The Immaculate Deception: How the Holy Grail of Protectionism Led to the Great Steroid Era

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THE IMMACULATE DECEPTION:  
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PROTECTIONISM LED TO THE GREAT  
STEROID ERA  

WHY CONGRESS SHOULD REVOKE BASEBALL’S  
ANTITRUST BOON DOGGLE  

ELDON L. HAM*  

When the Supreme Court says baseball isn’t run like a business, everybody jumps up and down with joy. When I say the same thing, everybody throws pointy objects at me.1 — Bill Veeck2

INTRODUCTION  

The United States Supreme Court may have thought itself cerebral, innovative, clever, cute, or perhaps all of those, but its controversial 1922 antitrust ruling in Federal Baseball Club v. National League3 has nonetheless wreaked havoc on the business of professional baseball for over eight decades, including what is now being called “The Great Steroid Era.”4

The ensuing legal and commercial mayhem is well documented, but it extended far beyond the obvious, reaffirming the “law of unintended

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2. Veeck was a baseball fan, owner, and innovator, who as a young man planted the first ivy at Chicago’s famed Wrigley Field. Nick Acocella, Baseball’s Showman, ESPN.COM, Aug. 20, 2006, http://espn.go.com/classic/veeckbill000816.html. Veeck later became principal owner of the Cleveland Indians (1948) where he signed the first African-American players in the American League, then owned the St. Louis Browns (1951) and Chicago White Sox twice (1959 and 1977). Id. He was widely known for marching midget Eddie Gaedel to the plate, who then walked on four pitches for the Browns in 1951. Id.


consequences," a cause-and-effect mandate that inevitably plays a large role in history, politics, law, and sports. No better archetype can be found than the logic-bending anomaly we call baseball’s antitrust exemption. Major League Baseball’s exalted legal status, and the reckless arrogance such protectionism necessarily fosters, has contributed one way or another to racism, indentured players, the ascension of baseball’s powerful labor union, a host of lawsuits from Charlie Finley and Ted Turner to Vincent Piazza and beyond, and Commissioner Peter Ueberroth’s collusion conspiracy during the 1980s.

So far, baseball’s curious antitrust enigma has largely escaped blame as a contributing factor to the steroid era, an unfortunate period of Nero-like fiddling by both the big leagues and the baseball union. But, indeed, such a court-made exemption may very well have been the original domino in a long line of events that eventually pushed baseball into a complicity of contraband, falsehoods, and marquee home runs.

Observers of law and sports are keenly aware of the notorious 1919 Black Sox World Series, the singular “baseball is not interstate commerce” antitrust exemption bestowed by the Supreme Court three years later in 1922, and the great steroid controversy that dogs baseball in the new millennium. Is it possible, even likely, that those seemingly disparate events are related?

The first two, the Black Sox and the Federal Baseball antitrust decision, took place almost concurrently, but history largely overlooks their very close ties. Both were faux pas of a sort, and not only did the former likely influence the latter, they both may have been rigged. Nearly all manipulation has a price, and the distortion of markets, law, or truth, let alone all three concurrently, assures an artificial playing field that invites the law of unintended consequences. Major League Baseball is no exception, and it is now paying the price. In more primal terms, baseball played with fire for too long and has gotten badly burned, most recently and very profoundly by the steroid era. Fully understanding how that came to be is a necessary first step to invoking the ultimate cure, an antidote that begs Congress to repeal the absurd baseball antitrust exemption because, among other reasons, it is a false law built on a false premise that has become the embarrassing Holy Grail of American protectionism—all of which has contributed to much aberrant behavior, probably including the steroid era.

WHY BASEBALL MATTERS

Baseball, like hope, springs eternal. With each new big league season, we are reminded why this particular rite of passage is about more than just a pastime. Baseball, with its long ties to our fathers and their grandfathers, American culture, law, and even Congress, virtually is us.

In 1958, Congress grilled baseball's irascible Casey Stengel and the fair-haired Mickey Mantle about baseball antitrust, inspiring a diatribe of Stengelese followed by Mantle's own brief account that brought the house down, loosely paraphrased as "I agree with him." More recently, Congress has devoted as much time to baseball steroids as most issues, and Capitol Hill has taken more than a little flack for such indulgences. But Congress is right, and should still do more.

Sports influence America—and the world—in deeply profound ways, pulling us forward much like art or literature, but more tangibly and often more forcefully. Nowhere is that more acutely apparent than with the Olympic Games, whether in 2008, 1984, 1980, 1972, or 1968—all recent Olympic years with politicized agendas. Indeed, one of the great sports blunders in modern times may have been Hitler's 1936 Olympic challenge to Jesse Owens and the other African-American sprinters who upstaged the Aryan Nazis on and off the track. The Americans proved themselves much faster, but the Nazi "blunder" demonstrated even more: black athletes can be as good or better than most, a milestone that would inevitably transcend sports.

In America, baseball is our oldest major team sport, and so its legacy is both enduring and often profound. Jesse Owens had competed against long jumper Mack Robinson, older brother and inspiration to Jackie Robinson, who later won the National Collegiate Athletic Association (NCAA) long jump title himself and then became the Jackie Robinson who changed baseball, if not America itself. Two years after Jackie's big league debut, the state of Kansas passed a school segregation law that would be struck down by Brown v. Board of Education in 1954. In the text of its opinion, the Supreme Court stated

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10. Major League Baseball is traced to 1876, while the NHL began in 1917, followed by the NFL (1920) and the NBA (1946). See Cliff Christl, Destiny's Darlings: Traditions Set Teams Apart, MILWAUKEE J. SENTINEL, May 11, 2003, at C1.
the visible success of "Negroes" in America, but in those days their most noted success was evidenced by the front page sports headlines of Jackie Robinson, Satchel Paige, Willie Mays, and a rookie named Hank Aaron who clubbed his first home run the very same year as the Brown decision. Baseball may still be known for its regrettable history of overt segregation, but it did integrate itself with spectacular success seven full years before our Supreme Court did the same for public education.

So when baseball wrongfully led our nation, especially our youth, down the steroid path of decadence and deceit, it meant much more than just who "ripped off" the most home runs. Baseball is our oldest, most revered, most celebrated major team sport, but it let America down not just with steroids, but with deception. Baseball looked the other way, perhaps hoping the steroid era would be without notice or blame, something like an "immaculate" deception. Eventually baseball only reluctantly invoked a testing program, which, at first, was embarrassingly weak. But why the arrogance? How did baseball believe it could get away with such a ruse?

THE HOLY GRAIL OF PROTECTIONISM

Although not as dramatic as the Salem witch trials nor as sweeping as the Plessy "separate but equal doctrine," the baseball antitrust boondoggle is no less obtuse and begs for reversal. In 1972, the Supreme Court expressly recognized the need for change, but then left the task of undoing this absurd exemption to Congress. Given the continuing impact of the original decision, not to mention its checkered history in the first place, the time has long come for Congress to intercede.

Major League Baseball is a profoundly visible interstate business as well as an American icon, but the true need for intervention is much more than philosophical. The antitrust exemption has wreaked havoc on American sports history, enslaved the game's best human resources during baseball's golden ages, and insulated baseball from normal business competition. Although the Curt Flood Act of 1998 and the non-statutory labor exemption provide partial relief to the players themselves, baseball still enjoys a government-sanctioned license to muscle its own team owners, vendors, and the public at large.

12. See id.
There can be little wonder, then, about the source of baseball’s arrogance as the steroid era emerged. Much has been written and debated about why—or whether—the game simply grew intoxicated with the marquee excitement of record home runs, all in the wake of the 1994 labor action and canceled World Series that left much of America soured on baseball.\textsuperscript{16} Clearly the finer details of how or why the steroid era got started can be analyzed \textit{ad infinitum}, but however baseball got there, it did so for the same fundamental reason a child steals a cookie: baseball believed it could.

\textbf{THE BASEBALL ENIGMA}

In \textit{Federal Baseball}, Justice Oliver Wendell Holmes, Jr. penned the most famous ruling in the history of organized sports and virtually exempted the business of Major League Baseball from the reach of federal antitrust laws, particularly Section 1 of the Sherman Antitrust Act.\textsuperscript{17} To this day, the \textit{Federal Baseball} finding remains an out-of-step, even preposterous legal ruling, and a particularly egregious beacon of hypocrisy in today’s world of billion dollar sports moguls where the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL) are expressly subject to such antitrust laws, while Major League Baseball still is not.\textsuperscript{18}

Congress bears enough credibility issues without also embracing the disingenuous \textit{Federal Baseball} directive in the face of logic—namely, that giving exhibitions of baseball is a business that concerns “purely state affairs.”\textsuperscript{19} Even in 1922, Major League Baseball was in full literal swing behind the likes of Babe Ruth and Rogers Hornsby as teams chugged from state to state performing before millions of fans for millions of dollars. Change that revenue to \textit{billions} of dollars, then add air travel, radio, television, product endorsements, and now, a good deal of alleged drug trafficking, baseball’s role as an interstate business becomes overwhelmingly self-evident. Yet \textit{Federal Baseball} continues as a discomforting affront to law and a mockery of precedent that boldly allows baseball to operate a lucrative game that is run like a business with a free wink at law and reason.

The 1922 Court may simply have been wrong, delusional, or possibly

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lured by an ends-justify-the-means reaction to concerns over baseball gambling. But fifty years later, when the Court considered the plight of star player Curt Flood, who was caught in the grip of baseball’s reserve clause, Major League Baseball was no longer seriously vulnerable to gamblers, yet it was still left very much immune from competition.\(^\text{20}\) The *Flood v. Kuhn* Court expressly acknowledged the errors of *Federal Baseball* but then did nothing, other than to blame Congress for its “positive inaction.”\(^\text{21}\) Justices Marshall and Brennan disagreed, calling for the Supreme Court to reverse itself without the aid of Congress: “It is this Court that has made [the players] impotent, and this Court should correct its error.”\(^\text{22}\) Marshall and Brennan were right, and had the rest of the Court listened, the steroid era might never have happened, assuming the game’s resulting arrogance would likely have been tempered long ago.

But for over three decades since *Flood*, Washington has failed to take the hint. Congress could continue to pretend that *Federal Baseball* is legitimate precedent or maybe just some kind of American frolic in a mischievous Huck Finn manner; but how can Capitol Hill keep looking the other way, especially since the ruling was likely an abuse of power in the first place? Simply stated, baseball’s antitrust exemption is much more than a legal paradox; it persists unnecessarily as a testament to twentieth century skullduggery that is now perpetuated by twenty-first century blinders.

**FEDERAL BASEBALL: WHAT THE SUPREME COURT REALLY SAID**

Commonly misquoted, the 1922 ruling did not expressly find that “baseball is not a business.”\(^\text{23}\) The real crux of the decision is that Major League Baseball was deemed not to be a business in interstate commerce, thus rendering it a “pastime” that is merely a “state affair” beyond the reach of the Sherman Antitrust Act.

Short on words if not logic, the entire *Federal Baseball* opinion is all of two pages long.\(^\text{24}\) Remarkably, though, the text actually gets everything right except the conclusion. The plaintiff was the Baltimore franchise of the upstart Federal League, which began play in 1914,\(^\text{25}\) the same year that Congress enacted the Clayton Act which provided for private antitrust suits, treble


\(^{21}\) Id. at 283.

\(^{22}\) Id. at 292 (Marshall, J., dissenting).


\(^{24}\) Id.

\(^{25}\) Id.
damages, and injunctive relief. Soon thereafter, in 1915, the new Federal League sued the National League for antitrust violations arising out of baseball's use of its rigid reserve language used to prevent players from bolting to the new league. A settlement was arm-twisted by the trial judge, but one team, the Baltimore franchise, refused to sign and dogmatically pressed upward to the Supreme Court.

Justice Holmes's *Federal Baseball* opinion recounted the facts, highlighted by the following:

The clubs composing the Leagues are in different cities and for the most part in different States. The end of the elaborate organizations and sub-organizations that are described in the pleadings and evidence is that these clubs shall play against one another in public exhibitions for money, one or the other club crossing a state line in order to make the meeting possible .... Of course the *scheme* [emphasis added] requires constantly repeated travelling [sic] on the part of the clubs, which is provided for, controlled and disciplined by the organizations, and this it is said means commerce among the States.

Obviously Holmes got the essence of the business exactly right, especially his telling use of the word "scheme" since antitrust is defined as a "contract, combination, or conspiracy in restraint of trade." But then he obliquely draws the wrong conclusion:

The business is giving exhibitions of base ball [sic], which are purely state affairs. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.

Had Holmes and the whole Court gone mad? Were they simply delusional, or maybe just plain wrong, failing to understand either the game of baseball or the nature of interstate commerce? Neither seems likely, of course. But there is overwhelming circumstantial evidence that the Court may have been seduced by an ulterior agenda.

28. *Id.*
29. *Id.* at 208-09.
MANIPULATING HISTORY

By the time *Federal Baseball* reached the Supreme Court, Kenesaw Mountain Landis had already been appointed the game’s first independent commissioner. With a clear mandate to purge the game from the pandemic of illicit baseball gambling that had just tarnished the 1919 World Series, Landis proceeded to garner unprecedented centralized authority for the commissioner’s office—and himself.

Landis had previously been a hard-nosed federal trial judge in Chicago, an antitrust expert who had already rocked the Standard Oil behemoth with a then staggering $29,240,000 fine for antitrust violations. The pervasive Sherman Antitrust Act, established in 1890 to counter a host of perceived robber barons of the post Civil War industrial era, was an inspiration for ambitious federal trust busters who had already focused on the American steel, railroad, and petroleum industries.

Landis was also a baseball fanatic with close ties to the Cubs and enjoyed personal allegiances to the Chicago White Sox as well. Most significantly, though, Landis was also the very same trial judge who had overseen the original *Federal Baseball* case and had bullied the eventual settlement among all parties except the rogue Federal Base Ball Club of Baltimore. In so doing, Landis issued a prescient warning to all concerned: “Both sides must understand that any blows to a thing called base ball [sic] would be regarded by this court as a blow to a national institution.” No wonder all but one party settled.

The Federal League may have brought suit in Chicago precisely because of Landis’s reputation for locking horns with big business. But the plaintiff ball clubs may have misunderstood Landis’s profound allegiance to baseball, and so Landis probably surprised many by favoring the National League in an act of baseball protectionism that captured the hearts, minds, and support of the game’s ownership cabal. By that time, baseball would have become keenly aware of its own vulnerability to ambitious trust busters of the day, if not more private sector lawsuits under the new Clayton Act, so the game’s


31. The fine was imposed against Standard Oil of Indiana in 1907. Although later reversed on appeal, it provided significant notoriety to Landis. See U.S. v. Standard Oil, 148 F.719 (D.C. Ill. 1907).


savvy owners lured Judge Landis as baseball’s first, and most powerful, independent commissioner.

But that was just the beginning. Commissioner Landis operated from baseball’s offices at 333 N. Michigan Avenue in Chicago, and for the first years of his regime he maintained his dual role as both baseball commissioner and an active federal district judge in Chicago. This gave Landis enhanced visibility and almost unbridled power, all while maintaining his direct ties throughout the federal judiciary—at least until Congress threatened to impeach him for it, forcing Landis to resign from the judiciary on February 22, 1922.

While his own Federal Baseball case continued to wind its way through the appeals process all the way to the United States Supreme Court, Landis had both the motive and the opportunity to influence the Court’s perceptions about baseball. Landis must have believed that he and the game needed centralized power to both rein in the players and quash the scourge of gambling to save the game, but such ubiquitous control would be vulnerable to the Sherman Act so long as the wild card Federal Baseball appeal loomed.

As a battle-tested judge, Landis had long been developing a philosophy of legal realism and judicial activism, suggesting he was receptive to an ends-justify-the-means approach to judicial intervention. Thus, with the requisite opportunity, motive, and judicial philosophy in place, the possibility of Landis tampering with legal process for a perceived higher good, especially for his beloved baseball, is both intriguing and possible. But there is much more.

Enter William Howard Taft, the former president who at the time was the Chief Justice of the Supreme Court and just as big a baseball fanatic as Landis. Not only had Taft played baseball at Yale, at one time he had been offered a contract to play professional ball for his hometown Cincinnati Reds. As president, Taft invoked the tradition of throwing the first honorary pitch of the baseball season, and later Taft himself would turn down the baseball commissioner’s job before it was to be offered to Landis. Taft, therefore, was linked directly to the game, if not to Landis, by means of both baseball and the federal judiciary, but there remained still more compelling

36. William Howard Taft was the twenty-seventh president of the United States and the tenth Chief Justice, nominated by Warren G. Harding.
connections to Landis and to the Federal Baseball case itself.

Taft was president from 1909 to 1913, and his presidency is recognized for its federal trust-busting efforts—some sources referring to the antitrust prosecutions in those days as “vigorously” or even “relentlessly.” More remarkably, Taft’s half-brother Charles Phelps Taft was owner of the Chicago Cubs from 1914 to 1916 during the precise period when the Federal League was competing with the Cubs and all the National League, not to mention actually suing Major League Baseball for antitrust violations in 1915. Thus, the Taft family, or at least part of it, originally had a direct stake in the outcome of the Federal Baseball litigation.

Taft was an especially powerful Chief Justice—as a matter of fact, as president he himself had appointed six justices to the Court, two of whom were still there when Federal Baseball, a unanimous ruling, was decided. So Taft carried a great deal of influence and incumbent baggage, along with his ties to antitrust and passionate devotion to baseball.

Landis could have taken his case for baseball protectionism directly to Taft, but under the circumstances he might have been much more subtle by invoking a behind the scenes whisper, a clandestine communiqué from an intermediary, or even just a public hint that would have caught Taft’s attention. The real question, then, is not whether Landis could have exerted influence—indeed that is a clear possibility—but, rather, how likely was it?

BASEBALL ANTITRUST: THE GREAT OXYMORON

Consider a binary premise of simple logic: either the Taft/Holmes Court was rational or it was not. If not, then the Federal Baseball ruling was simply irrational and baseball, therefore, had merely lucked out. But assuming the more reasoned probability of a rational Court, history begs for an explanation. Any such analysis leads to the ultimate inevitable question: did Holmes really believe what he was saying—that big league baseball was not a business in interstate commerce? If not, then there is no doubt the Court was up to something. Therefore, in addition to recognizing all the suspicious and compelling circumstances surrounding the Federal Baseball decision, it is helpful to examine Holmes himself.

Holmes, like Landis, had embraced a brand of legal realism and judicial activism. "The life of the law has not been logic, it has been experience," as Holmes said, revealing an attitude about logic and law that may have justified his approach to Federal Baseball. Tellingly, in May of 1923, exactly one year after he penned the baseball antitrust exemption, Holmes wrote another antitrust opinion that found, among other things, that a traveling vaudeville enterprise could be a business in interstate commerce. In Hart v. B.F. Keith Vaudeville Exchange, the manager for numerous traveling vaudeville performers had brought suit under the Sherman Act against "a combination of corporations engaged in similar business, and the owners of a large number of theatres" known respectively as the Keith Circuit and the Orpheum Circuit. The Federal Baseball case was central to the legal arguments and was even cited in the eventual opinion. Holmes must have recognized the impending antitrust dilemma in comparing baseball and vaudeville, which could explain this textual wrangling found in the Hart opinion:

> It is alleged that a part of the defendants’ business is making contracts that call on performers to travel between the states and from abroad and in connection therewith require the transportation of large quantities of scenery, costumes, and animals... The defendants contend and the judge below was of the opinion that the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental to that, and therefore that the case is governed by Federal Base Ball Club v. National League. On the other hand, it is argued that in the transportation of vaudeville acts the apparatus sometimes is more important than the performers, and that the defendants’ conduct is within the statute to that extent, at least... The bill [in question] was brought before the decision of the Base Ball Club case, and it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently.

Holmes probably recognized the monster he had created to save baseball, thus his above hint about the vaudeville interstate travel as more than just

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44. Id. at 273.
45. Id. at 272-73.
"incidental." He may or may not have actually believed in his own baseball and vaudeville analyses, but Holmes seemed to be laying the groundwork to reconcile the two. Without making these distinctions, the *Federal Baseball* case could have eventually diluted the Sherman Act into a legal scrap heap. But if Holmes had truly believed in *Federal Baseball*, why then did he press to wriggle out of it in the vaudeville case?

Perhaps Holmes really did not believe in *Federal Baseball*. The Court had normally applied broad criteria in finding interstate commerce, even ruling in 1911, in the midst of the Taft trust-busting presidency, that empty rail cars moving in-state were in fact instruments of interstate commerce. Considering the farcical reasoning of *Federal Baseball* and the wordsmithing of the *Hart* decision, especially in view of the Court’s line of commerce clause cases, it is difficult to accept Holmes’s sincerity. Did the Court really feel that empty rail cars affect interstate commerce, but filling them with ball players to perform before millions in stadiums around the country reduced those same cars to just "state affairs?"

The tell-tale fingerprints of Landis and Taft are smeared throughout the four corners of the *Federal Baseball* opinion and beyond. Landis, the *Federal Baseball* trial judge determined to rid baseball of gambling if not also save it from the Federal League competition, and Taft, the baseball fanatic with family ties to the competing National League Cubs, were both widely known for their antitrust expertise and influence. So it strains credulity to believe that *Federal Baseball* was simply the innocent product of misinformed great minds. Since the *Federal Baseball* antitrust findings are asinine, at best, and the baseball motives of Taft and Landis were overwhelming while the concurrent circumstantial evidence is compelling, the more likely scenario is an express or implied conspiracy. Perhaps it was driven by concerns over league competition or fears about pervasive gambling—or maybe the latter was a pretext for the former.

Considering all these possibilities in view of the Court’s other decisions about antitrust and interstate commerce, the true *sui generis* ends-justify-the-means role of *Federal Baseball* is inescapable: protect the game at all costs. This theory is not hard to swallow, given all the circumstances.

46. *Id.*

47. *Id.*

48. *Id.*

STEROIDS: THE IMMACULATE DECEPTION

Was the steroid era another in a long line of baseball’s ends-justify-the-means pattern of behavior? Few games can stir a bare-knuckled national brawl quite like baseball. It is a swashbuckling sport built to swing for the fences, and baseball will unabashedly move those fences, cork bats, steal signs, walk midgets, drill batters, juice the ball, and even juice the players to achieve its ends. Although many such baseball tactics are actually against the rules, an acceptable part of baseball strategy has long included the art of rule bending, deception, and cheating—at least within the acceptable tolerances of the game, all of which invokes a sense of “all is fair in love and baseball”—an inherent part of the game’s charm.

But not all such skullduggery is equally appealing. Stealing signs is “acceptable,” if not expected, while kidnapping an opposing player is not. Pretending to make a shoe-string catch in the outfield is readily accepted, but sliding into second with high spikes is not. Pitching inside to intimidate power hitters is expected and throwing at a batter is usually tolerated, while a fastball to the head will likely bring retaliation. Indeed, one reason baseball has become so sacrosanct is that it was created in the image of America itself. These same hip-shooting competitive traits are found in free market capitalism from Carnegie and Rockefeller to Steve Jobs and Bill Gates, not to mention the free-wheeling hard-ball politics of democracy.

So how do steroids and other illegal performance enhancers fit into the baseball paradigm? Is there a difference between illegal spitballs and illegal steroids? Or what about faking a sweeping tag at second versus lying to Congress?

In 1887, a Pittsburgh judge declared “baseball is one of the evils of the day,” 50 but today the lines separating evil from irreverence are blurred in real life and in baseball. The game stirs the American soul because it is a chip-on-the-shoulder microcosm of who we are—an irreverent capitalist society looking for an edge in business, life, and baseball. Baseball is an edgy game of angles where the one cardinal rule is that all the other rules are fundamentally suspect, and that was true when Ty Cobb played in 1910; 51 when Bill Veeck marched a midget to the plate in 1951; 52 and when Yankee

50. J.W.F. White, a criminal court judge in Pittsburgh, lectured a convicted thief, warning him to stay away from baseball games, calling Baseball “one of the evils of the day.” BENJAMIN G. RADER, BASEBALL: A HISTORY OF AMERICA’S GAME 50 (2002).
Graig Nettles accidentally sprayed hidden super balls all over the infield when he splintered his bat during a game in 1974.\textsuperscript{53}

The difference is a matter of perspective, a function of intent, a difference in reasonable expectations, and the possibility of harm to the game. Baseball, therefore, deserves no free pass in today’s steroid environment, notwithstanding its innate passion, humor, ties to capitalism, or pervasive mischief. Not only did steroids distort the game and the record books, they distorted the players themselves, deceived the public, and were a health risk to users, not to mention were and are illegal controlled substances in the first place.

No one knows the precise date, but it appears the baseball steroid era crept in sometime after the cancellation of the 1994 World Series. It may have been caused by the great 1998 home run chase waged by power hitters Mark McGwire and Sammy Sosa, the most riveting long ball year since Mantle and Maris slugged it out in 1961. If McGwire and Sosa were on the juice, the steroid era surely began then. If they were not, that banner year may still have inspired others to dig a little deeper into their own bags of tricks where, alas, they found steroids. Either way, 1998 suggests a good starting point.

But maybe both happened. McGwire later admitted to intentionally using “almost steroids,”\textsuperscript{54} and more recently the embattled Barry Bonds admitted to “accidentally using” a steroid cream.\textsuperscript{55} Sosa has made no admissions, but his transformation into a prodigious home run slugger has nonetheless been suspect for a host of widely reported reasons.

Regardless, Major League Baseball found itself mired in a decade long steroid controversy, with the after effects still lingering in the form of the Mitchell Report, congressional intervention, suspicion of perjury, permanently diluted records, possible latent health issues for the players who used them, and the severely tarnished integrity of the game.

Steroids have been around for decades and were used in sports for years, notably football. But the NFL invoked stringent testing with the cooperation of its players association many years ago, yet both baseball and its certified union resisted testing.\textsuperscript{56}

\textsuperscript{53} Phil Rogers, \textit{No Need for Sosa to Cheat; So Much Power, So Little Sense}, CHI. TRIB., June 3, 2003, at C6.


\textsuperscript{56} Both the league itself and the players’ association have denied the foot dragging, but the facts and testing history suggest otherwise, raising at least a viable question about timing, if not motives.
Prior to the implementation of current testing policies, extensively reported anecdotal evidence suggested that anywhere from twenty-five percent to eighty-five percent of the Major League players were on steroids.\textsuperscript{57} Things began to change when Orioles prospect Steve Bechler collapsed and died of heat stroke in February 2003, a tragedy that led the medical examiner to ultimately conclude that Ephedra, a non-steroid supplement, contributed to the player's death.\textsuperscript{58} Almost immediately, Commissioner Selig banned Ephedra from the minor leagues, but not the major leagues. One might surmise that collective bargaining constraints and related legal issues may have played a role in such delay.

In 1996, retired player Ken Caminiti, a former big league MVP, was provided a detailed account of how his body deteriorated, which he believed was primarily due to his own admitted use of steroids.\textsuperscript{59} In 1998 both Sosa and McGwire shattered the prior single season home run marks, and then each clubbed over sixty homers again in 1999. Two years later, Bonds rewrote the record books with seventy-three blasts, a year when the aging slugger became thirty-seven years old. The Bonds home run adventure soon led to the Bay Area Laboratory Co-operative (BALCO) investigation of an alleged steroid distribution ring in the San Francisco area.\textsuperscript{60} On March 17, 2005, a number of players—including Jose Canseco, Rafael Palmeiro, Curt Schilling, Sosa and McGwire—were brought before a congressional investigation.\textsuperscript{61} By 2006, an exposé book titled \textit{Game of Shadows} was published revealing, in great alleged detail, a number of claims that support the use of steroids by Bonds and many other players connected to the BALCO source including, among others, Jason Giambi and Canseco himself.\textsuperscript{62}

By March of 2006, former Senator George Mitchell was appointed by Commissioner Selig to spearhead a thorough investigation into the Major League Baseball steroid issue, including the alleged use by players and the

\textsuperscript{57} Pitcher David Wells estimated the figure at twenty-five percent to forty percent. Jose Canseco has suggested it was as high as eighty-five percent. ESPN Baseball, \textit{Well Claims "25 to 40 Percent" of Players Use Steroids}, ESPN.COM, http://espn.go.com/mlb/news/2003/0227/1515302.html (last visited Oct. 22, 2008).


curious evolution of baseball's steroid policies. Such investigation led to the Mitchell Report, a 409 page analysis of steroids in baseball, including an assessment of fault and recommendations for cleaning up the sport.63

The newest round of MLB testing policies were implemented in late 2005, replacing the weaker original policies. As of January 2005, an initial positive test would result in a ten-game suspension, the second positive brought thirty games, then sixty games for a third. Ultimately, it took a fourth positive result to bring a one-year suspension. Still, this policy had more teeth than the one implemented in 2002, which only provided for mandatory treatment for a first time offense, kept the player's name confidential, and took five failures to cause a one-year suspension. Such 2002 policy generated no player suspensions in all of 2004. The 2005 version adopted in January provided that offenders would be named and suspended, then the league implemented the tougher policy in November of that year, calling for a fifty-game suspension upon the first test failure.

Steroids are not addictive like cocaine or certain other recreational drugs, so there was little apparent justification for such a weak policy that took three failed tests to generate a meaningful suspension. After the 2005 season, baseball then tightened its policy to provide for a fifty-game suspension on the first test failure, one hundred games for the second, and finally a lifetime suspension after the third.

Compare all of this to the policy long utilized in conjunction with the Olympic Games where one positive yielded a two-year suspension, two failures brought a lifetime ban. The NFL reacted to steroids much sooner than baseball did, although it continues to revise and strengthen its own policies. The NFL began steroid testing policy in 1986 and then, according to the former NFL steroid oversight advisor, who resigned in 1990, about thirty percent of players in the league tested positive at first, yet received only warnings.64 Then the league began suspending players in 1989, when thirteen of them received four-game suspensions (about a month each).65

Baseball, on the other hand, seemed impervious to the mounting steroid evidence through the 1990s, a point corroborated by the exhaustive Mitchell Report (the Report) issued in December of 2007. The Report listed eighty-six names tied, variously, to the baseball steroid era, including seven MVPs,


thirty-one All-Stars, and notably pitching icon Roger Clemens who was mentioned no fewer than eighty-two times in the Report.66

Mitchell found plenty of blame. "Everyone involved in baseball over the past two decades – commissioners, club officials, the players’ association, and players – shares to some extent the responsibility for the steroids era. There was a collective failure to recognize the problem as it emerged and to deal with it early on."67 The requisite deception, then, was anything but "immaculate."

The breakdowns that led to the steroid era began at least as early as 1922 when Kenesaw Landis muscled those who participated in the 1919 Black Sox debacle. History largely forgets that the game had already been infested with gamblers for many years, with rampant betting in the stands even as the game was being played.68 Some even suggest the very first World Series in 1903 may have been rigged.69 So when Landis cleaned house, he just kept going, eventually hedging all bets with the Holy Grail of protectionism in the form of baseball’s antitrust immunity.

Baseball created a world all its own without fear of retribution. It ran an overtly segregated empire until 1947.70 Baseball owners controlled player labor until Andy Messersmith and Dave McNally successfully arbitrated the infamous reserve clause and discovered that its perpetual grip of contract renewals was a one-time provision and not an infinite lock on a player’s services.71 Baseball even resisted the advent of radio in the early 1920s, even though radio would soon spread baseball’s reach far beyond the ballpark and largely influence the voices of summer that represent today’s game. The owners were initially afraid of radio, thinking it would keep the fans away instead of acting as a magnet by reaching those who otherwise would never have been exposed to the game.

When baseball first discovered home runs as a marquee draw in 1918-


69. Id. at 93


1920, long before 1998, they simply changed the game. Before Ruth, the home run leaders would club only nine or ten long balls a year. But when Ruth was shipped to the Big Apple in 1920, the game changed. The spitball had been perfectly legal since its "discovery" sometime around 1905, but in 1920 it was suddenly banned. Yankee Stadium had begun, eventually opening in 1923 with a very short right field porch (294 feet), almost certainly to exploit Ruth's left-handed power. Over the decades, baseball has unabashedly manipulated the game on the field by banning the spitter, lowering the pitcher's mound, changing the makeup of the ball, inserting the designated hitter, excluding African-Americans, and then re-inserting them, too, as it desired. Off the field, baseball almost certainly hustled the antitrust boondoggle.

UNINTENDED CONSEQUENCES

All those actions on and off the field of play affected the game in ways that were both foreseen and unforeseen, but nowhere was the law of unintended consequences more pervasive than regarding the antitrust exemption. That legal anomaly altered the game in a myriad of ways, including the eventual unionization of baseball, the baseball collusion case, and probably even "The Great Steroid Era."

When the players butted against the antitrust exemption time and time again, coming up empty, even in the Flood Supreme Court decision of 1972 even though the Court actually agreed with Flood, the players and union chief Marvin Miller were forced into a different direction. They chose to abandon antitrust, then adopted a plan to attack the game's power through the federal labor laws, initially by challenging the reserve clause in 1976 through McNally and Messersmith. They won immediately, strengthening both the union and their resolve.

The exemption directly caused the great baseball collusion of the 1980s. Baseball felt secure in its antitrust immunity, so the owners met and overtly conspired to suppress player compensation. The scheme failed not because of antitrust, but because the owners forgot about the "no joint negotiating" clause that had already been inserted into the collective bargaining agreement. The clause was intended to prevent the threat of joint player hold-outs like the one pulled by Dodger pitching icons Sandy Koufax and Don Drysdale who successfully arm-twisted the Dodgers in 1966 making them at that time the


highest paid pair of teammates in history. But that same clause operated both ways, and the owners got nailed with a billion dollar collusion case.

Ultimately the antitrust exemption influenced the great steroid era because it was inevitable. The baseball labor wars that followed Messersmith in 1976 were contentious, but successful and lucrative for the players. The labor action in 1994 caused the embattled owners to dig in and cancel the World Series. They assumed the fans would forget, but they were wrong. Through it all, baseball maintained its arrogance and, for some reason, avoided a viable testing program for performance enhancing drugs. They were vigilant in dogging the users of recreational drugs, like with the likes of Steve Howe and Darryl Strawberry, but when Sammy Sosa and Mark McGwire slammed the 1998 season into the record books, baseball was electrified, fans returned, and 1994 was finally forgotten.

Speculation is no longer needed about how the steroid era evolved. There is no shortage of anecdotal evidence plus player admissions, exposé books by both journalists and players (notably Jose Canseco), sworn testimonies and, ultimately, the extensive Mitchell Report. Home runs were flying out of ballparks from coast to coast as Major League Baseball fell further behind the NFL and NBA in its steroid testing programs. Major League Baseball allowed the steroid era to happen, and curiously, the players' union did little to intervene, even though the issue directly impacts the playing conditions, health, and safety of the players. But why did all this happen? In science, life, and law, the simplest explanation is almost always the best, suggesting the steroid monster permeated the game because baseball let it in.

The antitrust exemption did more than just give the owners of yesteryear an upper hand against players and new owner wannabes. It created a culture of invulnerability and arrogance that ultimately acted as blinders over the eyes of baseball as it raced toward a dangerous cliff lured by the euphoria of drugs, the metaphorical highs of long ball ecstasy, and the temptations of greed and money.

The law of unintended consequences gripped baseball in a steroid vice that desecrated the game the way any drug addiction usually does: shattered lives, distrust, and broken dreams. Such malevolence often begins with a sense of invulnerability where nothing can go wrong. And where would baseball get such an invincible feeling? Not from fans or television or money, per se—the other sports leagues have those things, yet other leagues have still doggedly fought the steroid war for years.

74. The baseball strike during 1994-95 was MLB's ninth major labor dispute since just the 1972 season.
75. See, e.g., JOSE CANSECO, JUICED (2005).
Even a strong union was not enough to turn back the steroid monster—the union not only failed to try hard enough, it seemed to fight every meaningful effort to implement a viable testing program. The summary and conclusions of the Mitchell Report found that “[f]or many years before 2002, the Players Association opposed any drug program that included mandatory random testing, despite several proposals for such a program from different Commissioners.”76 This Report also found that during the course of the Mitchell investigation, “the Players Association was largely uncooperative.”77 Thus, the entire system of labor-management checks and balances failed all at once. And since baseball has a history of changing the game to suit its needs, specifically to enhance offense and home runs, why would the lure of steroid induced homers be any less tempting?

The nexus between the steroid era and the logical belief that the game could get away with it should be obvious. The cookie jar was full, and the game clearly felt immune from retribution, much like the child who feels secure in having bamboozled the unwavering support of one parent over the other. The antitrust exemption has been baseball’s ace in the hole since 1922—but it also has weakened the game in unforeseen ways of evolutionary intervention, and therein lies the true problem.

No, baseball is not an evil game. It is neither benevolent nor evil—it is merely an extension of us all. But beware the Shakespeare warning about “protesting too much,” especially as baseball vociferously backtracks from steroids and the Mitchell Report. To the contrary, baseball needs to dig deeper, to look under the steroid rug. After all, this is a game that still pretends the seventy-three home runs in 2001 were not tainted, and still hints that Roger Maris and his sixty-one dingers in 1961 somehow were (not because of steroids, but for tarnishing the near religious home run milestone of Ruth, which Maris eclipsed in 162 games, not Ruth’s 154). Clearly, we are left with a bigger question: has baseball itself been honest with the game, with history, and with us? The game may not be “evil,” but its front office integrity has been suspect for decades, even preceding Kenesaw Landis. The steroid era is only the game’s most recent gaff.

**REPEALING THE ANTITRUST EXEMPTION**

The antitrust exemption is not just a baseball enigma, and Congress should intervene but not solely because of the steroid era. The law as it stands is a grotesque legal anomaly, a brash endorsement of protectionism, and an

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77. *Id.* at 8.
arrogant testament to stubborn ignorance—none of which is helpful in a democratic nation where the rule of law depends on fairness and public acceptance. Consequently, there are at least six cornerstone reasons to repeal the exemption now.

1. The genesis of the Federal Baseball ruling is tainted, and so the decision itself is both tarnished and suspect in the first place.

2. Genuine or not, the original ruling is built on a wholly false premise: that Major League Baseball is not a business in interstate commerce. This is not only untrue now, it was false in 1922.

3. Congress does not need the exemption to maintain its grip on the game. Congress is not dependent on the perpetual threat of repeal; it already has enough subpoena power to rattle presidents, loose-cannon senators and colonels, and even the non-exempt NFL.

4. The ruling is a high profile blemish on the integrity of law that almost every sports fan understands as a boondoggle—hardly the right attitude in a society where the perceived integrity of law is essential.

5. If baseball itself is not deemed interstate commerce, drug trafficking certainly is. One could make a case for much of the game having been a drug ring of sorts, so if Congress or the courts need a new reason to revisit the game’s exemption, all the rationale they need can be found in the Mitchell Report.

6. The law of unintended consequences will strike again. Baseball’s artificial immunity and subsequent haughtiness have already played a part in racism, involuntary servitude, collusion, and probably steroids. Whatever may be next, it will probably be exacerbated by an antitrust free pass.

**CONCLUSION: CONGRESSIONAL HOBGOLINS**

Regardless of its inception, integrity, or propriety, the antitrust exemption is certainly out of step with the modern world. It stands as a long out-dated approach to revisionist legal theory and application, the need for which, if ever there was one, is long past. For guidance, Congress need look no further than Justice Holmes himself, who prior to Federal Baseball had published his acclaimed "Path of the Law" essay in the Harvard Law Review, which noted:

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have
vanished long since, and that the rule simply persists from blind imitation of the past. 78

Allowing Federal Baseball to stand uncontested in the face of logic, law, and the modern era is both a “blind imitation of the past” and an affront to American legal integrity. It almost ruined the game more than once, and most recently stands as a beacon of hypocrisy to the vulnerable youth of America. Moreover, its inherent duplicity unnecessarily aggravates the perennial national contempt for Capitol Hill that harkens the words of philosopher Ralph Waldo Emerson, a highly regarded contemporary of Holmes’s father, that should serve as a warning to Congress, baseball, and the rule of law: “A foolish consistency is the hobgoblin of little minds . . . .”79

“Perhaps ninety percent of baseball is half-mental,” to quote a source much closer to the game itself.80 Could this also be true of politics, business, and law? One thing can be predicted with reasonable certainty: if Capitol Hill does not act to repeal the antitrust exemption, the steroid era will not be the last aberration to tarnish the game of baseball.

“It will be like déjà vu all over again.” 81—Yogi Berra

78. Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457 (1887).
79. RALPH WALDO EMERSON, Self Reliance, in ESSAYS: FIRST SERIES (1841).
80. DICKSON, supra note 1, at 44.
81. Id.