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## Pretext: The Dark Side of Baseball

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# Pretext: The Dark Side of Baseball

Eldon L. Ham\*

Injustice anywhere is a threat to justice everywhere.

Martin Luther King<sup>1</sup>

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Baseball has always been a game of tactical deception (the curveball), clever shenanigans (stolen signs, the hidden ball trick), and outright lies (trapped balls and corked bats). But rather than tarnishing the game, baseball's unique larcenous ways on the field have long been part of the game's irascible charm that hearkens the essence of America's free-swinging politics and capitalism. But baseball does have a distinct dark side, and charm alone does not earn the game a pass. Baseball's historic embrace of blatant segregation

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1. Widely quoted, from King's *Letter from Birmingham Jail*, April 16, 1963. (King, Martin Luther, Jr. "Letter from the Birmingham Jail." In *Why We Can't Wait*, ed. Martin Luther King, Jr., 77-100, 1963.) (NOTE: it is preferable to cite the precise source for identification)

until—and often after—Jackie Robinson, the disingenuous flaunting of baseball’s baffling antitrust exemption, its acrimonious anti-labor stance, and eventually the steroid era, have all fostered a pathology of denial that harms not only the game of baseball, but a great deal more.

There is a bewitching allure to how baseball is played on the field of course, but baseball’s manipulative shenanigans have a more dubious history. Yes, the game’s overt racism has been widely denounced, and with good reason, but baseball has not been sufficiently criticized for other transgressions that undermine the credibility not just of baseball, but much of America itself, including its sly antitrust exemption and later how the game handled the steroid era. All of these transgressions undermine public confidence in all our institutions, not just baseball, particularly the United States Supreme Court which has been complicit in the continuing antitrust ruse.

There is a dangerous residue to baseball’s slippery contempt for fairness and justice because as it happens, baseball matters. Precisely because of its visibility and historic influence on American culture, baseball’s malfeasance matters more than prevailing attitudes about a mere game. Its arrogant indifference to justice has always been a threat to law and society, all of which has been enabled by baseball’s long embrace of the slippery legal axiom called “pretext.”

## I. BASEBALL AS AMERICA

As America’s first major professional team sport, baseball was anointed the great American pastime over a century ago for multifarious reasons, some random, some unlikely, others overtly manipulated. Sheer fate played a part, a poetic irony given St. Louis Browns iconic manager Branch Rickey’s observation about luck being the “residue of design.” At one time baseball was virtually the only professional team game, partly explaining its inexorable ties to capitalist America. Later the advent of radio helped propel the game, since radio had become commercialized at precisely the time Babe Ruth was sold to the New York Yankees where subsequent Ruthian home runs ignited a shock and awe jolt during the free-swinging Roaring Twenties. Those home runs were Ruth’s bread and butter, but they soon became a part of baseball’s overall appeal, helped along by some cleverly timed rule changes like banning spitballs in 1920 to help the offense, the very same year that Ruth and his bat burst onto the Big Apple stage.

Ruth had brought an unbridled Huck Finn attitude to our genteel Tom Sawyer game, and baseball would never look back. Coupled with the inherent larceny behind how baseball is played, the new marquee home runs almost certainly enhanced baseball’s role as the American pastime. After all, Ruth’s swing-from-the-heels moxie combined with baseball’s naughty gamesmanship symbolized the swashbuckling, no-holds-barred image that Americans had come to embrace about themselves.

This still holds true today. Baseball’s petulance reappeared, front and

center, during the 2013 season, when the Tampa Bay Rays pulled off a variation of the old “hidden ball trick” that picked Dodger Juan Uribe off third base, inspiring a media frenzy of national replay coverage. When Evan Longoria surreptitiously held the ball and tagged the unsuspecting Uribe, it became the first successful execution of the hidden ball trick since 2007, and the press loved it. “I’ve tried it four or five other times this year and never got anybody out in the big leagues,” said shortstop Yunel Escobar, who had tossed the ball to Longoria. The hidden ball success rate is not very good: it’s happened about 300 times in 150 years of major league ball.<sup>2</sup>

Over the decades, the basic fundamentals of the game have not materially changed, but baseball nonetheless continues to evolve, sometimes very dynamically. Accordingly, fans over the eons have learned to accept the dead ball era, the lively ball era, the spitball, Bobby Thomson’s home run shot heard round the world in 1951 (even though he probably benefitted from stolen signs), Gaylord Perry’s illegal greaseball pitch, the lowered pitching mound, the lifetime ban of Pete Rose, and myriad other anomalies and transgressions. Suddenly, though, America has begun to experience a great deal of difficulty in accepting one more sweeping issue, which we now call the steroid era, a contemporary topic that invokes hostility even in the face of baseball’s usual tolerance for on-field trickery. But why now? Why did steroids have such a deep-rooted effect?

The perception of unfairness is behind many of the more recent changes in modern American attitudes overall, while the specific psychology of injustice may be central to explaining why those shifts are happening now in particular. In February of 2012, the reigning MVP Ryan Braun lied straight to the camera and into the eyes of America by vociferously, and convincingly, denying his own use of banned substances. He then rubbed baseball’s nose in it with his outspoken protestations about the integrity of the testing itself, eventually overturning his failed drug test because of a breach in protocol about how the sample was handled. Then, in August of 2013, just 18 months later, Braun suddenly—and completely—recanted, apparently because he had become hopelessly entwined in the Biogenesis clinic scandal that was linked to Yankees slugger Alex Rodriguez, among others. When Rodriguez was hit with a record suspension by the league, he was incredulous. Together, the Braun circus and the Rodriguez consternation managed to become the last straw of American tolerance for baseball injustice. But just when was the *first* such straw? When, and how, did all this shift begin, or did it merely happen all at once? The root causes apparently took hold long before Braun and Rodriguez, prior to the Bonds home run record, and even before the Sosa-McGwire home run chase. The long, long slippery slope of baseball’s slide from grace and power began in another era altogether.

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2. *Rays Pull Off Hidden Ball Trick*, [http://espn.go.com/mlb/story/\\_/id/9557115/tampa-bay-rays-pull-hidden-ball-trick-los-angeles-dodgers](http://espn.go.com/mlb/story/_/id/9557115/tampa-bay-rays-pull-hidden-ball-trick-los-angeles-dodgers) (viewed 02.18.14)

Injustice is a bitter pill to swallow in or out of baseball. It was the perception of unfairness that caused many fans to flee the game after the 1994 labor wars canceled the World Series, which partly explains why World Series viewership is down dramatically since 1981, the last year the Series achieved a 30 rating (it was a mere 7.6 in 2012 and 8.9 in 2013)<sup>3</sup> It is also a sense of injustice that fuels fan hostility toward steroid era baseball, the steroid users, and even the game's commissioner Bud Selig. Fans can accept spitballs as part of the game's bad-boy legacy, but they are not so forgiving when directly lied to, whether by Pete Rose about gambling, or Ryan Braun, Alex Rodriguez, the players union, or Commissioner Selig himself when it comes to performance enhancing drugs. They can usually accept an umpire's blown call, but fans are insulted if the ump cannot or will not fix it with a simple glance at replay, especially in a media age when the NBA and NFL make such productive use of replay. The open use of a replay system conveys not just fairness, but the perception of fairness. Fans can deal with stolen home runs aided by signs lifted from the catcher, but fans seem unwilling to accept blatant, institutionalized injustice. They don't want to be lied to or used anymore.

The accomplished Packers quarterback Aaron Rodgers, who plays in the same state as Braun (Wisconsin), echoed the sentiment: "It doesn't feel great being lied to like that," he said publicly. Rodgers should know. He was friends with Braun, and is also Braun's business partner in a local restaurant. Moreover, Rodgers had initially backed his friend before Rodgers realized Braun had lied to his face, as the quarterback would later put it.<sup>4</sup> Rogers' disappointment was deeply personal, evoking powerful psychological principles of fairness. Braun, though, is not the only one to blame. Baseball itself has been complicit in its own self-destruction, a folly that started even before the steroid era. There is, as it happens, a broader baseball abyss that was the root of the game's true problems.

Because its early foothold and evolving star power provided a strong platform, baseball popularity was poised to explode once Babe Ruth began cracking home runs in bunches. Star power, though, can also beget arrogance, and that leads to a slippery slope of lies if not outright corruption. "Power tends to corrupt, and absolute power corrupts absolutely," as the English politician Lord Acton cynically put it in 1887.<sup>5</sup> When baseball became the American pastime, it was all-powerful in the world of team sports, the American entertainment business, and even in politics. It was at this point, around the time of Kenesaw Landis' appointment as commissioner in 1920, when baseball

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3. "World Series Television Ratings," <http://www.baseball-almanac.com/ws/wstv.shtml> (viewed 02.19.14)

4. "Aaron Rodgers: Ryan Braun Looked Me in the Eye and Lied," NBC Sports. <http://profootballtalk.nbcsports.com/2013/07/26/aaron-rodgers-ryan-braun-looked-me-in-the-eye-and-lied/> (viewed 11-16-13).

5. Phrase Dictionary, Meanings and Origins, "Power Corrupts." <http://www.phrases.org.uk/meanings/absolute-power-corrupts-absolutely.html> (viewed 11-16-13)

fell victim to Lord Acton's postulate. The game would eventually become its own worst enemy.

## II. PRETEXT AND THE GAME OF LIES

All sports leagues have wrestled with credibility issues since each league has to balance a fine line between cooperation and legitimate competition. The NBA draft lottery, implemented to counter accusations of throwing games to land higher draft picks, has itself seemed suspicious, like when the dominant Patrick Ewing landed on the Knicks in 1985, the first year of the NBA lottery system. But instead of addressing many of its issues openly, baseball resorted to its roots of trickery and deception.

Baseball's own fall from grace accelerated when the game discovered the world of "pretext," a term of art to describe when an apparent legitimate purpose is used as a smokescreen to detract from the real, very different, and usually illicit objective. "The excuse to legalize an illegal activity," is how Black's Law Dictionary puts it.<sup>6</sup> Was this a function of Landis' legal training? A coincidence? A natural outgrowth of baseball's larcenous ways? Or maybe this embrace of pretext was merely a function of fate and opportunity? Whatever the inspiration, baseball has continued to embrace pretext to a fault. There is no shortage of examples: "the black ballplayers aren't good enough;" "baseball is not a business;" the snub of Roger Maris for what many irrationally deemed an inferior career body of work; the reserve clause; Commissioner Ueberroth's great baseball collusion; crocodile tears and the steroid era; and the shunning of most instant replay for reasons of "tradition (at least until the 2014 season)" Joe Jackson's shoes, life-size image, bat, and jersey can be found at the Hall of Fame—but Shoeless Joe himself is not there. What is the sense of that? One of the more perplexing anomalies is baseball's willing acceptance of the bloated steroid records while concurrently blackballing the players who set those records. Much about baseball these days seems disingenuous. The All-Star Game, for example, now has a pretend meaning all its own after baseball diluted the long grueling season by pegging World Series home field advantage to sheer fiat: based on the all-star game winner. Pretending an exhibition game matters more than the real baseball season to prop up the ratings? More pretext.

Baseball is so engrained in American culture that many of the baseball's numbers need no explanation at all, like 61, 60, 56, and .406.<sup>7</sup> Baseball is also a game of dates, a unique attribute of our national pastime that is unlike football or basketball or other major team sports, with some years speaking volumes on their own: 1919, 1927, 1941, 1956, 1961, 1998. All were major milestone

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6. Black's Law Dictionary Online, 2d Ed., "Pretext." <http://thelawdictionary.org/pretext/> (viewed 11-16-13).

7. For less devoted fans, in order: Babe Ruth's final home run record, the immortal 60 homers of 1927; the 61 Roger Maris home runs that broke Ruth's record in 1961; the Joe DiMaggio hitting streak that some say is the greatest record in baseball history; and the last season batting average to reach .400 or better, Ted Williams' .406 in 1941.

seasons, but those two years at each end—1919 and 1998—were red-letter dates of dubious notoriety.

The 1919 black sox gambling scandal led directly to baseball's appointment of its first genuine commissioner, Kenesaw Mountain Landis, who soon invoked the infamous lifetime suspensions of the "eight men out" Chicago White Sox players. Suspending so many players, so harshly and for so long, was a clear statement by Landis: gamblers beware. It still resonates today, and is the single biggest reason that iconic infielder Pete Rose is still banned from baseball. The other tarnished year, 1998, saw the greatest home run chase since Roger Maris and Mickey Mantle dueled to nearly the end in 1961, the campaign when Maris tasted glory and infamy by surpassing not one, but two baseball icons: the fair-haired boy wonder Mickey Mantle and the irascible, unassailable, Babe Ruth, whose consummate home run record they were both chasing.

Interestingly, the year 2001 never gained its own unique infamy, even though it marks the quantum leap home run year of Barry Bonds' 73 home runs. By this time the public was desensitized to milestone long ball numbers, disgusted by lies, and resigned to the fact that no legitimate players could ever surpass such a mark. At first it appeared that Bonds' homers were something of a scarlet number that shone a light on Bonds' indiscretions. But now it seems more like this new single season home run record is illusory, almost invisible, and certainly not credible to the public eye.

### III. BASEBALL SEGREGATION

Pretext has long been used to justify racial segregation in America, but baseball perfected that excuse sometime around 1890. When the current major leagues were formed during the National League debut of 1876, African Americans like Moses Fleetwood Walker were given an opportunity to play. But there were not many like him, and those players who actually took the field did not last long, while the first black player to play pro ball of any sort, Bud Fowler, never actually made it to the majors.<sup>8</sup>

On the field of play, baseball featured a colorful but dubious array of machinations. In the very early days, the second baseman would sometimes grab the belt of a runner headed for third, and even the modern era has seen its share of spitballs, corked bats, stolen signs, and other creative gamesmanship like growing the infield grass extra long at Chicago's Wrigley Field.<sup>9</sup> Off the field of play, baseball manipulated fans, law, and history. In June 1942, a team of major league all-stars led by Dizzy Dean lost three straight games to the all black Kansas City Monarchs. Commissioner Landis canceled the scheduled

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8. Fowler's baseball journey was a remarkable story that began with the International Association in 1878. See "Bud Fowler," [http://www.baseball-reference.com/bullpen/Bud\\_Fowler](http://www.baseball-reference.com/bullpen/Bud_Fowler) (viewed 11-16-13).

9. Bill Veeck, when he owned the Milwaukee minor league franchise, even had a moveable outfield fence that he brazenly manipulated to change the outfield distance.

fourth game, and the very next month Landis articulated his official position on major league integration: “Negroes have not been barred from baseball . . . and never have been in the 21 years I have served. There is no rule in organized baseball prohibiting their participation and never has been to my knowledge. If Durocher, or if any other manager, or all of them, want to sign one, or twenty-five Negroes, it’s all right with me. The business of the commissioner is to interpret the rules of baseball, and to enforce them.”<sup>10</sup> Whether in sports, politics, or business, denial works only for short periods at best, and big changes would come soon for baseball.

On November 25, 1944, a little more than two years after Landis’ express denial about racism, the commissioner died in a Chicago hospital at age 78. Less than one year later, on October 23, 1945, Branch Rickey was signing Jackie Robinson to a minor league deal with the Dodgers organization. With that die cast, the future of baseball integration was inevitable. Landis said he had never banned black players from the game, but it still took his death before the first African American was signed.

We do not know whether Landis ever actually said there would be no Negro major leaguers except “over his dead body,” but that is, in fact, what happened. More recently the major leagues resisted serious drug testing and penalties long after steroids had infested the game, and well after the NFL and NBA had implemented their own successful testing programs. Denial at work, but only until the truth crushed it yet again, unraveling the home run era of steroid deception.

#### IV. THE ANTITRUST RUSE

Baseball’s unwritten “no blacks” edict emerged during the Nineteenth Century when baseball closely reflected widespread American attitudes. The resultant segregation certainly was not good, but neither was it unusual, given the times. In some ways the slightly more recent antitrust exemption is nearly as troubling because it may have purposely been manipulated to undermine prevailing federal law, namely the Sherman Antitrust Act of 1890.<sup>11</sup> And, unlike the old days of segregation, the antitrust exemption still exists as a legal farce. Some may be reluctant to criticize baseball for merely benefiting from an aberrant Supreme Court decision insulating the game from antitrust laws—but does baseball deserve such a simplistic pass? Before his stint as commissioner, Landis had been a Chicago federal trial judge noted for his baseball affinity and his antitrust acumen. Curiously, the *Federal Base Ball* antitrust case, filed by a fledgling new league against the National League and which eventually wound its way to the Supreme Court, had originally been before Landis himself.<sup>12</sup> One

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10. Kalb, Elliott, and Weinstein, Mark, *The 30 Greatest Sports Conspiracies of All Time* (New York: Skyhorse Publishing, 2009), 19.

11. Sherman Antitrust Act (Sherman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. § 1–7).

12. *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Baseball*



of the original defendants had been the Chicago Cubs, owned by William Howard Taft's half-brother—the same William Howard Taft who used to be president and who was chief justice of the Supreme Court that heard the *Federal Base Ball* arguments. This, taking place precisely when the Court was deciding the case, created more than a mere conflict: it was an incestuous disgrace for which Taft should have recused himself. But he did not do so, because, simply, he did not have to. To be fair, the Cubs themselves were no longer a party by the time the case had reached the Supreme Court thanks to some persuasive arm-twisting by Landis. In fact, by the time *Federal Base Ball* had reached Taft, all the plaintiff teams had settled except for one, the Federal Baseball Club of Baltimore, which had opted to continue the fight. Still, any decision rendered by Taft and the Court would clearly have impacted the National League and therefore the Chicago Cubs. No matter. The case—and Taft—pressed on.

Did the Court really believe that major league baseball was not a business in interstate commerce? In the context of the times, this reasoning may have offered something of a plausible ruse—baseball was still thought of as a sport, if not a mere pastime—but even given this broader context, any conclusion that major league baseball was not an interstate business was patently erroneous, both logically and legally. So what happened?

Before he was the big league commissioner—and for a while during his baseball tenure, too, which caused a riff of its own—Kenesaw Landis was a federal district judge in Chicago. He was a rabid fan of both the Cubs and White Sox, and was often a fixture at games for both clubs. Moreover, as a jurist, Landis had the reputation and swagger of an antitrust expert. The Sherman Act of 1890 codified American antitrust laws, which were developed further in ensuing federal law.<sup>13</sup> These were the turn-of-the-century days of industrialists, robber barons, and bigger than life tycoons like Rockefeller, Carnegie, Vanderbilt, and Ford. Prosecutors were just learning how to use these antitrust laws as a powerful tool. In fact, Landis himself had already levied a fine against Rockefeller's Standard Oil in the staggering amount of \$29 million, after which Landis found himself the “most talked of person in America.”<sup>14</sup>

When the Black Sox scandal broke at Chicago's south side, the whole country learned that the 1919 World Series between Chicago and Cincinnati had been rigged by gamblers. Baseball immediately sought to repair its image

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*Clubs, et al.*, 259 U.S. 200 (1922). The actual case before the Supreme Court had been re-filed in a new jurisdiction, but the Baltimore plaintiff, the defendant National League, the facts, and the issues were all the same. Note: the case was filed when “base” was still an adjective, hence the awkward looking “Base Ball” in the title.

13. 15 U.S.C. Sec. 1-7.

14. *United States v. Standard Oil Co.*, 148 F. 719 (N.D. Ill. 1907). See also: Sigman, Shayna, “The Jurisprudence of Judge Kenesaw Mountain Landis,” *Marquette Sports Law Review*, Vol. 15, No. 2, <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1326&context=sportslaw> (viewed 11-30-13).

with an independent, tough-minded commissioner. The owners first turned to William Howard Taft who, as president, had ramped up antitrust prosecutions, doubling the number of suits that his predecessor Teddy Roosevelt had pursued and earning high profile victories against the American Tobacco Company and United States Steel. Taft, though, felt he had a good-enough job already at the Supreme Court and declined. Landis was offered the post and jumped at the chance to guide his beloved game of baseball.

Was baseball's sudden interest in politically connected jurists, especially those with significant experience in antitrust, a mere coincidence? Fixing baseball's image and standing after the Black Sox debacle would require a great deal of centralized power in the office of the commissioner. Baseball was already front-page news, catching the national eye of politicians and prosecutors just as the federal trustbusters were wielding the antitrust laws against powerful interstate businesses. So at the very least, it would have been helpful to select a commissioner skilled in the nuances of antitrust, perhaps even one who could navigate the very real *Federal Base Ball* case itself as it worked its way up to the nation's highest court. After all, *Federal Base Ball* was virtually the same case that would lead to major league baseball's famous antitrust exemption.<sup>15</sup>

Suspiciously, the *Federal Base Ball* dispute had begun with Landis as the original presiding trial judge in Chicago. Landis had delayed the case, then pushed a settlement through when the cash-strapped Federal League struggled. But the owners of one club, the Federal Base Ball Club of Baltimore, opted to keep fighting and pursued their own action that led to the eventual "baseball is not a business in interstate commerce" ruling penned by Supreme Court Justice Oliver Wendell Holmes while Taft was Chief Justice.

Although later distinguished and somewhat diluted over the decades, the essence of the *Federal Base Ball* antitrust exemption still stands. The Supreme Court famously opted to not overturn the curious antitrust exemption by ruling against St. Louis outfielder Curt Flood in his subsequent challenge in 1972.<sup>16</sup> However, every other major sports league in America, including the NFL, NBA, and NHL, has been deemed a business in interstate commerce subject to federal antitrust laws.<sup>17</sup> Even casual sports fans can sense the paucity of logic or legal reason behind such an anomaly. Many serious fans are familiar with these incongruous rulings, dismissing the baseball antitrust exemption as an inexplicable aberration.

Although the baseball antitrust exemption certainly is an aberration, it is not inexplicable. Nor, perhaps, is it an innocent curiosity. Although many knowledgeable fans are just resigned to it, those inclined to delve further may

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15. See *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs et al*, 259 U.S. 200 (1922).

16. *Flood v. Kuhn et al*, 407 U.S. 258 (1972)

17. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978), and *Robertson v. National Basketball Association*, 389 F.Supp. 867 (S.D.N.Y. 1975).

sense that something more was afoot, which diminishes the perceived integrity of the Supreme Court. Landis had killed most of the *Federal Base Ball* case while he was still a sitting federal district judge in Chicago before the Black Sox 1919 World Series scandal damaged baseball's reputation and jeopardized its future. Landis had a mandate to rule and restore the game. He did this by centralizing power, which he wielded by intimidating all the players, meting out major suspensions of select members of the Black Sox, and others. Even Babe Ruth was suspended for the first six weeks of the 1922 season as punishment for an allegedly illicit barnstorming tour he had participated in after the 1921 World Series. Teammate Bob Meusel got the same treatment for his role on the tour. As history well knows, those infamous eight members of the 1919 White Sox fared much worse, since they were not just suspended, they were promptly banned from baseball for life.

However, such unrestricted, centralized control of major league baseball left the game vulnerable to antitrust attacks. Baseball was and is a consortium of individual teams working in concert as a professional sports league. Under the law, baseball's structure is recognized as a "private association." This point has been litigated numerous times over the decades, including the *American Needle* case in 2010 whereby even the single-entity licensing arm of the National Football League was held to be part of the multiple entity structure of the league.<sup>18</sup> Landis, as an antitrust expert, would have been keenly aware of this risk and its implications for major league baseball, a front-page consortium of owners if ever there was one.

Landis arm-twisted a settlement in *Federal Base Ball*, except that he could not get the Baltimore franchise to go away. Without some form of relief, an adverse *Federal Base Ball* ruling would surely jeopardize the ironclad control that Landis and the owners exerted over baseball and its players. In the end, it seems likely that the eventual "baseball is not a business in interstate commerce" ruling relied more upon pretext than either precedent or fiat. The circumstantial evidence, in fact, is overwhelming.

To begin, the abject absurdity of the finding speaks largely for itself. Then consider the motives behind baseball's desire for centralized control, the incestuous nature of the *Federal Base Ball* case and the Taft family involvement with the major leagues through its ownership of the Chicago Cubs, and the tapping of Landis as an antitrust expert and federal judge whose fingerprints were all over the *Federal Base Ball* dispute. Consider also that Taft himself, who was chief justice at the time, had been an aggressive user of federal antitrust laws when he had been president. This was also an era when arguments concerning Congressional powers to regulate interstate commerce were emerging in conjunction with the commerce clause at Article I, Section 8 of the Constitution. As a matter of fact, the Supreme Court interpreted the impact on interstate commerce very broadly, including findings that even

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18. *American Needle, Inc. v. National Football League et al*, 130 S. Ct. 2201 (2010).

empty rail cars moving intrastate, or not moving at all, could affect interstate commerce and were subject to federal rail car safety laws.<sup>19</sup> But then consider the illogical implications of *Federal Base Ball*. Load those same rail cars with ballplayers and equipment, move them from state to state and city to city to perform entertainment exhibitions of baseball for profit before millions of spectators, and there is no impact on interstate commerce?

But can we concede the banality of the *Federal Baseball* ruling, yet still excuse it as some kind of folly? Not likely; apparently, even the Supreme Court itself did not believe in *Federal Base Ball*, or at least in its principles. Just one year later, Justice Holmes, who wrote the *Federal Base Ball* opinion, penned another decision finding that traveling Vaudeville troops hauling stage props and scenery from state to state were engaged in interstate commerce.<sup>20</sup> So traveling clowns, thespians, and comedians are instruments of interstate commerce, but major league ballplayers are not? Considering all these circumstances, which seems more logical: the Supreme Court had lost its mind, or the supposed paucity of interstate commerce by major league ball was legal pretext for something else? Perhaps something like insulating Landis' beloved major league baseball from federal antitrust laws?

#### V. THE STEROID ERA

Baseball proceeded to wield its court-protected powers indiscriminately, invoking the famous reserve clause to prevent player movement—at least until the Andy Messersmith and Dave McNally arbitration decision that ushered in the age of free-agency—<sup>21</sup>not to mention vigorously enforcing baseball's antigambling policy and other player conduct rules, and even invoking the game's discipline measures against recalcitrant owners like Charles O. Finley and Ted Turner.

Thanks to banned Reds star Pete Rose, neither Rose nor Shoeless Joe, nor any of the other 1919 White Sox players are even eligible for Hall of Fame consideration. Rose was eventually imprisoned for tax evasion charges stemming from his gambling history. He was released on January 7, 1991. Less than one month later, on February 4, 1991, the Hall of Fame changed its rules making all players on baseball's "permanently ineligible" list officially ineligible for induction. One might call this the "Pete Rose Rule," but it now applies to all those on the list. The effect is to extend lifetime bans into perpetuity, even after death.

Fast-forward to the steroid era, when baseball neglected to use its aggressive power to purge and suspend without retribution, instead keeping its head in the sand precisely when home runs were rejuvenating a fan base that still felt burned by the 1994 labor action and cancelation of the World Series.

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19. See, for example, *Southern Railway Co. v. United States*, 222 U.S. 20 (1911).

20. *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923).

21. See *Professional Baseball Clubs*, 66 LAB. ARB. REP. (BNA) 101 (1975) (Seitz, Arb.).

Commissioner Selig could have, and should have, clamped down right after the 1998 record season of Sosa-McGwire, but the game was still basking in the greatest home run chase since the Maris-Mantle dual of 1961. Baseball should have suspected the steroid era in 1998, if not before, but surely it must have known the truth by 2001. The statistical evidence was in plain sight: the six greatest home run seasons in the history of major league baseball all occurred from 1998 to 2001, displacing the revered marks of Babe Ruth, Hank Aaron, and Roger Maris, and diluting the other great milestones of Mickey Mantle, Willie Mays, Ted Williams, and other icons.

No one knows when the first steroid shots were taken, but for all practical purposes the official “steroid era” did not begin until those injections actually manipulated the game and its record books. This time frame may never be fully proved by testimony, but it can be determined statistically by circumstantial evidence. Beginning in 1969 with a lowered pitching mound, the total league-wide home runs jumped from around 2,500 annually to about 3,000 per year, although there were slight deviations from year to year thereafter, as might be expected. The most significant was a drop to 2,235 homers in 1976 followed by a large jump to a record 3,644 in 1977 (+63.04%), before the totals settled in around the low 3,000s in most years. There was a sizeable increase from 3,038 in 1992 to 4,030 in 1993 (+32.65%), after which the shortened 1994 season was followed by another noticeable jump from 4,081 (in 1995) to 4,962 in 1996 (+21.58%). Then came the iconic 1998 home run season of Sosa-McGwire when the entire major leagues also set a record, surpassing the 5,000 homer plateau for the first time, at 5,064. The totals remained over 5,000 every year until a downward trend emerged with 4,957 in 2007. At the same time, concerns about performance enhancing drugs were gaining traction and attracting public scrutiny. It was during 2007 that baseball’s Mitchell Report was being investigated and compiled by former U.S. Senator George Mitchell. During a span of less than five months, between February 27 and July 6, 2007, a suspect Orlando pharmacy was raided, Rangers player Jerry Hairston, Jr., allegedly received a shipment of HGH from a New York pharmacy, a former Mets clubhouse worker pleaded guilty to felony steroid charges, and the Tigers’ Neifi Perez became the first player suspended for a testing violation due to Performance Enhancing Drugs (PED).

In addition to analyzing the league-wide home run totals, an examination of the individual league leaders reveals a provocative collection of milestones and anomalies. For 70 big league seasons from 1928 through 1997—seven long ball decades from the likes of Ruth, Gehrig, DiMaggio, Greenberg, Foxx, Mays, Aaron, Williams, Mantle, Jackson, and many more—only one player, Roger Maris, managed to slug at least 60 homers in a season, and he did it only once. From 1998 to 2001, Sammy Sosa alone did it *three* times (slamming 66, 63, and 64)—and *not one* of those times did he even lead the league. Someone else was always better: Mark McGwire bested Sosa twice, Bonds once. In 1996, McGwire slugged 52 home runs, the highest league leading total since

George Foster hit 52 for the Reds in 1977. The last player to hit 52 before Foster was Willie Mays in 1965, and before him it was Roger Maris with 61 in 1961, when Mickey Mantle managed 54 before an injury took him out of the home run race<sup>22</sup> After McGwire reached 52 in 1996, Ken Griffey, Jr. slammed 56 in each of 1997 and 1998, bested by McGwire's superhuman 70 in 1998 to best Sosa's 66 that same year. McGwire hit 65 more in 1999, before plummeting to just 32 homers in 89 games during 2000, and 29 homers in 2001, his final year.

Then came the Barry Bonds scarlet number, 73 home runs in 2001 that represent the current official record, even though the Bonds' mark is widely dismissed as a steroid aberration. Thereafter, the leading league totals slipped into the 40s and low 50s. By 2008 Miguel Cabrera was topping the AL with just 37, while Ryan Howard lead the NL that same season with 48. In 2013, Baltimore's Chris Davis made a nice run with 53, drawing the attention of the press and fans while he flirted with Roger Maris' record pace through July. Tellingly, the media focused on Maris and hardly ever compared Davis' potential to the unreachable numbers of Bonds.<sup>23</sup> Why bother?

Today we know why the long ball numbers are askew, yet the game has become strangely bi-polar: the steroid era sluggers are blackballed from the Hall of Fame, but the records they set still stand. What is the sense of that? Even Maris remains an enigma. The game still ostracizes Maris, whose home run ball, bat, and jersey are displayed at the Hall of Fame—yet Maris himself cannot be found there. And why does baseball embrace the steroid records but not the players who set them? In the Olympics, the records set by juiced athletes are immediately rescinded, and if baseball had that rule Maris would be back on top, right where he would be had the steroid era not existed. But now we learn that even with testing, lawsuits, and Congressional hearings, the game still isn't wholly clean anyway. No wonder the public has grown weary while baseball's lifeblood television ratings continue to slip. Once the crown jewel of sports championships, the World Series last had a 30 rating in 1981 according to Nielsen Media Research. The last time the World Series ratings reached 20 was

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22. Mantle was a homerun prodigy who was already a member of the 50-homer club and a proven Triple Crown winner. Maris, an established power hitter, hit just ahead of Mantle in the Yankees lineup during most of 1961 and probably benefitted by seeing better pitches as a result. (We do know that he was not intentionally walked even once that season.)

23. There is at least one anomaly in these numbers. Ken Griffey, Jr. has not yet been linked to steroids. However, his statistics from 1996 through 1999 seem like an aberration, suggesting that either the steroid era is not so obvious by the numbers alone, or perhaps that Griffey was not necessarily clean during those years. During each of his first four years in the majors, Griffey never hit more than 27 homers. Then he managed two better seasons at 45 and 40. During 1996 through 1999, Griffey's home run totals were 49, 56, 56, and 48, respectively. Only once did Griffey ever lead the league in RBIs, slugging, or total bases, but he did all three in 1997, the first of three times he would also lead the league in home runs. Although the 50-homer plateau was reached 21 times through 1996, it has been achieved 22 times since then. Griffin may have been clean, but perhaps we will never again know for sure which players and numbers are wholly beyond reproach.

in 1992, and now the level hovers in single digits, including an anemic 7.6 in 2012. (The ratings improved a bit for an interesting Boston-St. Louis Series in 2013, but still languished in single digits at 8.9.)

Throwing the book at Ryan Braun and Alex Rodriguez, as baseball did in 2013, is good for headlines, but baseball needs much more to regain its image as an American institution.<sup>24</sup> Although not the marquee MLB standards, at least the home run record of Roger Maris still stands as the official American League standard, as do many AL marks that were unscathed by the plethora of National League sluggers linked to performance enhancers. It will be very difficult for anyone to slam over 60 jacks against fresher, specialized pitchers during our current era of relief pitchers and set-up men, let alone to threaten the drug inflated marks of 70 and 73, but even if someone does, *and* remains clean, the perceptions of a skeptical public will likely tarnish those new milestones for years to come.

Baseball, however, is finally doing the right thing by addressing the present to save the future. But it also needs to remedy the past, own up to the steroid era, and set the records straight. Fixing the baseball record book mess is not easy, but there is one way that acknowledges the steroid era without impugning specific individuals: give an asterisk to Roger Maris and Hank Aaron, recognizing both as the “last home run record holders in the pre-steroid era.” This way every Chris Davis slugger of the post-steroid era, including the current one, will have something to legitimately aim for. And baseball can stop living a big lie about its bloated records. The game may actually find that it more exciting when new young stars can start swinging for the Maris and Ruth marks again. But even so, baseball’s post-steroid reputation will remain fragile. The public may be skeptical about how clean the game is in the future, fueled by continuing transgressions like the recent Braun and Rodriguez issues in the wake of baseball’s tarnished reputation as a denial factory throughout the steroid era.

#### CONCLUSION

Baseball has a reputation for bending history to suit itself. Although such manipulation has been effective over the decades, it comes with a price, casting baseball in a unfavorable light with a commensurate long-term cost to the game’s credibility. Baseball’s eventual downfall may not be driven by any one given miscue, although the steroid era is doing plenty of harm, but the game’s overall obsession with pretext may be its ultimate Waterloo. The baseball of old pretended African-American players were not good enough, then pretended that chugging players around the country for big money is not an interstate business, and once even pretended that a frigid October night was not cold when then commissioner Bowie Kuhn sat in the stands with no overcoat but

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24. Sometimes those headlines can backfire, evidenced by the Rodriguez accusations of a Selig vendetta followed by a Rodriguez lawsuit that he subsequently abandoned.

plenty of denial during the groundbreaking 1976 World Series night game in Cincinnati.<sup>25</sup> Today, Baseball's pretext has continued to worsen: the game embraces steroid records but not the players who set them; continues to ostracize Roger Maris while also featuring his memorabilia at the Hall of Fame; and falsely manipulates the World Series home field based on the results of an exhibition game. Moreover, until recently the game dragged its feet on steroid testing while pointing fingers everywhere but in the mirror; was the last major team sport to embrace instant replay; and, above it all, still, to this day, pretends that major league baseball is not a business in interstate commerce, even though this billion dollar interstate behemoth of radio and television is clearly a multi-state commercial enterprise.

It is the collective ruse driven by all these aberrations that matters most, even morphing the sport of baseball into something of a national joke. Pretext, if used at all, must certainly be invoked only sparingly and with great discretion. If the public can be perpetually lied to with such blatant falsehoods as the steroid shell game and the antitrust exemption, or the freezing out of black players before that, the public will not only mistrust baseball, it will understandably exhibit a widespread mistrust all institutions, in particular the United States Supreme Court and Congress, both of which are complicit in baseball's legal shenanigans, while both are on the receiving end of much public skepticism already. If the Supreme Court can officially pretend baseball is not a business subject to antitrust laws, saying it with a straight face no less, who can seriously trust the Court when it rules on abortion, voting rights, presidential elections, hanging chads, or more recently the Affordable Care Act? The same holds for a Congress that refuses to fix the problem legislatively during an era when Congressional approval ratings are at all-time lows. The public does not like to be lied to, nor does it want to be made into fools. Low ratings, whether from the World Series, approval polls, or the voting booth, are the inexorable price.

Pretext is hardly new, of course. It has long been the tool of charlatans looking to undermine truth, fairness, and justice. The precise meanings of the term vary in form but not substance, for they all lead to the essence of this representative definition: "Pretext: The reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation; or which if true are not the true reasons for such act."<sup>26</sup> Pretext is a common ruse of politics, law, discrimination, and history's greatest injustices like the old argument that African Americans should sit at the back of the bus "for their own good," as though benevolent concern is the reason for such cowardly customs. Baseball, though, can do its part not just for the history and sake of

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25. See "Sports of the Times; The Thermal Man," <http://www.nytimes.com/1982/11/02/sports/sports-of-the-times-the-thermal-man.html> (viewed Nov. 8, 2013).

26. See, for example, "pretext" at <http://www.lectlaw.com/def2/p153.htm> (viewed Nov. 6, 2013).



the game, but indeed for America itself, by embracing truth at the expense of pretext. If baseball does not, then Congress should act, at least where the disingenuous antitrust exemption is concerned.

Each of the NFL, NHL and NBA has been deemed subject to federal antitrust laws, as has the NCAA. Most sports leagues have had problems with drug issues, both recreational and performance enhancing. But the NFL and NBA aggressively responded with serious testing programs over 20 years ago. And other leagues have made productive use of instant replay long before baseball, even though baseball is a great candidate given the nature of its bases, home run lines and distant outfield plays.

As for the steroid era, the Hall of Fame, the All-Star Game, the new one-game playoff ploy that reduces whole seasons to the whims of one final game, instant replay, and other misadventures, baseball itself will have to reassess its priorities—unless the game actually prefers obscurity. “The fault,” according to Shakespeare’s Cassius, “is not in our stars, but in ourselvesFalse”, a point drive home centuries later cartoonist Walt Kelly’s Pogo and a forest of cartoon characters making one of the lasting observations of the Twentieth Century: “we have met the enemy and he is us.”<sup>27</sup>

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27. Kelly, Walt. “We have met the enemy and he is us.” <http://www.ask.com/question/we-have-met-the-enemy-and-he-is-us> (viewed 11.23.13).