1947 presented the players at last with leaders like Flood who, through their words, actions, and mere presence, gave confidence to other players, black and white, to stand up for themselves. In his stand, Flood convinced many players who previously were on the fence with regard to the Players Association that its cause was just. Through Flood, they were able to

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<sup>76</sup> *Id.* at 6.

<sup>77</sup> Nathanson, *supra* note 31, at 81–82.

<sup>78</sup> KORR, *supra* note 42.

see that their demands were not selfish; they were representative of something bigger than simply wanting a larger slice of the financial pie. It was this mindset that led to successive collective bargaining agreements that steadily ratcheted minimum player salaries up to acceptable levels after decades of stagnation.<sup>79</sup> Although the extra income realized through these agreements was certainly welcome, the collective bargaining agreements were ultimately not just about money. They were also about power. They were about rights and privileges and who, as between the players and the owners, most appropriately lined up on which side of the ledger. And as the players gained power and prestige through each successive collective bargaining agreement, the owners lost some of theirs in the process. Flood's quest was certainly instrumental in this narrative shift, but it was merely part of the larger movement led by Miller that compelled the public to question its faith in the owners as benevolent protectors of our national game.

The narrative Miller put before the American public was hardly the romantic one of baseball and American history that the owners had peddled for decades. Rather, it was a brutal "slave narrative" where the allegedly privileged players were not granted even the most basic rights afforded to ordinary citizens.<sup>80</sup> He, and later other player spokesmen as well, "employed the language of labor—scabs, work stoppages, picket lines,"<sup>81</sup>—to align the players with the powerful labor movement of the era, and he chose his words carefully with the intent of provoking the owners as well as the public to acknowledge the reality of baseball's management-labor relationship that had been up to then blissfully ignored in favor of the more optimistic, reassuring myth of benevolent paternalism. At one point in 1973, Miller invoked the sting of baseball's segregationist past by remarking that any gains made by the Players Association could easily be thwarted by a "gentlemen's agreement" between the owners, a statement that recalled the so-called "gentlemen's agreement" that kept black players out of the game for decades.<sup>82</sup> Miller's choice of the phrase was intentional; there existed beneath the veneer of our national pastime something unsavory and cruel about the business of

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<sup>79</sup> See generally *id.* at 3–4.

<sup>80</sup> See William W. Wright & Mick Cochrane, *The Uses of History in Baseball Labor Disputes*, in *DIAMOND MINES: BASEBALL & LABOR* 62, 68 (Paul D. Staudohar ed., 2000).

<sup>81</sup> *Id.* at 69.

<sup>82</sup> See Korr, *supra* note 42, at 126. The discussion of Miller and benevolent paternalism, herein, draws primarily from Korr's text. See *id.* at 237–38.

baseball and Miller wanted everyone to be cognizant of it. In his words and actions, Miller attempted to demonstrate that the owners were not to be trusted and that they were merely presenting a facade of themselves as romantic baseball men “using tradition to mask self-interest.”<sup>83</sup> They were hardly the gentlemen they portrayed themselves to be.

In essence, Miller was on a crusade to show that the concept of benevolent paternalism simply did not exist within the game of baseball. In order to make his point, he had to break the stereotype of the “aw shucks, gee-whiz, I’m so glad to be a major leaguer that I would pay to put on the uniform” player of romantic myth.<sup>84</sup> Although the realities of Major League Baseball never aligned with this myth, it nevertheless served the owners well for decades, permitting them free rein to pay the players less than their true value, allowing them to withhold benefits, and ensuring that no player could speak up without fear of public censure. By breaking the chains of this myth and allowing the players a voice in their profession, Miller effectively marginalized the role of the owners in the overall stewardship of the game. As he portrayed them, they were cruel, petty, self-interested people who were not to be trusted. Not by the public and, ultimately, not by the judiciary either.

The Players Association was not the sole cause of the owners’ collective loss of status and, consequently, national deference, however. They were also done in by newer, improved versions of themselves—products of a post-World War II corporate revolution that changed the face of American business, causing it to become more powerful yet less visible all at once. When this revolution hit Major League Baseball, the owners disappeared from the national stage for good.

#### IV

#### THE CORPORATE REVOLUTION

Much of the rationale for the traditional judicial deference to Major League Baseball came from the judiciary’s comfort in entrusting the thorny legal issues of baseball to the well-known stewards of the game. As stated earlier, the owners who ran the game up through the fifties were household names who had, at least in the public eye, long demonstrated their baseball bona fides. There had always been some

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<sup>83</sup> *Id.* at 126.

<sup>84</sup> *Id.* at 238.

turnover in ownership ranks but the stalwarts—the O’Malleys, the Yawkeys, the Crosleys, the Carpenters, the Wrigleys, et al.—had seemingly been “baseball men” forever and had accumulated a presupposed institutional knowledge of the business of baseball that many courts were hesitant to challenge. Just as importantly, although the owners bickered among themselves on more trivial issues, they often spoke with a unified voice on the bigger issues concerning the game. As such, in deferring to Major League Baseball, courts could be reassured that they were entrusting the resolution of significant questions to a well-known, learned body of baseball “experts.”

Beginning in the sixties, however, things began to change. Slowly at first, but then more rapidly as the decades passed, owners began coming and going more frequently.<sup>85</sup> With the increase in turnover, they became increasingly anonymous. In addition, and partially as a result of the increase in turnover, the cohesiveness of the owners’ “voice” began to dissipate as club owners now disagreed on more fundamental questions concerning the game. By the eighties and nineties, deferring to the owners increasingly led to more questions than answers: Who were the owners? What did they stand for? How would they protect the game of baseball? How *could* they protect the game of baseball given their increasingly disparate interests? By the time of the 2006 and 2007 *C.B.C.* decisions, deference to Major League Baseball was a far less reassuring prospect than it had ever been before. In short, the people at the ownership table by 1980 were far different in temperament and background than those sitting in those same chairs in 1960. They were the products of a corporate revolution in America that, although not publicized nearly to the degree as the student and counter-culture revolutions of the same era, changed the fundamental nature of corporate America<sup>86</sup> and, naturally, baseball’s ownership group as well. Ironically, these new owners were far more powerful, in a global sense, than their predecessors, but it was their power that caused them to fray as a group and become, collectively, weaker. As they weakened, their ability to speak not merely for themselves but for “baseball” waned significantly.

Traditionally, owning a Major League Baseball team was a relatively simple, straightforward proposition. The economics were

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<sup>85</sup> See KOPPETT, *supra* note 64, at 399.

<sup>86</sup> See RICHARD M. ABRAMS, *AMERICA TRANSFORMED: SIXTY YEARS OF REVOLUTIONARY CHANGE, 1941–2001*, at 99–100 (2006).

rudimentary—the vast majority of revenue stemmed from gate receipts along with a trickle from radio.<sup>87</sup> Expenses were minimal given that salaries and ticket prices were low. In this atmosphere, owning a baseball team was little more than a vanity investment. Just as in the nineteenth century, these non-players sought a connection to the game more for the status it brought them than the income it generated. Making money was not, and could not, be a primary motivation, as there was not much generated. As one sports economist concluded of the prewar era, “even the most successful ball team’s revenues were no more than those of a department store or a large supermarket.”<sup>88</sup> In this atmosphere, owners had the luxury of considering themselves amateur sportsmen. “Mr. [Phil] Wrigley never took a penny out of the ball club, never took a dividend,” said Cubs Business Manager E.R. “Salty” Saltzman.<sup>89</sup> “He didn’t care much about profits; he just didn’t care to subsidize losses.”<sup>90</sup> Because being a member of this elite fraternity was what mattered most, cohesiveness and solidarity among owners was not a problem. All of this resulted in a position of status that demanded deference, judicial and otherwise.

Of course, there were always divisions among owners, and squabbles and grudges abounded. However, when it came to the proverbial “big picture,” the operation of the business of baseball, they had every incentive to act in lock step. To do otherwise would cost them money that many of them simply did not have.<sup>91</sup> They could strike out on their own, sign the best prospects without regard to price, and take on veteran players with higher contracts to help them in a play-off push, but these tactics were risky. If these moves failed to translate into success on the diamond, they would not see much of an increase in ticket sales, and then they would be left with bloated expenses without any way to balance their ledger sheets at the end of the season.<sup>92</sup> Or they could be content with life in the second division, smaller crowds and barely a whiff of the pennant race, and be assured of meeting their reduced expenses. The first option could

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<sup>87</sup> See HELYAR, *supra* note 44, at 51.

<sup>88</sup> Roger G. Noll, *Major League Team Sports*, in *THE STRUCTURE OF AMERICAN INDUSTRY* 365, 365 (Walter Adams ed., 5th ed. 1977).

<sup>89</sup> HELYAR, *supra* note 44, at 13.

<sup>90</sup> *Id.*

<sup>91</sup> For an analysis of the economics of the era and the nature of the choices available to owners, see MITCHELL NATHANSON, *THE FALL OF THE 1977 PHILLIES: HOW A BASEBALL TEAM’S COLLAPSE SANK A CITY’S SPIRIT* 62–64 (2008).

<sup>92</sup> *Id.*

bring them a nice profit or, if things went south, a mountain of debt that might require them to sell their club and leave the ownership fraternity they prized above all else. The second option virtually guaranteed perpetual membership in the fraternity regardless of how their club finished in the standings. Given the choice, it was no wonder so many of them took the latter route.<sup>93</sup>

Competitive self-interest (as opposed to self-promotion and status) was not much of a concern to these pre-expansion owners because, unless they did something foolhardy such as expend precious resources toward putting a competitive team on the field, their ledgers would be balanced by factors that had little to do with the play of their team on the diamond.<sup>94</sup> Given the meager expenses in the game at the time, it did not take much in the way of attendance for a club to break even at the end of the year regardless of how it finished in the pennant race. A club could average as few as 1500 fans a game during the week and still break even because it would receive the income necessary to pay its bills in the few games (night games, Sunday games, games against the Yankees in the AL or whoever happened to be ruling the NL at the time) annually that drew large crowds. For decades, a club could draw as few as 500,000 fans a season—with the majority of these fans showing up only for the few premium games during the season—and still remain comfortably in business.<sup>95</sup> In this atmosphere, it was not uncommon for owners and general managers to consult each other on salaries, player movement, and other internal decisions.<sup>96</sup> Maintaining a competitive advantage was not something that was always in the forefront of their minds.

Rather than fight the system (i.e., the Yankees—the most powerful and visible team within Major League Baseball) and sweat, most American League owners found it more advantageous to give in to it, to take orders from the Yankees, and to make sure that their votes aligned with the Yankees' interests. In return, the Yankees subsidized their seven putative competitors.<sup>97</sup> The Yankees' tally between 1921 and 1964 is a testament to this devotion: twenty-nine pennants and twenty World Series championship rings in that forty-three-year span. Even in the National League, the Yankees held influence; it was their "brand" that the other teams fed off (not to mention the fact that the

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See HELYAR, *supra* note 44, at 89–90.

<sup>97</sup> See KOPPETT, *supra* note 64, at 194–95.

Yankees were often willing trade partners for teams looking to dump high-salaried players in order to balance their ledger sheets at the end of another disappointing season). The aura of the Yankees of Ruth, Gehrig, and DiMaggio spilled over into every Major League city. In this atmosphere, cohesiveness was not hard to achieve. Thus, it was mutual weakness that necessitated the codependence that drove these old-guard owners into each other's arms. In the process, they were able to clearly and forcefully speak on behalf of "baseball." They had a unified vision as well as the ability to see it through.

The old-time owners were exemplified in the two-headed beast that ran the Yankees for much of their golden age: Dan Topping and Del Webb. Topping was considered the "sportsman" of the pair, not unlike Bob Carpenter of the Phillies and Tom Yawkey of the Red Sox. Although he dabbled in business, he was independently wealthy and effectively an amateur aristocrat.<sup>98</sup> With this background, he answered to no one. His money was his own; he was privileged to spend it as he pleased. Webb, on the other hand, was a businessman through and through. By the early sixties, one would not be incorrect in calling him a mogul—his construction empire spread across the nation and was involved in hotels, casinos, and ballparks, along with military contracts.<sup>99</sup> However, his was a typical prewar corporation in that, despite its size, it was organized very simply. Given that his corporation was essentially involved in only a single line of business—construction—Webb was able to maintain a strong, authoritarian voice.<sup>100</sup> Like Topping, Webb was able to be a firm decision maker. The many businessmen owners, like Webb, operated as the heads of similarly organized, relatively simply constructed corporations focused on one or, at most, two lines of business.<sup>101</sup> Topping himself was the beneficiary of this simple, streamlined organizational structure; his grandfather, Daniel Reid, was known as "The Tin plate King," having amassed his fortune in the tin industry.<sup>102</sup> Even those owners whose resumes were broader than either Webb's or Topping's typically stuck to a straightforward, relatively simple business model. Powel Crosley, owner of the Reds,

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<sup>98</sup> See Mark Gallagher, *The Yankees Encyclopedia*, 325–29 (Sports Publishing LLC (4th ed.), 2000); see also BALTZELL, *supra* note 52, at 298.

<sup>99</sup> See MICHAEL SHAPIRO, *BOTTOM OF THE NINTH: BRANCH RICKEY, CASEY STENGEL, AND THE DARING SCHEME TO SAVE BASEBALL FROM ITSELF* 75–76 (2009).

<sup>100</sup> *Id.* at 76.

<sup>101</sup> See ABRAMS, *supra* note 86, at 99.

<sup>102</sup> SHAPIRO, *supra* note 99, at 183.

was a little bit Topping and a little bit Webb; he was born into some money, but then he became an industrialist on his own.<sup>103</sup> At times over the course of his professional career, he was involved in radio manufacturing and broadcasting, household appliance sales, and automobile production, along with his interest in the Reds.<sup>104</sup> However, one would hardly call Crosley's empire a conglomerate, or even an empire for that matter. Rather, it would be more accurate to say that he dabbled in a little of this and a little of that over the course of his life. And in all of it, his was the final word.

This business model would undergo a radical transformation beginning in the middle of the twentieth century but picking up steam by the sixties such that, by the seventies, and certainly by the eighties, such autonomy by any one individual would be practically unheard of. This rendered it near impossible for any one owner to make firm decisions on the spot without fear of the ramifications beyond the owners' caucus; there were simply too many other interests to consider. This diminution of authority in the individual could have no other effect but to fray group cohesiveness as well as the ability of the owners to speak with a unified voice. In the process, their role of guardians of the concept of baseball diminished.

The destruction of the small, single-industry corporation through the concentration of economic power would be the outstanding feature of the post-World War II American economy.<sup>105</sup> During the fifties, this concentration accelerated such that quickly a dwindling percentage of American corporations accounted for an increasingly overwhelming share of net corporate income. The transformation of America from a land of many simple, single-industry corporations—family businesses—to one of relatively few mega-conglomerates that were dispersed across multiple lines of business was swift and staggering. “By the end of the 1960s, the 100 largest industrial corporations held a greater share of total assets than the 200 largest in 1950, and the largest 200 held about the same share as the largest 1000 did in 1941.”<sup>106</sup> The result of this flurry of activity was obvious: between 1955 and 1970, the largest companies—the

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<sup>103</sup> See *Powel Crosley Jr.*, OHIO HISTORY CENT.: AN ONLINE ENCYCLOPEDIA OF OHIO HISTORY (July 1, 2005), <http://www.ohiohistorycentral.org/entry.php?rec=63&nm=Powel-Crosley-Jr.>

<sup>104</sup> *Id.*

<sup>105</sup> See ABRAMS, *supra* note 86, at 97.

<sup>106</sup> *Id.*

“Fortune 500”—practically doubled in profits and assets.<sup>107</sup> As for how this came about, the answer was simple: mergers and acquisitions. In the two decades following the conclusion of World War II, 3900 smaller companies were swallowed up by the 200 largest companies such that, by the late sixties, almost all large manufacturers were operating in more than five separate industries.<sup>108</sup> Smaller single-industry companies, the mom-and-pop shops that formed the backbone of the American economy in the early part of the century and the ones that bred many MLB owners during this period, were gobbled up by increasingly larger, more diverse conglomerates with complicated corporate structures and large boards of directors replete with divergent and often conflicting interests.<sup>109</sup>

This transformation would profoundly change the nature of American business and, therefore, the management side of Major League Baseball. Decision making now was a much more complicated process. There were multiple interests to consider, many of them competing with one another. As this new corporate influence seeped into baseball during the sixties, the days of sitting across the table from a fellow owner and making major decisions on the spot were dwindling. To be sure, there were several members of the old-guard left: the O’Malleys, the Carpenters, the Yawkeys. But over time they came to be outnumbered by the products of the revolution until they were little more than relics of an earlier, simpler time—plantation owners in the land of the corporate boardroom. When they finally departed, the old days were gone for good.

Most Americans were either unaware of or indifferent to the corporate revolution going on all around them, which was changing the fundamental realities of their daily lives. Media attention was focused elsewhere: Vietnam, the Cold War, the hippies in San Francisco, and the sit-ins in Berkeley.<sup>110</sup> In baseball, attention was similarly diverted to an issue that was easier to cover, easier to paint in black and white: Marvin Miller and his suddenly agitated Players Association. All of these uprisings were significant, sometimes colossal in their impact, but the corporate revolution affected them all in a quiet yet profound way: this revolution affected the decision-making process with regard to all of the others. And how a response is made often dictates the response itself.

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 99.

<sup>109</sup> *Id.* at 98–102.

<sup>110</sup> *Id.* at 100.

Corporate ownership and corporate influence were not foreign concepts to Major League Baseball prior to the sixties but, as the decades wore on, it would see more and more of them. As new owners arrived on the scene of the newly expanded National and American Leagues (with four teams being added in 1961 and 1962), they would be, in one sense, far more powerful people than their predecessors; they were in most cases far richer and far more influential politically given the realities of running a multinational conglomerate (it is far easier to get the collective ear of Congress when your business operates in all fifty states rather than in one or two).<sup>111</sup> But it would be their individual power that would bring the owners down collectively; having to answer to so many interests other than their baseball brethren simply made group cohesiveness impossible.

The corporate influx in Major League Baseball grew more pronounced as the decades passed. Eventually, huge conglomerates such as Disney, Time Warner, the Tribune Company, and others owned controlling interests in ball clubs.<sup>112</sup> All of these investors had varied agendas, some baseball related, some not. Although the transition from plantation to boardroom ownership was complete by the nineties, the new wave began disrupting and fraying the old guard from the moment it arrived several decades earlier.<sup>113</sup> With all of the varied interests now present at the owners' table, the ability of a powerful team such as the Yankees, to say nothing of the commissioner himself, to dictate an agenda or to speak on behalf of others, or for "baseball" for that matter, became increasingly difficult. How to persuade a conglomerate? There were simply too many disparate private agendas involved as more and more clubs now had their own large, institutional problems to consider.<sup>114</sup> Everyone was seemingly out for themselves with nobody left to look out for or to speak on behalf of our national pastime.

Starting in the sixties, the economics of baseball changed; clubs were no longer the financial equivalent of supermarkets. The corporate revolution amped up the American economy and made everything bigger and more expensive, including Major League Baseball clubs. Significant debt service now became an issue: clubs

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<sup>111</sup> *See id.* at 102.

<sup>112</sup> KOPPETT, *supra* note 64, at 469.

<sup>113</sup> *See* KORR, *supra* note 42, at 79.

<sup>114</sup> KOPPETT, *supra* note 64, at 469–70.

needed to consider it whenever making significant decisions.<sup>115</sup> No longer could they simply fall blindly in line behind the Yankees; they had their creditors and shareholders to consider. Big money meant the arrival of big, powerful people and entities in the game, but people and entities with agendas that rarely considered the well-being of their putative competitors. The old guard always considered themselves a powerful lot, but the source of their collective power was rooted in weakness rather than strength. When the individually powerful products of the corporate revolution infiltrated the ranks of club ownership, the result was not enhanced power and prestige but, ironically, a dissipation of it. Their tight fraternity was finally cracked and, once it was, the old guard's solidarity was irrevocably broken. They could no longer speak with one voice. Gone was their ability to speak for the concept of "baseball" and the deference that came with that.

As the longtime stalwarts left the game, they were replaced with owners from the corporate boardroom who were more likely than their predecessors to enter and leave the scene quickly, seeking profit and then exiting either as soon as they had achieved it or found that it was not forthcoming in sufficient abundance. By 1963, either through expansion or recent transfers in ownership, six of ten American League owners were individuals who were not members of the fraternity a mere three years earlier (in the NL it was four out of ten).<sup>116</sup> Thus, at joint league meetings, half of the decision makers were people new to one another. This dynamic added to the increasing difficulty of maintaining group cohesiveness.

The changes and turnover in ownership increased throughout the next several years. In 1969, another round of expansion brought four more teams and, therefore, four new faces to the table along with new owners in Cincinnati and Washington.<sup>117</sup> By the seventies, club owners were coming and going at an unprecedented rate. As stated earlier, though there had always been some turnover in ranks, ownership turnover was nothing like it was after the influx of the products of the corporate revolution. Something fundamentally changed in the nature of club owners; they simply were not staying in the game as long as they had before. Although the irony was most likely lost on most of the ownership group as it existed during the mid

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<sup>115</sup> *Id.* at 428.

<sup>116</sup> *Id.* at 296–97.

<sup>117</sup> *Id.* at 342.

to late seventies, despite their charges of renegade behavior leveled at the players as a result of free agency, it was the owners who were carpetbagging like never before. All of this had disastrous results for their once tight fraternity; in this atmosphere it was almost impossible for one owner to get to know another. Before long, they would be replaced with somebody else. Without fraternal allegiances everybody was out for themselves. Concepts such as vision and cohesiveness were things of the past. Without an institutional memory, owners meetings became pitched battles between self-serving owners interested only in what benefited them today; yesterday or tomorrow be damned.<sup>118</sup> Major League Baseball ownership had always been portrayed as a collection of separate fiefdoms, but for decades, the power of and deference to the Yankees made a mockery of this allegation. After the corporate revolution, it was a mockery no more.

## V

### THE NATIONAL DEMONIZATION OF MAJOR LEAGUE BASEBALL AND THE SEPARATION OF MLB FROM THE CONCEPT OF BASEBALL

The shift in power within the game from the owners to the players did not result in a concurrent passing of the torch in terms of the role of spokesmen and protectors of the concept of baseball. While the owners faded into the background, the players, through their powerful Players Association, were never able to replace them as the voice of the game. With repeated labor showdowns throughout the seventies and eighties, culminating in the 1994–95 strike that wiped out the 1994 World Series, public mistrust of the Players Association grew only more fervent. As such, because they were repeatedly vilified by the owners, the media, and consequently, the public, the players were unable to successfully become the voice for anything beyond their own self-interests. Eventually, it became fashionable to draw a line between Major League Baseball as composed of the increasingly anonymous owners and demonized Players Association on one side and the purer, perhaps fictional, certainly larger, concept of baseball on the other. In the process, Major League Baseball, and all who resided within it, became divorced from the idea of baseball as our national pastime. Inherent in this separation was the notion that the Major Leagues comprised only one aspect, and a less significant one at that, of the larger concept of baseball. By the time of the *C.B.C.*

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<sup>118</sup> See *id.* at 385, 399, 428.

decisions, Major League Baseball (as well as the Players Association who partnered with it through Major League Baseball Advanced Media) spoke only for itself and not more expansively for the game overall. All of this left the *C.B.C.* courts with the question of how to determine what was in the best interest of our national game. Who was to decide? In a break with the past, the courts concluded that, this time, they were the best qualified entity to speak on the game's behalf.

In their increasingly feverish battles with the Players Association, the owners set out to demonize its leader, Marvin Miller. This tactic proved unsuccessful as the Players Association steamrolled over the weakened owners' cabal in showdown after showdown. On a grander scale, however, this tactic did inflict lasting damage; the portrait of Miller and the Players Association that the owners helped to create (and which Miller oftentimes did little to counteract) would assure that, regardless of their power and sway within Major League Baseball, the Players Association would never be regarded as the stewards of the game the way the owners once were.

Whenever provided the opportunity, the owners, either through their mouthpiece, Commissioner Bowie Kuhn, or directly, would call into question Miller's patriotism. At one point, Kuhn stated that he believed Miller to harbor "a deep hatred and suspicion of the American right and of American capitalism."<sup>119</sup> Sportswriters across the nation hammered away at the patriotism charge as well, labeling the leader of the Players Association "Comrade Miller," or "Marvin Millerinski."<sup>120</sup> Beyond the snarky, communist-baiting monikers, critics disparaged Miller for having a "narrow mind" and in many ways they were correct; Miller refused to do what the owners had done for decades: to mythologize and romanticize the game and to make it a metaphor of idyllic American ideals. He refused to block out the negative and focus only on an idealized positive. He refused to use the rhetoric associated with the concept of baseball to justify the fundamental inequalities and subjugation that existed within Major League Baseball.<sup>121</sup>

Quite simply, he had no interest in the larger concept of baseball. Instead, he was focused solely on the labor issues that confronted his clients, and he considered it his job to address them. In the process,

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<sup>119</sup> BOWIE KUHN, *HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER* 77 (1987).

<sup>120</sup> KORR, *supra* note 42, at 43.

<sup>121</sup> *See id.* at 237.

he perhaps unwittingly drew a distinctly different portrait of both baseball and America than the portraits most Americans had grown up with through the owners' blather with regard to the idyllic life of a Major League Baseball player. In Miller's world, the game, as well as life, was cold, harsh, and unforgiving. Although, unlike the owners, he rarely encouraged the connection between baseball and America; it was inevitable, however, that the public would make one, given that the relationship between the two had been forged through nearly a century of association by the owners as well as the media. As such, and with the encouragement of Kuhn and the owners, Miller's take on baseball's labor issues was received by a public who saw it as a critique on a grander scale—a virulently un-American perspective offered up by one whose patriotic allegiances were questionable. All of this doomed Miller and the Players Association in the court of public opinion, regardless of his strategic successes vis-à-vis the owners. Even if they could prevail at the bargaining table (as they overwhelmingly did), there would be little chance of their assuming the mantle of guardians of the game. For there was little chance that the well-being of our national pastime would be entrusted to an entity headed by an alleged communist sympathizer.

The divergent portraits of baseball, historically drawn by the owners and more recently by Miller, were never more clearly on display than in the Supreme Court's 1972 opinion in *Flood v. Kuhn*.<sup>122</sup> In that case, the Justices were required not merely to resolve the legal dispute surrounding Curt Flood's quest for free agency but also to announce their preferred vision of the game: the romantic one offered by the owners or the brutal slave narrative propounded by Miller. If they chose the owners' vision, deference to the benevolent protectors of the game and consistency with historical precedent would be an acceptable result. If they chose Miller's vision, a ruling placing the fate of players such as Flood in the hands of the self-serving manor lords could only be absurd. In the end, the majority sided with the owners, choosing romance over reality. As such, even though the Court retreated from its position in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*<sup>123</sup> (the case that created the exemption in 1922 by holding that Major League Baseball was not engaged in interstate commerce), it held that ultimately this fundamental shift in

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<sup>122</sup> *Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>123</sup> *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922), *reh'g granted*, 42 S. Ct. 587 (1922).

perspective was not dispositive. Instead, it held that the Sherman Act was nevertheless inapplicable to Major League Baseball, concluding simply that its decisions in *Federal Baseball* and later in *Toolson v. New York Yankees, Inc.*<sup>124</sup> were “aberration[s] confined to baseball.”<sup>125</sup> In Justice Harry Blackmun’s majority opinion, he identified himself as firmly in the camp of the romantics as he prefaced his opinion with a five-paragraph summary of his understanding of the history of the game, the greats who played it, and the Americana that surrounds it, ticking off the writing of Ring Lardner, Thayer’s “Casey at the Bat,” and “the ring of Tinker to Evers to Chance.”<sup>126</sup> All of this, concluded Blackmun, “made it the ‘national pastime’ or, depending upon the point of view, ‘the great American tragedy.’”<sup>127</sup> Once he finally reached the merits of the case, Blackmun again diverged into romance and mythology, quoting approvingly from the lower court’s ruling against Flood:

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

Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves everyone to keep it there.<sup>128</sup>

Consistent with the romantic view of Major League Baseball, only players such as Flood could be accused of “undue concentration . . . on commercial and profit considerations.” Because the owners were benevolent guardians of the national game, they necessarily had higher considerations and priorities.

In dissent, Justice William O. Douglas adopted Miller’s worldview and, in so doing, focused on the absurdity of entrusting the owners with overseeing the public interest in baseball. In a direct rebuke of Blackmun and the romantics, Douglas remarked that the *Federal*

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<sup>124</sup> *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam).

<sup>125</sup> *Flood*, 407 U.S. at 282.

<sup>126</sup> *Id.* at 262–64.

<sup>127</sup> *Id.* at 264.

<sup>128</sup> *Id.* at 266–67 (quoting *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)).

*Baseball* decision was “a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream.”<sup>129</sup> Taking note of the modern realities of Major League Baseball (those realities ignored by the owners and hammered upon time and again by Miller), Justice Douglas wrote:

Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. The beneficiaries of the *Federal Baseball Club* decision are not the Babe Ruths, Ty Cobbs, and Lou Gehrigs.

The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. I use the word “victims” in the Sherman Act sense, since a contract which forbids anyone to practice<sup>130</sup> his calling is commonly called an unreasonable restraint of trade.

Justice Douglas’s perspective would receive a measure of vindication thirty-five years later in the *C.B.C.* decision when the Eighth Circuit balanced the competing interests and held that, contrary to Justice Blackmun’s pronouncement, the public interest was contrary to, not inherent within, that of the owners. In essence, it held that the proprietors of the “dismal business” of baseball were incapable of looking beyond their personal pecuniary interests and acting in furtherance of the larger concept of baseball. The *C.B.C.* decision would go even further, however, in that it did not merely hold against the owners; it held against the Players Association as well. That it did, as well as the fact that the owners and the Players Association were on the same side of the issue in this case, speaks volumes on how the image of Major League Baseball changed in the thirty-five years between the *Flood* and *C.B.C.* decisions.

With each victory over the owners, the Players Association gained just a bit more stature within Major League Baseball. Within a remarkably short time, the players rose from inconsequential serfs to de facto partners with the owners in the running of the game. Although they were formally paired in ventures such as Major League Baseball Advanced Media, they were informally linked in a myriad of other ways as each successive collective bargaining agreement granted them an increasingly greater say over the business side of baseball. By the nineties, “Major League Baseball” no longer implied

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<sup>129</sup> *Id.* at 286 (Douglas, J., dissenting) (footnote omitted).

<sup>130</sup> *Id.* at 287.

merely the collection of owners along with the commissioner. Now, with the owners fading into the background (indeed, by this point most owners were unrecognizable even in their own cities—a far cry from the days of O'Malley, Yawkey, and Wrigley, et al.), the term “Major League Baseball,” at least in a business sense, implied the uneasy partnership between management and the Players Association. And because the labor waters had been so unsettled ever since the arrival of Marvin Miller and his emboldened union, many casual fans (along with many more hardcore fans) blamed the Players Association for the seemingly endless threatened work stoppages between 1972 (when the players first walked out in spring training, which resulted in the shortening of the 1972 season) and 1994 (when baseball Armageddon arrived in the form of a canceled World Series). Led at first by the putative communist Miller, and later by the no less reviled Donald Fehr, there was little chance that the newly formed partnership at the helm of Major League Baseball would be able to speak persuasively on behalf of the larger concept of baseball. As a result, public respect and deference to the better judgment of the leaders of the modern game would most likely be less forthcoming than it had been in the game's master-servant plantation era. Ultimately, Marvin Miller achieved what he set out to do back when he assumed the position of executive director of the Players Association back in 1966; the era of benevolent paternalism was over. But with its passing went Major League Baseball's authoritative voice as well.

Although it would be too simplistic to denote a single date or event as the turning point in Major League Baseball's public stature, the 1994–95 strike is relevant in that it perhaps represented the culmination of over two decades of events that conspired to bring about the change. As the stoppage wore on (it eventually lingered into 1995 and shortened that season as well), many fans struggled to reconcile their reverence for the concept of baseball with their distaste for the labor wars affecting Major League Baseball. In the process, some (although certainly not all) divorced the two, altering their definition of baseball itself. Whereas for generations the game (along with the concept) was defined through Major League players such as Babe Ruth, Mickey Mantle, Willie Mays, Jackie Robinson, and Roberto Clemente, with “baseball” and “Major League Baseball” being synonymous, now, to an increasingly broader swath of fans, “baseball” was something else altogether, something distinct and severed from its professional incarnation. As Robert Lipsyte wrote

on the day after the season was canceled (in sentiments that were repeated, in some variation, by columnists, sportscasters, and fans across the nation):

Baseball has less to do than one might think with the major league season. Baseball is about the family farm, which few of us grew up on, and it is about railroad trains keening in the night on the prairies, which few of us have ever heard. It is about daydreaming of drinking the same beer with your dad as he drank with his dad, of screaming at your son's Little League coach in the same obnoxious way your father screamed at your coach.<sup>131</sup>

To Lipsyte, the mythical (as he clearly acknowledged it to be) concept of baseball was independent of its Major League incarnation. The 1994 Major League strike was irrelevant to it; it survived because the concept of baseball and Major League Baseball were two distinct entities. The former demanded the respect and reverence it always had; the latter had apparently used up its chits. The Eighth Circuit would make clear what Lipsyte and many fans voiced out of frustration over the cancellation of the 1994 World Series; Major League Baseball and the concept of baseball were inexorably intertwined no more.

It is important to note that the Eighth Circuit's decision need not have come out the way it did; if the court had been so inclined, it could have both protected the concept of baseball and deferred to Major League Baseball in an opinion that would have been no different from the myriad of other baseball cases that had come before federal courts from the *Federal Baseball* decision forward. That it chose to protect the concept and to rule against Major League Baseball marks it as somewhat of a departure from its forebears and perhaps signals a shift in the federal judiciary's attitude toward Major League Baseball, if not the concept of baseball itself. For instance, in the court's balancing of interests (between the players' acknowledged rights of publicity and the First Amendment), it emitted a hint of judicial cynicism toward the alliance between the owners and the Players Association. Despite the acknowledged rights of publicity, the court held that this was nevertheless not the sort of case that calls for judicial protection of these rights.<sup>132</sup> "Economic interests that

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<sup>131</sup> Robert Lipsyte, *In Memoriam*, N.Y. TIMES, Sept. 15, 1994, at A1.

<sup>132</sup> See *C.B.C. Distrib. & Mtkg., Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818, 824 (8th Cir. 2007) ("In addition, the facts in this case barely, if at all, implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals.").

states seek to promote include the right of an individual to reap the rewards of his or her endeavors” the court stated.<sup>133</sup> Although it would seem as if protecting a player’s right to benefit from the commercial use of his name by way of fantasy baseball falls squarely within this definition, the court brushed this argument aside, stating coolly that “major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.”<sup>134</sup> Perceived self-interest and greed seems to have worked against the Players Association here, as the Eighth Circuit appears to have made its own calculation that the players earned enough money in other ways to make the infringement of their rights of publicity in this instance to be inconsequential. It is difficult to reconcile the court’s definition of the proper use of the right of publicity with its subsequent application of the facts in this case unless one factors in the possibility that the court simply was adamant about not providing a judicial blessing upon yet another means for growing the coffers of the self-interested Players Association.

In addition, through its adoption of the “public domain” rationale for permitting the First Amendment to outweigh the players’ rights of publicity, the court likewise demonstrated little of the deference courts have traditionally shown toward Major League Baseball (perhaps because “Major League Baseball” now included the Players Association as well). As stated earlier, the court held that “it would be strange law that a person would not have a first amendment right to use information that is available to everyone.”<sup>135</sup> However, as other commentators have noted, the public domain rationale falls short in that the people most likely to seek protection under the right of publicity are celebrities of one ilk or another and these are precisely the people “most likely to be in the ‘public domain’ due to their fame.”<sup>136</sup> “The very people that the right of publicity exists to protect are those who likely have information about them in the ‘public domain,’ and it is not ‘strange law’ to allow these people to be protected, considering that this is the purpose of the right of publicity.”<sup>137</sup> Through the court’s curious reasoning, practically every right of publicity case would be trumped by the First

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 823.

<sup>136</sup> Mann, *supra* note 10, at 316.

<sup>137</sup> *Id.*

Amendment due merely to the realities of the individuals seeking protection under the doctrine. “Taken to its logical end, this would mean that the use of a person’s picture for commercial advantage would be trumped by the First Amendment simply because the information is readily available in the ‘public domain.’”<sup>138</sup> This calculation makes a mockery of the right of publicity, which, in the players’ case here, was extraordinarily compelling given the amount of money generated through the use of their names for the purpose of commercial fantasy baseball games. That the court blithely dismissed the players’ compelling interests may in be due, at least in part, once again to the court’s unwillingness to sanction this additional stream of revenue to the seemingly greedy, self-interested players.

Irrespective of the court’s disdain for Major League Baseball, its reverence for the concept of “baseball” was undiminished, a reality made clear in the court’s framing of the First Amendment interests presented in the case. Rather than view the merits of this fantasy baseball case through the narrow prism of the “dismal business” of baseball as advocated by Justice Douglas in his *Flood* dissent (although it certainly did not hesitate to see the interests of the Players Association through this prism), the court chose to view the issue more expansively and, as most courts had done previously, held that the public interest lay not merely within the commercial endeavor of fantasy baseball games (which would presumably be insignificant) but instead with “information about the game of baseball and its players.”<sup>139</sup> Through this framework, the public interest was strong indeed given that what was at stake was information vital to the nation’s ability to properly follow its national pastime.<sup>140</sup> Just as courts had done for decades, the Eighth Circuit was unable to see the issue before it for what it was: a simple business dispute between competing private interests. Instead, it saw narrow, self-serving interests on one side (i.e., a dismal business) and a broad, patriotic public interest on the other. Had MLB AM attempted to prevent the publication of players’ statistics in newspapers or more generally over the Internet, the Eighth Circuit’s definition of the interests in this case would have been closer to the mark; in those scenarios the national interest in “information about the game of baseball” would have been compromised indeed. Here, however, MLB AM’s purpose was

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<sup>138</sup> *Id.* at 317.

<sup>139</sup> See *C.B.C. Distribution*, 503 F.3d at 823. The court followed this with its paean to the game discussed earlier.

<sup>140</sup> *Id.* at 823–24.

limited in scope to protecting the substantial rights of publicity of its players against infringement by a company that intended to reap significant profits through a violation of these rights; the public's ability to otherwise obtain this information remained unobstructed. As such, there was no national public interest at issue in this case; the interests on both sides were purely commercial. The First Amendment interest was insignificant at best, if it existed at all.

#### CONCLUSION

By traveling down the road of its predecessors in focusing on (and deferring to) the concept of "baseball" rather than on the specifics of the commercial dispute that was more properly before it, the Eighth Circuit distorted the true issue presented in the *C.B.C. Distribution* litigation and transformed it into yet another case that seemingly called for the protection of our national game. As such, the ruling was going to be, as was inevitable, one that yet again protected and promoted "baseball" rather than one that addressed the specific concerns before the court. It was only upon examining the competing interests before it that the Eighth Circuit departed from its predecessors; the court saw the alliance between the owners and the Players Association as self-interested. Seemingly because it saw greed on this side of the equation, it ruled against Major League Baseball rather than for it, something that would have been difficult to imagine back in "the good old days" when Major League Baseball was run by a cartel of well-known and well-respected owners who spoke with a unified voice, purportedly on behalf of the concept of baseball and not merely themselves. Back then, it most likely would have considered a ruling for the owners to be consistent with a ruling that protected and promoted the larger concept of baseball. If fantasy baseball had existed,<sup>141</sup> the court most likely would have entrusted

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<sup>141</sup> In fact, fantasy baseball, in one form or another, has been around for decades. Jack Kerouac played a rudimentary version of it as early as 1933. By 1938 he had developed a game that would be recognizable to modern fantasy baseball players in that he developed his own team names (he was fond of names based on automobiles, hence the "Boston Fords," "St. Louis LaSalles," etc.). He liked to imagine himself as a fantasy general manager and proposed "trades" for the purpose of stocking his own "fantasy team." See ISAAC GEWIRTZ, *KEROUAC AT BAT: FANTASY SPORTS AND THE KING OF THE BEATS* 31–39 (2009). In 1960, the modern fantasy baseball game was born when sociologist William Gamson introduced his creation to a few of his colleagues at the Harvard School of Public Health. He called it the "Baseball Seminar" and explained that participants were to act as if they were general managers, bidding on the rights to actual Major League players in an auction and then playing games using these players' actual game statistics. See "*Baseball Seminar*": *The First Fantasy Game?*, in LATE INNINGS, *supra* note 67, 256, 256–58. In

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the industry of fantasy baseball to these seemingly benevolent owners, holding that, because they had the public interest at heart, they would be better able to decide how to manage it to ensure that the national interest in both the game on the field, as well as the fantasy variation of it, would be protected and furthered. Instead, due to changes within the game, as well as larger societal shifts over the past half-century, the court took the protection and promotion of the concept of baseball upon itself and substituted its own judgment for that of Major League Baseball. It will be interesting to see just how many other federal courts will do the same going forward.

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1980, an outgrowth of the Baseball Seminar was created by writer and editor Daniel Okrent and friends at La Rotisserie Française restaurant in New York. They called it “Rotisserie League Baseball” which eventually became known more generally as “fantasy baseball.” *See id.* at 256; *see also* PAST TIME, *supra* note 9, at 199–200.

