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IT'LL BREAK YOUR HEART EVERY TIME: RACE, ROMANTICISM AND THE STRUGGLE FOR CIVIL RIGHTS IN LITIGATING BASEBALL'S ANTITRUST EXEMPTION

*John Tehranian**

I. INTRODUCTION

Not long ago, I met two buddies at a bar. We were not there to meet women. We were not there to imbibe. We had more serious matters to discuss: we were there to talk baseball.

Spring training had just begun and we were plotting our upcoming trip to Arizona. Through the course of the long evening, we delved into meandering discussions about our favorite players and most treasured baseball memories. We quizzed each other on the starting line-up of the 1982 Atlanta Braves and the names of every Dodgers Rookie of the Year. We swapped stories about Doc Ellis's infamous no-hitter while tripping on LSD, John Smoltz's apocryphal first appearance on the disabled list,¹ and John Kruk's sudden, mid-season retirement to preserve his place in statistical history.² Oblivious to our surroundings,

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1. Smoltz burnt his chest after allegedly ironing his shirt—while wearing it. See Ray Holloman, *All-Bizarre Injury Team*, ESPN (Mar. 7, 2002), <http://espn.go.com/page2/s/holloman/020307.html>.

2. It's July 30, 1995—right during the heart of the season—and John Kruk, hitting in the three spot, goes to bat against Orioles southpaw Scott Ericson in the opening frame. On the first pitch, he drives a single to left field. Upon reaching base, he promptly motions for a pinch runner to take his place. He goes into the dugout and back to the locker room, and does not return. But he's not injured. Instead, out of the blue and without warning to anyone but his manager, he announces his retirement. Although the move seemed inexplicable at the time, there was method behind the madness. Kruk knew the importance of numbers in the game's history and mythology. And, as it turns out, that last safety nudged his lifetime batting average one one-thousandth of a decimal point

we sat around through the wee hours—until the other patrons had left the bar and we alone shut the place down—talking passionately and intently about an otherwise inconsequential game involving a ball and a bat.

And so it goes with baseball: it has an inexorable ability to turn men into little boys.³ This charming and beautiful aspect of the game, however, is also its most alarming. And it is this antinomy, and what it tells us about *stare decisis* and the juridical process, that represents the focus of this Essay.

II. LONG LIVE ROMANTICISM

This Essay finds its origins in the events of June 3, 2009. An otherwise inconsequential day in the grand scheme of things, it was the day my childhood ended. Granted, I was thirty-five years old and it was about time. Yet that did not stop my sense of melodrama from abounding unabated.

I had just arrived in Cooperstown, New York, where I was making my first pilgrimage to the Baseball Hall of Fame to give a talk. As I drove through town, I tuned into a local sports station and that's when I heard the news: in an unexpected move, my team, the Atlanta Braves,⁴ had unceremoniously released pitcher Tommy Glavine, the last baseball vestige of my childhood. I was devastated.

Glavine made his major league debut in 1987—just months before I started high school—and he became the anchor of one of the greatest pitching staffs of all time, leading the Braves to fourteen consecutive division titles and their only World Series victory. By 2009, however, age had set in and the Braves had unceremoniously cut him to make room for another Tommy—Tommy Hanson, a twenty-one-year-old flame-throwing phenom—who was waiting in Triple-A for his call-up.⁵

Ultimately, the decision to release Glavine in favor of Hanson may have been entirely rational.⁶ But that hardly softened the blow—to

higher, assuring him of a career line of .300—the mythical demarcation line between the good and the great. With 1170 hits in 3897 official at-bats, he retired a .300 hitter. It was as good a time as any to call it quits. See Murray Chass, *Baseball: Different Departures for Bagwell and Kruk*, N.Y. TIMES (July 31, 1995), <http://www.nytimes.com/1995/07/31/sports/baseball-different-departures-for-bagwell-and-kruk.html>.

3. And women into little girls, it should be noted.

4. I grew up in Hawaii at a time when the only regular baseball broadcasts to reach the Island were from WTBS, Ted Turner's superstation. Year after year, my friends and I passionately rooted for nothing more than a uniform and, unlike most fans, we had no geographical ties whatsoever to excuse our irrationality.

5. Only in baseball would two adults go professionally by the name "Tommy" rather than "Tom" or "Thomas"—a further testament to the ability of the sport to suspend us in childhood.

6. Hanson went 11-4 with a sparkling 2.89 ERA/143 ERA+. See *Tommy Hanson*,

Glavine, to Braves fans around the country, and to me. After all, even though I understood that the so-called game was just a business, I still wanted Glavine to get another chance in The Show—radar gun and Father Time be damned.⁷ While it may be a business, the national pastime is not *just* a business. No other sport carries such mythical lore and possesses the ability to turn the most resolute rationalist into a reckless romantic.

Consider, for example, the impact of the game on the imagination of our nation's finest writers and thinkers. A lifelong love affair with the Red Sox blossomed into A. Bartlett Giamatti's haunting, bittersweet ode to the game, *The Green Fields of the Mind*.⁸ Baseball's curious superstitions and traditions inspired James Thurber to tell the whimsical, slapstick tale of a team caught in throes of a losing streak and the unusual slump buster they rode to the pennant in *You Could Look It Up*.⁹ And the magic and melancholy of the final fleeting moments of Ted Williams's storied career sparked John Updike's transcendent narrative, *Hub Fans Bid Kid Adieu*.¹⁰

Even though the national pastime's chief rival, football, enjoys immense popularity and a rabid fan base, it has never galvanized such literary and intellectual fervor. After all, as George Will reminds us, football captures the worst two features of modern American life: "violence punctuated by committee meetings."¹¹ Thus, for all of its dynamism, football embraces an ultimately militaristic design that, in the words of comedian George Carlin, exhorts "the quarterback, also known as the field general, to be on target with his aerial assault, riddling the defense by hitting his receivers with deadly accuracy in spite of the blitz, even if he has to use shotgun."¹² Baseball's object, by contrast, has

BASEBALL-REFERENCE, <http://www.baseball-reference.com/players/h/hansoto01.shtml> (last visited Apr. 15, 2018).

7. The Braves had released Glavine after they determined that he could no longer pitch at a major league level. Despite the results of rehabilitation starts, during which he pitched eleven consecutive scoreless innings, they cited his lack of velocity as the reason. See *Glavine Released by Braves*, ESPN (June 5, 2009), <http://sports.espn.go.com/mlb/news/story?id=4228623>. As Glavine's friend and longtime teammate John Smoltz wryly noted, it was the first time that anyone had shown concern over Glavine's velocity, which had been sub-par for years. See *id.* During his last productive years, for example, Glavine's fastball rarely broke eighty-two miles per hour. In the end, the decision was probably a combination of finances and the opportunity cost associated with giving Glavine any further playing time.

8. A. BARTLETT GIAMATTI, *The Green Fields of the Mind*, in A GREAT AND GLORIOUS GAME: BASEBALL WRITINGS OF A. BARTLETT GIAMATTI 7-14 (Kenneth S. Robson ed., 1998).

9. JAMES THURBER, *My World—Welcome to It*, in THURBER: WRITINGS AND DRAWINGS 553-67 (Garrison Keillor, ed., 1996).

10. JOHN UPDIKE, HUB FANS BID KID ADIEU 22-35 (2010).

11. George F. Will, *Socialism at the 50-Yard Line*, WASH. POST, Aug. 26, 1982, at A19.

12. George Carlin, *Baseball and Football*, BASEBALL ALMANAC, <http://www.baseball->

always been far simpler and more noble: “to go home . . . [a]nd to be safe.”¹³ Perhaps it is the universalism of this narrative—as old as Odysseus’s *Odyssey* itself—that inspires such sentimentality.

Theologian David Bentley Hart’s unabashedly ecstatic spin on the sublime nature of the game epitomizes the passion it provokes. “I know there are those who will accuse me of exaggeration when I say this,” he explains, “but, until baseball appeared, humans were a sad and benighted lot, lost in the labyrinth of matter, dimly and achingly aware of something incandescently beautiful and unattainable, something infinitely desirable shining up above in the empyrean of the ideas.”¹⁴ Though Hart readily acknowledges the seeming absurdity of his position, he does not waver in his ecclesiastical fervor and righteous reverence for baseball’s ontological imperative:

You needn’t smirk. I admit that my rhetoric might seem a bit excessive, but be fair: Something about the game elicits excess. I am hardly the first aficionado of baseball who has felt that somehow it demands a ‘thick’ metaphysical—or even religious—explanation. For one thing, there is the haunting air of necessity that hangs about it, which seems so difficult to reconcile with its relatively recent provenance. It feels as if the game has always been with us. It requires a whole constellation of seemingly bizarre physical and mental skills that, through countless barren millennia, were not only unrealized but also *unsuspected* potencies of human nature, silently awaiting the formal cause from beyond that would make them actual. So much of what a batter, pitcher, or fielder does is astonishingly improbable, and yet—it turns out—entirely natural. Clearly, baseball was always intended in our very essence; without it, our humanity was incomplete. Willie Mays was an avatar of the divine capacities that lie within our animal frames. Bob Feller’s fastball was Jovian lightning at the command of mortal clay.¹⁵

It was easy for me to feel the same way as Hart that late spring day in 2009, as I blithely bathed in Cooperstown’s bucolic backdrop. The setting, which is itself based on a remarkable fiction about the game’s purported nativist and rural origins,¹⁶ furthered my irrational yearnings

almanac.com/humor7.shtml (last visited Apr. 15, 2018).

13. *Id.*

14. David Bentley Hart, *A Perfect Game: The Metaphysical Meaning of Baseball*, FIRST THINGS (Aug. 2010), <http://www.firstthings.com/article/2010/08/a-perfect-game>.

15. *Id.*

16. In an early twentieth-century effort to firmly establish baseball’s American roots, Albert Spalding, the owner of the Chicago White Stockings and a sporting goods magnate, famously propagated the myth that one Abner Doubleday, later a Union hero in the Civil War, had invented the game in 1839 in pastoral Cooperstown, New York. Donald Dewey, *The Danish Professor and*

for that timeless field of dreams, lodged in a mythic Jeffersonian ideal, far removed from the crass cacophony of modernity. So along with Thurber, Updike, and Giamatti, I was not alone in entertaining baseball's mythic lore.

Unfortunately, however, another important American institution—the Supreme Court—has shown itself even more incapable of putting aside romantic ideations about the game. This failing has proven particularly pernicious when litigants have called upon the federal judiciary to engage in the fair interpretation and application of the law in matters baseball. Indeed, when it came down to taking care of business, Giamatti *qua* Commissioner was able to overcome the mythology of Charlie Hustle in doling out a lifetime ban to Pete Rose.¹⁷ Updike *qua* journalist recognized the yeoman-like solitude and sadness behind Williams's greatness. And one hopes that, despite his unrepentant lapse into baseball romanticism in the first part of this Essay, this author can do better in the next. Yet in its encounters with the national pastime, the Supreme Court has proven all too easily seduced and solicitous. Nowhere is that more evident than *Flood v. Kuhn*,¹⁸ a decision that

Baseball: How Per Maigaard Traced America's National Pastime to Scandinavia, SCANDINAVIAN REV., Summer 2006, at 70, 70-71. To solidify the canard, on December 30, 1907, the Mills Commission—put together by the reigning commissioner of baseball at the time—issued a formal report on the game's history that pointed to the testimony of an elderly Colorado miner named Abner Graves, who swore that he had personally witnessed the mythic moment. *The Origins of the National Baseball Hall of Fame and Museum*, NAT'L BASEBALL HALL OF FAME, http://www.catskills-house.com/images/baseball_hall_of_fame_A.pdf (last visited Apr. 15, 2018). Graves, it turns out, was a liar. Doubleday was actually a cadet at West Point in 1839 and could not have been in upstate New York at the time. Dewey, *supra*, at 71. Meanwhile, Graves was an alcoholic who spent his final days confined to a mental asylum after murdering his wife. *Id.* As it turns out, modern American baseball was invented in the city—at the Elysian Fields in Hoboken, New Jersey, to be precise—and the game's origins stretch back centuries—not just to England, but to places as far afield as Libya. See DAVID BLOCK, *BASEBALL BEFORE WE KNEW IT: A SEARCH FOR THE ROOTS OF THE GAME* 95-96 (2006); *The Origins of the National Baseball Hall of Fame and Museum*, *supra*, at 71-72. To wit, the question of the game's origins has not just a national, but also racial dimension. In 1937, Corrado Gini, the Italian demographer who gave us the eponymous coefficient that measures inequalities in income distribution, stumbled upon a remote group of blonde Berbers in Libya playing an ancient game called *ta kurt om el mahag* (translation: the ball of the pilgrim's mother). The game bore a striking resemblance to baseball. Gini concluded that a wandering tribe of Northern Europeans from the Stone Age had brought the game there. After all, he apparently thought, its origins must be continental. See BLOCK, *supra*.

17. In 1989, Special Counsel to the Commissioner, John Dowd, issued a 225-page report (the "Dowd Report") that found that Pete Rose, baseball's all-time hit king, had violated the game's ban on betting by placing money on games involving his own team. See JOHN M. DOWD ET AL., *REPORT TO THE COMMISSIONER* (May 9, 1989), <http://www.thedowdreport.com/report.pdf>. On the strength of the Dowd report, Commissioner Giamatti promptly banned Rose from baseball for life. Tragically, Giamatti died just seven days later. Meanwhile, although Rose denied the betting allegations for many years, he ultimately confirmed them in his 2000 autobiography. See generally PETE ROSE & RICK HILL, *MY PRISON WITHOUT BARS* (2000).

18. 407 U.S. 258 (1972).

effectively finished the baseball career of Curt Flood yet, unbeknownst at the time, marked the beginning of the end for baseball's century-old feudal economic system.

III. DEATH TO ROMANTICISM

A. Flood v. Kuhn: *The Social and Political Backdrop*

At various turns in his professional life, Curtis Charles Flood was a businessman, activist, broadcaster, restaurateur, and painter.¹⁹ But above all, he was a ballplayer—and a fine one at that. One of the greatest defensive centerfielders to ever play the game, he spent over a decade patrolling the outfield at Busch Stadium playing for the St. Louis Cardinals. However, shortly after the end of the 1969 regular season, his team made him a marquis piece in a blockbuster, seven-player deal with the Philadelphia Phillies.²⁰ While the other seven players involved in the trade reported to their new teams in time for the 1970 season, Flood did not.²¹ He refused to play in Philadelphia and, more fundamentally, questioned why he should be treated like chattel²² and lack the basic rights that workers in virtually every other profession enjoyed: the ability to ply their trade with the company of their choice. After his protests to the Commissioner of Baseball, Bowie Kuhn, fell on deaf ears, he filed suit in federal district court on January 16, 1970, claiming that baseball's reserve clause—the instrument through which the sport achieved its feudal control over Flood and its other labor inputs— infringed his civil rights and constituted a form of restraint of trade and price fixing in violation of antitrust law.²³

A critical part of the playing contract of Flood and every other Major League Baseball player since 1879,²⁴ the reserve clause bound

19. See BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS 266 (2006); Terry Sloope, *Curt Flood, SOC'Y FOR AM. BASEBALL RES.*, <https://sabr.org/nioproj/person/23a120cb> (last visited Apr. 15, 2018).

20. See Sloope, *supra* note 19.

21. *Id.*

22. Flood famously wrote to Commissioner Bowie Kuhn to challenge the reserve clause and the dictates of the trade and to seek his free agency. In the letter, Flood impressed upon Kuhn that he should not be treated as "a piece of property to be bought and sold irrespective of my wishes." *Flood*, 407 U.S. at 289 (Marshall, J., dissenting).

23. See *id.* at 265.

24. In *Flood*, the Supreme Court dated the public introduction of the reserve system into baseball contracts as 1887. See *id.* at 259 n.1. However, as Ed Edmonds has persuasively demonstrated, the Court was incorrect. See Ed Edmonds, *Arthur Soden's Legacy: The Origins and Early History of Baseball's Reserve System*, 5 ALB. GOV'T. L. REV. 38, 48-52 (2012). Among other things, the *New York Times* even published the names of eleven players on the reserve list on

each player to remain with the team that controlled his rights for as long as that team wanted.²⁵ In short, when a yearly playing contract with a team ended, a player could not sell his services to the highest bidding team, as one now sees with the advent of free agency.²⁶ Instead, the player either had to accept a contract with his prior team or ask the team for his release or a trade—actions the team was under no obligation to undertake. As a result, players possessed little economic leverage with their employers. Wages remained severely repressed below market rates and players effectively faced two choices: play under the terms dictated by their controlling team or simply refuse to play baseball at all. Since Flood did not want to play in Philadelphia, he had no choice but to sit on the sidelines while his case worked its way through the judicial system.

Though he had the formal support of the Major League Baseball Players Association (“MLBPA”),²⁷ Flood rightfully felt alone in his struggle—at least among his peers. This was not the stalwart union of contemporary lore, with its notable record of work stoppages and labor victories. In 1970, the MLBPA was less than two decades old and the venerable Marvin Miller had only recently taken its helm.²⁸ Thus, while Miller and his team provided necessary assistance to Flood, the rank and file players equivocated, at least publicly. Notably, not a single active major league player showed up to Washington, D.C. to attend the oral arguments before the Supreme Court.²⁹ They feared the owners,³⁰ and

October 27, 1884. *Id.* at 61.

25. *See id.* at 49-50, 52.

26. *Flood*, 407 U.S. at 289 (Marshall, J., dissenting); *see* Edmonds, *supra* note 24, at 49-52. Of course, for the first few years of their major league careers, players are, by virtue of the extant collective bargaining agreement, restricted from becoming free agents and, instead, are subject to salary minimums and arbitration, depending on their length of service.

27. *Flood*, 407 U.S. at 294 (Marshall, J., dissenting).

28. Richard Goldstein, *The Bargainer Who Remade the Old Ball Game*, N.Y. TIMES, Nov. 28, 2012, at A1.

29. *See* SNYDER, *supra* note 19, at 266 (describing how several members of Flood's trial team, and Flood himself, were not present for oral argument at the Supreme Court); *id.* at 175-76 (stating that no major league players went to Flood's trial in Manhattan); *1969 Curt Flood Challenges MLB Reserve Clause*, HISTORY.COM, <http://www.history.com/this-day-in-history/curt-flood-challenges-mlb-reserve-clause> (last visited Apr. 15, 2018) (explaining that “[n]o active players agreed to testify” at Flood's Supreme Court case). Even Flood's best friend, Bob Gibson, who privately supported him, told him that he was “crazy” and that he “planned on standing ‘a few hundred paces’ behind him to avoid any fallout.” SNYDER, *supra* note 19, at 121.

30. That fear is understandable. Consider the recent plight of quarterback Colin Kaepernick. In 2016, he famously decided to take a knee rather than stand during the singing of the National Anthem, which occurs prior to the start of each National Football League (“NFL”) game. *See* Ken Belson, *Colin Kaepernick, Who Began Anthem Kneeling, Files Complaint Against N.F.L.*, N.Y. TIMES (Oct. 15, 2017), <https://www.nytimes.com/2017/10/15/sports/colin-kaepernick-nfl-collusion.html>. Kaepernick's actions constituted a silent protest against continuing racial inequities, particularly those coming at the hands of our criminal justice system. *See id.* After he became a free

the players' trepidation, however pusillanimous, reflected the game's one-sided history of labor-management relations to that point.³¹

Yet, while Flood received little solace from his fellow ballplayers, he did find support elsewhere.³² Specifically, his dispute both reflected and touched upon the broader civil rights struggles of the time, something Flood himself recognized and explicitly discussed. A self-proclaimed child of the 60s, Flood took inspiration from Tommie Smith and John Carlos's infamous black power salute at the 1968 Olympics as well as Mohammed Ali's challenge, grounded in racial politics, to the Vietnam War. To fully understand the zeitgeist of the era, it is worth remembering that, at the time of the *Flood* case, baseball had only recently desegregated with Jackie Robinson's arrival to the big leagues and that the dismantling of Jim Crow in the South had proceeded at a glacial pace. The project of racial equality was, to say the least, inchoate. Baseball—like the other major sports and much of corporate America—still lacked any black presence in management. Players continued to receive disparate treatment based on race. Black players had only recently begun to receive bonuses, which were usually reserved for white athletes. Black players still faced racial taunting from fans—Hank Aaron, for example, was dogged by racial epithets and death threats as he approached Babe Ruth's immortal 714 in the early 1970s.³³ The Red Sox did not have a single black ballplayer until 1960.³⁴ And Philadelphia, the city to which the Cardinals had traded Flood, was known as the “most northern of southern cities,” teeming with bigoted bleacher bums who notoriously taunted minority players (both on the

agent in 2017, Kaepernick was not signed by any team, despite the fact that he was ostensibly in the prime of his career and his statistics matched or bettered that of many quarterbacks (both backups and starters) on NFL rosters. *See id.* Kaepernick has filed a grievance against the NFL and its team owners for colluding to deny him the right to continue to play as a result of the political stand he took. *Id.* Going against the grain can be costly and those brave enough to bring attention to civil rights issues often pay a high price.

31. Former players generally did little better. Significantly, however, Jackie Robinson courageously testified on Flood's behalf at the trial. Nick Acocella, *Flood of Free Agency*, ESPN, http://espn.go.com/classic/biography/s/Flood_Curt.html (last visited Apr. 15, 2018).

32. For example, Flood did receive strong support from several notable sportswriters, including Red Smith of the *New York Herald Tribune*, Shirley Povich of the *Washington Post*, and Jim Murray of the *Los Angeles Times*. However, even among writers, support was the exception, not the rule. *See* ABRAHAM IQBAL KHAN, CURT FLOOD IN THE MEDIA: BASEBALL, RACE, AND THE DEMISE OF THE ACTIVIST-ATHLETE 144-46 (2012); SNYDER, *supra* note 19, at 113-14.

33. *See* Larry Schwartz, *Hank Aaron: Hammerin' Back at Racism*, ESPN, http://sports.espn.go.com/espn/classic/bio/news/story?page=Aaron_Hank (last visited Apr. 15, 2018).

34. Howard Bryant, *No Honor in Red Sox Anniversary*, ESPN (July 21, 2009), http://sports.espn.go.com/mlb/columns/story?columnist=bryant_howard&id=4345309.

home and away teams) from the stands.³⁵ Thus, as Flood saw, the dispute over the economic status of baseball players and the on-going battle for racial equality were intricately intertwined.

To be fair, Flood was not the first to challenge the reserve clause and the analogy to civil rights was not unique. In 1885, John Montgomery Ward, a graduate of Columbia Law School who also happened to hurl the second perfect game in baseball history, instigated the inaugural effort to unionize the game by forming the Brotherhood of Professional Baseball Players.³⁶ In the Brotherhood's manifesto, Ward declared that "[p]layers have been bought, sold and exchanged as though they were sheep instead of American citizens. Like a fugitive slave law, the reserve clause denies him a harbour or a livelihood, and carries him back, bound and shackled, to the club from which he attempted to escape."³⁷ Of course, in the late nineteenth century, and for more than half a century thereafter, professional baseball entirely excluded blacks from the game.³⁸ Thus, the reference to slavery was merely an analogy (and, quite arguably, an insensitive one at that). But by the 1960s, the battle over the reserve clause had quite literally taken on a racial dimension. During Flood's era, African Americans represented a full quarter of all major leaguers.³⁹ So when Flood echoed the sentiments of John Montgomery Ward in his letter to Commissioner Bowie Kuhn drafted on Christmas Eve, 1969, his words resonated with the entire political and cultural milieu of the time and the ongoing struggle for black civil rights. Refusing to accept his trade from the St. Louis Cardinals to the Philadelphia Phillies, he wrote:

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 which produces

35. Acocella, *supra*, note 31; Judith Giesberg, 'The Most Northern of Southern Cities', N.Y. TIMES (May 22, 2011, 7:00 PM), <https://opinionator.blogs.nytimes.com/2011/05/22/the-most-northern-of-southern-cities>.

36. ROB STEEN, FLOODLIGHTS AND TOUCHLINES: A HISTORY OF SPECTATOR SPORT 243 (2014); John Ward, NAT'L BASEBALL HALL OF FAME, <http://baseballhall.org/hall-of-famers/ward-john> (last visited Apr. 15, 2018).

37. NATIONAL BROTHERHOOD OF PROFESSIONAL BASEBALL PLAYERS, *Brotherhood Manifesto*, in DEAN A. SULLIVAN, EARLY INNINGS: A DOCUMENTARY HISTORY OF BASEBALL, 1825–1908, at 188–89 (1997).

38. Steven A. Riess, *Professional Team Sports in the United States*, OXFORD RES. ENCYCLOPEDIA AM. HIST. 3–4 (Feb. 23, 2017), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-198?print=pdf>.

39. Jay Scott Smith, *Number of African-American MLB Players Reaches Historic Low*, THEGRIO.COM (Apr. 18, 2012), <http://thegrio.com/2012/04/18/number-of-black-mlb-players-at-60-year-low>.

that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and the several states.⁴⁰

While the chattel argument reflected the most obvious analogy to the civil rights movement, Flood's challenge contained another subtle, but equally pernicious, link to the fight against racial inequality. Specifically, supporters of segregation and baseball's reserve clause conjured up and appealed to similar mythologies to legitimate their respective causes. The Bull Connors of the time dwelled on romanticism about the Old South and advanced traditionalist arguments urging the need for racial segregation in order to preserve social order and stability.⁴¹ Likewise, management played on the trope of baseball as a game, not as a business or form of commerce, and exhorted the courts to eschew interference with the reserve clause by claiming that any other economic system would kill our national pastime.⁴² In both cases, the defenders of the status quo appealed to the need to keep their institutions uncorrupted by modernity and its sullied embrace of unfettered marketplaces with free flows of labor and capital. A whitewashed vision of the "Southern Way of Life" and the game's "Golden Age" therefore loomed large in the advocacy for control of both race and labor. After a long century, the Supreme Court ultimately resisted the prelapsarian mythology of the segregationists,⁴³ but it succumbed to that of baseball management.

B. Flood v. Kuhn: *The Decision*

In 1971, and in advance of the Supreme Court's hearing of his case, Curt Flood published his autobiography, *The Way It Is*.⁴⁴ In it, Flood discussed the suit and his reasons for fighting the reserve clause.⁴⁵ Though absolutely convinced of the moral and legal rectitude of his position, he recognized the long odds he faced before the courts. "To challenge the sanctity of organized baseball," Flood noted, "was to question one of the primary myths of the American culture."⁴⁶

40. CURT FLOOD WITH RICHARD CARTER, *THE WAY IT IS* 194 (1971).

41. *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (stating that a law that requires racial segregation in public facilities is reasonable when considering "the preservation of the public peace and good order").

42. See Thomas J. Ostertag, *Baseball's Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54, 57-59 (2004).

43. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (finding that racial segregation of schools violates equal protection of the laws and that separate is inherently unequal).

44. See FLOOD WITH CARTER, *supra* note 40.

45. *Id.* at 194-95.

46. *Id.* at 16.

Unfortunately for Flood, his words were prescient. As Branch Rickey III once remarked, the lure of baseball's mythology is so great that it can "corrupt even members of our highest court."⁴⁷ And corrupt it does. Romanticism and mythology played a central, if not dispositive, role in the *Flood v. Kuhn* decision, and an exegesis of the opinion illustrates this process in action.

1. Blackmun's Infamous List

The decision opens with "The Game," a grandiloquent recital of baseball history highlighted by a lengthy list of the game's immortal greats.⁴⁸ "The list seems endless," the majority opinion wistfully remarks at end of its recital.⁴⁹ And, in the hands of the Supreme Court, it almost is, lasting a full page in the *United States Reports*.⁵⁰ The history itself occupies a whopping five pages.⁵¹ Legend has it that the Justices may have spent as much time putting together and fighting over the names on this list as they did drafting the analytical and dispositive portions of the *Flood v. Kuhn* opinion.⁵² While this possibility delights the baseball fan within me, it is met with significantly less enthusiasm upon sober reflection.⁵³ Not surprisingly, this section has received widespread criticism and ridicule as "rambling and syrupy," "juvenile," and "rhapsodic," and even downright "bizarre."⁵⁴ Indeed, Woodward and Armstrong's *The Brethren* reports that Blackmun spent hours wading

47. John Tehranian, Speech at the 21st Cooperstown Symposium on Baseball and American Culture at the National Baseball Hall of Fame and Museum: Stare Decisis and the Risks of Romanticism: Curt Flood and the Civil Rights Movement (June 3, 2009) (response comment by Branch Rickey III).

48. *Flood v. Kuhn*, 407 U.S. 258, 260-64 (1972).

49. *Id.* at 263.

50. *Id.* at 262-63.

51. *Id.* at 260-64.

52. Notably, however, two justices who signed on to Blackmun's majority opinion—Chief Justice Burger and Justice White—declined to sign on to his preambulatory and perambulatory list. See Roger I. Abrams, *Blackmun's List*, 6 VA. SPORTS & ENT. L.J. 181, 205-06 (2007) (discussing, inter alia, the origins of Blackmun's list and his disappointment that two of his Brethren declined join in with it).

53. This is particularly true when one considers the shaky foundations of the ultimate holding.

54. Richard Crepeau, *The Flood Case*, 34 J. SPORT HIST. 183, 187 (2007) (deeming Part I to be "bizarre" and characterized by "'corn ball' prose"); David Greenberg, *Baseball's Con Game*, SLATE, July 19, 2002, at 2 ("The opinion 'for which Blackmun would long be ridiculed' included a juvenile, rhapsodic ode to the glories of the national pastime, sprinkled with comments about legendary ballplayers and references to the doggerel poem Casey at the Bat."); Mitchell Nathanson, *Gatekeepers of Americana: Ownership's Never-ending Quest for Control of the Baseball Creed*, NINE, Sept. 2006, at 68, 79 (describing Blackmun's opinion as containing "a lengthy, rambling and syrupy retelling of the history of the game"). But see Paul Campos, *Silence and the Word*, 64 U. COLO. L. REV. 1139, 1142 (1993) (defending Blackmun's section I as providing "traces of resistance to the hyperrationality of contemporary legal discourse").

through the *Baseball Encyclopedia* and other historical almanacs in formulating “The Game.”⁵⁵ Apparently, Blackmun took the task of compiling the infamous list with alarming seriousness, and he even passed around multiple versions to the other Justices and their clerks to ensure that his inventory did not omit any crucial names.⁵⁶

Admittedly, the history of baseball was not entirely tangential to the legal questions at issue. But the Court’s rhapsodic history lesson is surprisingly problematic in its selectivity and glaring omissions. Among other things, it waxes eloquent about the peripatetic amblings of the 1869 Cincinnati Red Stockings, “the introduction of Sunday baseball,” the “troublesome and discouraging” World Series of 1919, *Casey at the Bat*, and “the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season.”⁵⁷ All the while, however, there is little mention of the economics of the game or the saga of management and labor relations through the years—rather central queries in an antitrust suit, one would think. And, most startling, the majority’s chronicle entirely omits the sport’s dark history of employment discrimination, achieved through collusion. Specifically, there is no mention of the infamous “Gentlemen’s Agreement,” which resulted in the uniform exclusion of players of African ancestry until Jackie Robinson broke the color barrier in 1947.⁵⁸ In short, although the Court provides a recital of the game’s history, it is a carefully bowdlerized version that conspicuously eschews matters of antitrust and race, despite the fact that this was a suit about unfair competition and collusion in the violation of civil rights.

55. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 190 (1979).

56. *Id.* According to Woodward and Armstrong, Thurgood Marshall privately took Blackmun to task since his original list lacked any mention of African-American baseball players. *Id.* at 191. However, Brad Snyder disputes this account and states, after his examination of Blackmun’s archives, that Blackmun’s original draft contained the names of several African-American players, including Roy Campanella, Jackie Robinson, and Satchel Paige. SNYDER, *supra* note 19, at 301.

57. *Flood v. Kuhn*, 407 U.S. 258, 261-63 (1972).

58. Technically, Jackie Robinson was not the first individual of African ancestry to play professional baseball. Moses Fleetwood “Fleet” Walker played in the American Association (“AA”) in the 1880s, before the AA adopted the National League’s Gentleman’s Agreement. See Brendan Macgranachan, *Before Jackie: Baseball’s First African-American*, SEAMHEADS.COM (Apr. 18, 2008), <http://seamheads.com/2008/04/18/before-jackie-baseball%E2%80%99s-first-african-american>.

2. The De-Legitimation of Flood

While “The Game” represents the easiest target for criticism of *Flood v. Kuhn*, it is hardly the most disconcerting. The decision’s disquisition on “The Petitioner” plays that role by painting a selective portrait of Flood that betrays the Court’s objectivity. What is particularly striking is the majority’s clear attempt to delegitimize Flood through its use of language and data. Although the opening sentences of the section provide a few cursory data points about Flood’s performance on the field,⁵⁹ the statistic that the Court seems most impressed by—or, more to the point, wants to impress most on its audience—is the salary that Flood has enjoyed through the years.⁶⁰ Set aside in its own paragraph, indented to attract any wandering eye at first glance, the floating numbers send a clear message:

1961 \$13,500 (including a bonus for signing)
 1962 \$16,000
 1963 \$17,500
 1964 \$23,000
 1965 \$35,000
 1966 \$45,000
 1967 \$50,000
 1968 \$72,500
 1969 \$90,000⁶¹

As if these numbers were not enough, the Court could not resist a tangential stab at the end of the list: “These figures,” we are told, “do not include any so-called fringe benefits or World Series shares.”⁶² The message to the reading audience is clear: the Plaintiff in this case of so-called slavery is a deeply privileged man. After all, at the time, Flood was making an order of magnitude more than the average American household. And, in an era of deep racial prejudice, he was an African-American out-earning all but the upper echelon of whites, including all of the Supreme Court Justices. As such, the Court cannot help but portray Flood as an ingrate to boot: “Flood declined to play for Philadelphia in 1970, despite a \$100,000 salary offer, and he sat out the year.”⁶³

59. *Flood*, 407 U.S. at 264.

60. *See id.* at 265.

61. *Id.*

62. *Id.*

63. *Id.* at 266. Woodward and Armstrong note that White, in particular, resented Flood and other athletes that were earning far more than he ever did playing professional sports. WOODWARD

Legally speaking, this discussion is unbalanced at best, if not wholly irrelevant and prejudicial. After all, the Court ultimately declined to address the merits of Flood's antitrust claim by disposing of the suit on the grounds that, based on long-standing precedent, baseball lies beyond Congress's regulatory powers under the Commerce Clause.⁶⁴ Consider the many other statistics with which the Court could have regaled the reader. It could have discussed the surge in revenues and the wild profits the sport (i.e., the owners) had enjoyed in recent years. It could have published data about the financial health of the sport and the dramatic increase in team valuations from which ownership had benefitted. Or, it could have documented the dramatic decline in player salaries as a share of revenues through the decades. Indeed, prior to the implementation of the reserve clause in 1879, players received approximately 60% of the sport's revenues.⁶⁵ With the reserve clause firmly in place, that figure had declined to 15%.⁶⁶ But the Court does not delve into such matters. Rather, the first and only piece of economic data that the opinion provides involves one about Flood himself. The subtext is clear: the majority seeks to delegitimize Flood's claims of slavery—after all, his suit for antitrust violations came with an explicit Thirteenth Amendment claim—and to undermine any sympathy his plight might receive.

3. The Legal "Romantysis"

With the pungent smell of baseball romanticism wafting through the air and Curt Flood firmly cast in the role of the uppity and even privileged spoiler, the Court launched to its legal analysis. Against all reason, it reaffirmed one of the more unusual products of Supreme Court jurisprudence over the past two centuries—Justice Oliver Wendell Holmes's 1922 decision in the *Federal Baseball* case.⁶⁷

In *Federal Baseball*, the Court held that professional baseball did not constitute a form of interstate commerce and, therefore, was beyond

& ARMSTRONG, *supra* note 55, at 191. White was, of course, a former running back with the Pittsburgh Steelers and Detroit Lions. Bootie Cosgrove-Mather, *Former Justice Byron White Dies*, CBS News (Apr. 15, 2002, 4:42 PM), <https://www.cbsnews.com/news/former-justice-byron-white-dies>. "There were too many prima donnas, concerned with their own statistics. White had difficult feeling sorry for Curt Flood, who had turned down a \$100,000 annual salary." WOODWARD & ARMSTRONG, *supra* note 55, at 191. That said, at least White flatly refused to join Blackmun's section detailing the history of the game.

64. *Flood*, 407 U.S. at 285.

65. ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 46 (1998).

66. *Id.*

67. *Flood*, 407 U.S. at 285 (citing *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 207-09 (1922)).

the reach of federal regulation, including antitrust laws.⁶⁸ Though troubling, *Federal Baseball* was at least mildly defensible when understood in the context of the extremely restrictive view of interstate commerce espoused by the Supreme Court prior to 1937.⁶⁹ At the time, of course, the Constitution's Commerce Clause was read narrowly to empower the federal government to regulate only the transportation of articles in commerce across state lines, but not intrastate manufacture or production.⁷⁰ Since baseball produced no physical goods, Holmes reasoned, no commerce actually occurred; thus, the federal government had no authority to regulate the game.⁷¹ That said, while Holmes's opinion was arguably consistent with the commerce clause jurisprudence of its time, it nevertheless appears incongruent with some of Holmes's own rulings during the same period. In *B.F. Keith Vaudeville Exchange*, decided just a few months later, for example, Holmes reversed a dismissal of antitrust claims brought against a vaudeville booking company and found that the booking of entertainers across state borders could constitute commerce as such bookings might involve the non-incidental transportation of large quantities of scenery, music, and costumes.⁷² As far as their respective links to commerce, there is little distinction between vaudeville entertainment and professional baseball, one would think, thereby making Holmes's holding all the more perplexing.

However, the re-affirmance of *Federal Baseball* by the *Flood* Court is far more difficult to justify.⁷³ By 1972, the Supreme Court had thoroughly rebuked *Federal Baseball*'s antiquated definition of commerce in every other context.⁷⁴ The Court had gone almost four

68. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 208-09.

69. All of that changed with the infamous "Switch in time to save Nine," after which the Supreme Court took a much more expansive view of what constituted interstate commerce under the Constitution's Commerce Clause. See, e.g., *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 37 (1937) (finding that the National Labor Relations Act of 1935 was a constitutional exertion of Congress's power under the Commerce Clause and that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control").

70. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 298, 301 (1936) (holding that "regulation of commerce applies to the subjects of commerce, and not to matters of internal police").

71. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 209.

72. See *Hart v. B. F. Keith Vaudeville Exch.*, 262 U.S. 271, 272-74 (1923).

73. It should be noted that *Flood* was not the first time the Supreme Court had reaffirmed baseball's antitrust exemption. See *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (citing *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 209).

74. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964) ("[T]he

decades without striking a single piece of congressional legislation on Commerce Clause grounds because, among other things, the Court had taken an expansive view of commerce that included just about any form of commercial intercourse, not merely production or manufacturing.⁷⁵ More pointedly, the Court had systematically refused to grant similar antitrust exemptions to any other professional sport,⁷⁶ and had found that professional football, basketball, hockey, golf, and other sports all represent forms of interstate commerce subject to antitrust regulation.⁷⁷ Yet *Flood* reaffirmed baseball's exceptional status and, in a sense, went a step further in expressly granting baseball an antitrust exemption.⁷⁸

Clearly, in light of the expansive view of interstate commerce adopted in the modern era, the continuing validity of baseball's exemption made no legal (or logical) sense. As a result, the *Flood* Court had no choice but to admit (unlike the *Federal Baseball* Court) that "professional baseball is a business and it is engaged in interstate commerce."⁷⁹ Yet this fact did not change the Court's ultimate conclusion: that baseball's "unique characteristics and needs" warranted

determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest."); *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (holding that commerce "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them . . . the effective execution of the granted power to regulate interstate commerce"); *United States v. Darby*, 312 U.S. 100, 113 (1941) ("While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."); *Jones & Laughlin Steel Corp.*, 301 U.S. at 37 (holding that Congress may regulate intrastate activities "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions").

75. See *United States v. Lopez*, 514 U.S. 549, 551, 558-59, 567 (1995) (holding the Gun-Free School Zones Act of 1990 unconstitutional, and taking the broad approach that Congress may regulate "the channels of interstate commerce, . . . the instrumentalities of interstate commerce . . . [and] those [economic] activities having a substantial relation to interstate commerce"); Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 122 (2000) ("The *Lopez* decision marked the first time in sixty years that the Court invalidated Congress's exercise of its Commerce Clause power.").

76. See, e.g., *Mackey v. Nat'l Football League*, 543 F.2d 606, 610-11, 622 (8th Cir. 1976).

77. See, e.g., *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202-04 (2010); *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971); *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 245 (1959); *Radovich v. Nat'l Football League*, 352 U.S. 445, 451-53 (1957).

78. For a more thorough discussion of this point and the argument that *Federal Baseball* and *Toolson* never created an antitrust exemption for baseball, see Mitchell Nathanson, *Who Exempted Baseball, Anyway? The Curious Development of the Antitrust Exemption that Never Was*, 4 HARV. J. SPORTS & ENT. L. 1, 40-43 (2013).

79. *Flood*, 407 U.S. at 282.

an antitrust exemption.⁸⁰ Arguably, *Federal Baseball* never granted baseball an antitrust exemption; it simply held that baseball was not a form of interstate commerce and, as such, could not be regulated by Congress under its commerce power—whether on antitrust concerns or other concerns.⁸¹ *Flood* admitted that baseball came under the scope of federal regulatory authority.⁸² But it granted an antitrust exemption to baseball regardless.⁸³ Other than mythic notions attached to the game, however, the Court never really explained just what unique characteristics and needs of the game justified such a move. In short, the Court's rationale was the product not of analysis but *romantysis*—putative reasoning ultimately swayed by romantic ideations about the game and its revered place in American society. Just as these ideations would allow the *Federal Baseball* Court to deny that baseball constitutes a form of interstate commerce—despite overwhelming evidence to the contrary—the same ideations would lead the *Flood* Court to insist that the reserve clause is absolutely necessary to maintain competitive balance and preserve the integrity of the sport—despite similarly overwhelming evidence to the contrary.

One popular narrative of *Flood* reads the holding as an outgrowth (albeit an extreme one) of the doctrine of stare decisis.⁸⁴ To be sure, Blackmun's opinion makes this point by citing to *Federal Baseball* and the subsequent *Toolson* case as firmly establishing, and thereby warranting, baseball's long-standing aberrational treatment.⁸⁵ Indeed, with its seemingly uncompromising obeisance to tradition, the Court appears as forward thinking as the villagers in Shirley Jackson's *The Lottery*.⁸⁶

But, contrary to what many observers have suggested, the Court is engaging in more than just blind deference to stare decisis. After all,

80. *Id.*

81. *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 209 (1922).

82. *See Flood*, 407 U.S. at 282.

83. *Id.* at 283-84.

84. *See, e.g.,* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 214 (2012) ("The *Flood* Court refused to overturn *Federal Baseball*, concluding that stare decisis concerns, as well as Congress's failure to legislatively address the exemption, justified continued adherence to the prior baseball precedents."); David Haddock, Tonja Jacobi & Matthew Sag, *League Structure & Stadium Rent Seeking—The Role of Antitrust Revisited*, 65 FLA. L. REV. 1, 45 n.135 (2013) (stating that the *Flood* case "refused to withdraw baseball's antitrust exemption, relying upon stare decisis").

85. *Flood*, 407 U.S. at 282 ("Federal Baseball and *Toolson* have become an aberration confined to baseball.").

86. *See Shirley Jackson, The Lottery*, NEW YORKER, June 26, 1948, at 25 (describing a fictional small town whose annual tradition requires villagers to be chosen at random to serve as human sacrifices to ensure a good harvest).

the drafter of the majority opinion was hardly one to stick dogmatically to precedent. For example, tradition hardly restrained Blackmun's majority opinion in *Roe v. Wade*,⁸⁷ which was issued just a few months after *Flood*. Rather, the Court both claims deference to Congress while simultaneously attempting to rationalize its reaffirmation of the *Federal Baseball* decision as desirable on public policy grounds based on the particular nature of baseball. Both moves reflect underpinnings short on logic but long on romantic ideations about the national pastime.

First, the Court rationalizes its position by pointing to congressional silence on the exemption as a veritable form of congressional acquiescence, if not implicit approval or adoption, of baseball's aberrational treatment.⁸⁸ To those who might critique the soundness of baseball's unique antitrust exemption, the Court states: "If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court."⁸⁹ Such a tack is both ironic and unusual for several reasons. First, the Court, not Congress, created baseball's antitrust exemption in the first place.⁹⁰ If anyone were to undo it, one would think the onus would fall on the Court. Second, the Court's deference to Congress on the matter was inconsistent with its recent holdings in analogous situations. Specifically, the Court pointed to congressional silence in the wake of the Court's ruling in *Federal Baseball* as a signal that Congress had effectively adopted the Court's ruling as its own on the matter of baseball's antitrust status.⁹¹ However, as William Eskridge points out, the Court had directly rejected the idea of obeisance to *stare decisis* on the grounds of legislative silence just a few years earlier in *Helvering v. Hallock*.⁹² As Felix Frankfurter wrote for the majority in that case: "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities."⁹³ Finally, if the Court were going to start deferring to Congress, one would think it would do so when making factual and policy-driven determinations about whether the reserve clause was good or bad for the

87. 410 U.S. 113, 154 (1973) (concluding that the "right of personal privacy includes . . . abortion . . . but that this right is not unqualified and must be considered against important state interests in regulation").

88. *Flood*, 407 U.S. at 273-74.

89. *Id.* at 284.

90. *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 356-57 (1953).

91. *See Flood*, 407 U.S. at 273-74, 277 (1972).

92. 309 U.S. 106, 118-21 (1940).

93. *Id.* at 119-20.

game. Instead, the Court makes its own explicit findings about this issue. Arguably, such an analysis was wholly irrelevant to whether baseball was a form of interstate commerce and whether antitrust laws applied to the game. Yet the Court had no compunction about confidently asserting that antitrust enforcement would harm the game and about making such a position central to its holding.

Second, the majority opinion asserts that, through the years and despite changing circumstances, the *Federal Baseball* decision has “generally and necessarily [been] accepted as controlling authority.”⁹⁴ The Court then quotes a congressional report from 1952 to argue that, even independent of considerations of stare decisis, the antitrust exemption from baseball actually makes good sense. “The overwhelming preponderance of the evidence established baseball’s need for some sort of reserve clause. Baseball’s history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle.”⁹⁵ These unsupported assertions say nothing about baseball *qua* commerce/object-of-antitrust-regulation. The question before the Court was whether antitrust laws applied to baseball, not whether it was a good policy to do so.

More pointedly, the Court’s fatalistic language demonstrates a complete failure of imagination—one brought on by the apparent inconsistency of free agency with the game’s romantic mythology. Indeed, the Court’s claims, asserted as gospel, would prove patently untrue only a few short years later. As it turns out, in baseball’s first decade of free agency, the game witnessed unprecedented levels of parity. From 1978–1987, there was a different World Series champion each year, a stark contrast to the years prior to the advance of free agency, which were dominated by the Oakland A’s dynasty and the Big Red Machine. Besides, even if the reserve clause did help provide competitive balance, it was certainly not the only mechanism capable of doing so. Revenue sharing, to take one small example, could accomplish the same goal without such harsh implications for the rights of players. As for the chaotic conditions to which the Court obliquely referred, the major tumult experienced with the arrival of free agency was a recalibration of relative wealth between owners and players. This hardly constituted an existential threat to the overall “integrity” of the game—a

94. *Flood*, 407 U.S. at 272 (emphasis added).

95. *Id.* at 272-73 (quoting H.R. Rep. No. 2002, at 229 (1952)).

game that subsequently experienced an explosion in revenues enjoyed by all of its stakeholders.

Ultimately, romanticism did not just afflict Blackmun or even the Supreme Court. It pervaded judicial considerations of the reserve clause at all levels. Both the District Court and Second Circuit rebuked Flood's claim.⁹⁶ Admittedly, these lower courts were stuck with explicit precedent that they were powerless to overrule (though they certainly could have distinguished it).⁹⁷ But, consider Judge Moore's concurring opinion at the Second Circuit⁹⁸—cited favorably by the Supreme Court⁹⁹—which epitomized the mythological ideations undergirding the courts' rulings. With remarkable certitude, Moore mocked any suggestion that the Supreme Court might *ever* overrule *Federal Baseball* and *Toolson*: “there is no likelihood that such an event will occur” he unnecessarily opined.¹⁰⁰ Indeed, the Supreme Court's decision in *Flood* extensively quoted Moore's concurrence, wherein he stated:

And properly so. Baseball's welfare and future should not be for politically insulated interpreters of technical antitrust statutes but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record.¹⁰¹

Moore's language is significant: he assumes that regulation will damage baseball and, in citing this language with approval, so does the Supreme Court majority.¹⁰² Yet even if the Justices held such a belief, it should have been wholly irrelevant to the outcome of the case. The Court had to determine whether antitrust laws applied to baseball (i.e., whether baseball was a form of interstate commerce subject to congressional regulation and/or whether stare decisis principles combined with congressional silence meant the exemption should stand), not whether it made sound policy to apply them to baseball in the first place.

At the end of the day, therefore, the baseball antitrust exemption provides a cautionary tale about romantic ideations invading the minds

96. *Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971), *aff'g* 316 F. Supp. 271, 278, 281-82 (S.D.N.Y. 1970).

97. *Id.* at 266. The Second Circuit, for instance, wrote that it felt “compelled to affirm” based on binding precedent. *Id.* at 265-66.

98. *Id.* at 268 (Moore, J., concurring).

99. *Flood*, 407 U.S. at 268 (quoting *Flood*, 443 F.2d at 268, 272).

100. *Flood*, 443 F.2d at 272 (Moore, J., concurring).

101. *Flood*, 407 U.S. at 268 n.9 (quoting *Flood*, 443 F.2d at 272).

102. *See id.*

of even the most rational realists and judicial jurists. It is an outgrowth of the peculiar role of baseball in the American imagination that the Supreme Court would repeatedly uphold the proposition that, effectively, it is just a game immunized from Congress's regulation of interstate commerce. The Court succumbed to decision-making driven less by the even-handed application of neutral principles than a desire to preserve existing social hierarchies in service of romantic ideations. Put simply, it felt wrong to subject the game of our youth, imbued as it is with pastoral images of our nation in its infancy, to the frigid regulatory machinery of the modern bureaucratic state.¹⁰³ The national pastime needed to remain above the fray and beyond the ugly banality of modern life—dominated by cold capitalism, concrete and commerce. Give us baseball—a pure and unadulterated exhibition of athleticism played on Elysian fields—the Court told us, logic and consequences for the very real litigants in the case be damned.

IV. ROMANTICISM AND ITS DISCONTENTS

By the time the Supreme Court had handed down its decision in *Flood v. Kuhn* on June 19, 1972, Flood's playing career was already over. While the appeal in the suit pended, the Phillies had exercised its unfettered right to control player movements by trading Flood to the Washington Senators before the start of the 1971 season.¹⁰⁴ But after just thirteen games, it became clear that Flood was no longer a serviceable major leaguer, let alone his erstwhile self. In the midst of the season,

103. In 1981, the House Judiciary Subcommittee on Monopolies and Commercial Law held hearings on antitrust and professional sports. With special thanks to Warren Grimes, then-Chief Counsel of the Subcommittee, for bringing this testimony to the Author's attention, it is worth nothing that Ted Turner, the media mogul who owned the Atlanta Braves at the time, served as a star witness. In response to a question about why baseball needed an antitrust exemption that none of the other professional sports enjoyed, Turner chortled, half-cocked and to the amusement of both himself and the crowd said, "It is played in the summer. [Laughter] It is the only sport where they use wooden bats. [Laughter]." See Antitrust Policy and Professional Sports, Hearing on H.R.823, H.R. 3287, and H.R. 6467 Before the Subcomm. on Monopolies and Commercial Law, of the H. Comm. on the Judiciary, 97th Cong. 91-107, 103 (statement of R.E. Turner III). In truth, Turner readily admitted the quixotic and suspect nature of baseball's antitrust exemption. See *id.* at 101. Sports broadcaster Howard Cosell—a strident anti-exemption advocate who never suffered fools gladly—was more blunt in his assessment of those who justified baseball's antitrust exemption by appeals to the game's purportedly unique qualities. "I can't believe that argument would appeal to anyone over the age of six," he said. See United Press International, *Sports Broadcaster Howard Cosell Told a House Subcommittee Thursday*..., UPI (July 16, 1981), <https://www.upi.com/Archives/1981/07/16/Sports-broadcaster-Howard-Cosell-told-a-House-subcommittee-Thursday/5994364104000>.

104. SNYDER, *supra* note 19, at 198-201; 1969 *Curt Flood Challenges MLB Reserve Clause*, *supra* note 29.

Flood abruptly retired at the age of thirty-three.¹⁰⁵ After losing his case before the Supreme Court, he spent the rest of his life meandering between trades of a different sort—as a broadcaster in Oakland, Commissioner of the short-lived Senior Professional Baseball Association, and in a string of (mostly failed) business ventures¹⁰⁶—and, at just fifty-nine, suffered an untimely death.¹⁰⁷

Though Flood himself may have faded into obscurity, his legal legacy has not. Despite suffering a resounding defeat at the Supreme Court, Flood's suit brought unprecedented attention to the inequities of the reserve clause and galvanized new efforts to defeat it. Marvin Miller and his team renewed their offensive against the sport's traditional labor regime when pitchers Andy Messersmith and Dave McNally declared themselves free agents by taking advantage of a previously unnoticed and unchallenged ambiguity in the clause's poorly drafted verbiage.¹⁰⁸ Codified in paragraph 10(a) of the Uniform Player's Contract, the relevant part of the clause provided that, if a player and his club could not agree on terms to a new contract for the baseball season by March 1, "the Club shall have the right by written notice to the Player . . . to renew this contract for the period of one year on the same terms."¹⁰⁹ The owners had always interpreted this renewal right to apply *ad infinitum* for the unilateral issuance of consecutive one-year contracts.¹¹⁰ But the MLBPA advanced a new view that was more consistent with the literal language: that the owners enjoyed this right only a single time, after which a player would become a free agent.¹¹¹ With the ratification of the 1970 Collective Bargaining Agreement between the owners and players, Miller had secured a private dispute resolution system for the hearing of all player grievances, so the interpretive dispute went to arbitration instead of to the (presumably hostile) federal courts.¹¹² On December 23, 1975, arbitrator Peter Seitz ruled for the players.¹¹³ Owner efforts to

105. *Curt Flood Trades and Transactions*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/players/trades.php?p=floodcu01> (last visited Apr. 15, 2018). Flood's last game was on April 25, 1971—his thirteenth game of the season and Washington's seventeenth. *See Curt Flood*, Baseball Reference, https://www.baseball-reference.com/bullpen/Curt_Flood (last visited Apr. 15, 2018); 1969 *Curt Flood Challenges MLB Reserve Clause*, *supra* note 29.

106. SNYDER, *supra* note 19, at 326-27, 342-43.

107. *Id.* at 346.

108. *Id.* at 319.

109. *Id.*, at 2 (quoting MAJOR LEAGUE UNIFORM PLAYER'S CONTRACT, available at, <https://www.mlbtraderumors.com/files/mlb-contract.pdf> (last visited Apr. 15, 2018)).

110. *Id.*

111. *Id.* at 2, 319.

112. ABRAMS, *supra* note 65, at 83.

113. *Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F. Supp. 233, 235 (W.D. Mo. 1976). Three panelists actually decided the case, but the players and the owners

challenge Seitz's holding in federal district court and before the Eighth Circuit ended in failure.¹¹⁴ Baseball's century of operating under the tightly controlled economic system made possible by the reserve clause came to a sudden end. With the promulgation of a new collective bargaining agreement between Major League Baseball and the Players Association in 1976, the modern free agency era officially began in earnest. Though Flood did not enjoy the benefits, his sacrifices had changed the baseball landscape for all time.

As for the legacy of *Flood v. Kuhn*, if scholars and courts mention the case at all these days, it is usually invoked as an extreme example of slavish deference to precedent.¹¹⁵ But the case represents much more than that. It serves as a cautionary tale of what happens when the romantic imagination about a beloved institution runs amok and undermines the judiciary's task of meting out even-handed justice. And while there are only a few hundred active major leaguers in the world at any given time, the consequences of the juridical "romantysis" epitomized by *Flood* extend far beyond the lives of these elite athletes.¹¹⁶ If the highest court in the land cannot put aside its personal feelings about a game involving a bat and a ball, it is only fair game to question the other luring and pervasive mythologies to which the members of the courts may irrationally subscribe and defer in their decision-making. They are human after all, and romanticism can get the best of us, even if we are professors of law or Supreme Court Justices. The only hope we have is to remain cognizant of this very real risk, especially when confronting time-honored institutions that are universally beloved.¹¹⁷

When culture and the courts clash, poor results typically issue for both. *Flood* and its antecedents reveal the limitations of the courts in grappling with the institution of baseball. Perhaps, in the end, that is because there are so many ways to tell the true story about the national pastime.¹¹⁸ It's about the most educated judges losing all sense of logic

each assigned an arbitrator and both of these arbitrators ruled, not coincidentally, for their appointing party. The case therefore came down to the vote of Seitz, the "impartial" arbitrator. *Id.* at 236.

114. See *id.* at 265, 270, *aff'd*, 532 F.2d 615 (8th Cir. 1976).

115. See, e.g., William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1381 (1988).

116. See ABRAMS, *supra* note 65, at 67. Of course, John Kruk might dispute such a characterization. As he famously said: "I ain't an athlete, lady. I'm a baseball player." See Spencer Hirsch, *John Kruk Is Not an Athlete*, COAST NEWS (Feb. 22, 2013), <http://thecoastnews.com/2013/02/john-kruk-is-not-an-athlete>.

117. Or, in the opposite situation, reviled institutions that are widely loathed.

118. Cf. TIM O'BRIEN, *How to Tell a True War Story*, in THE THINGS THEY CARRIED 64, 81 (First Mariner Books ed. 2009).

when confronting the game's mythology and majesty. It's about selfish athletes squeezing out every last dollar from their preciously short careers. It's about calculating management, giving players every reason to believe that they are fungible commodities, bought and sold like chattel. But most of all, it's about that little boy in the stands who witnesses the last remnants of his childhood unceremoniously wiped away on an ordinary June day. It's just like Bart Giamatti once said: "It breaks your heart. It is designed to break your heart."¹¹⁹

119. GIAMATTI, *supra* note 8, at 7.