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THE SOVEREIGN NATION OF BASEBALL: WHY FEDERAL LAW DOES NOT APPLY TO "AMERICA'S GAME" AND HOW IT GOT THAT WAY

MITCHELL NATHANSON*

ABSTRACT:

This article examines the relationship between Major League Baseball ("MLB") and the law; discussing how it has evolved that MLB has become unofficially exempt from federal law on a wide range of issues due to its unique status within American society. Although its antitrust exemption is well-known, MLB has, in practice, not been subject to the forces of federal law in many other contexts as well, setting it apart from most other corporations and organizations - even other professional sports leagues such as the NFL, NHL and NBA. As a result of the wide berth provided to MLB by the federal courts and legislature, MLB has largely been free to govern itself pursuant to its own definition of what is in "the best interest of baseball" - denying its players even the most basic and fundamental due process rights, arbitrarily punishing those it has labeled as "rogue" owners, and willfully violating federal law that has applied to it for decades in theory but not in practice, in the process. From its inception in 1876 to the present, MLB has been, in effect, an extra-judicial entity, a society unto itself, answerable to no one in all but the most extreme circumstances. It is this atmosphere of de facto sovereignty that has led to the culture of corruption identified within the recently released Mitchell Report, which beneath the fireworks over the names of the players identified within the report, quietly and systematically details MLB's decades-long disregard for federal law. Such disregard eventually provided a fertile breeding ground for the corporate malfeasance that permitted MLB to ignore both federal law and the overwhelming evidence of illegal drug use taking place within its locker rooms and to, in fact, encourage it throughout the 1990s and 2000s. In the end, as the Mitchell Report highlights, in MLB it was the system itself that was corrupt, with the identified players merely symptoms of the problem, rather than the problem in and of themselves. This article examines how things progressed to this point.

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I. INTRODUCTION

On November 16, 2007, Barry Bonds – baseball’s all-time home run king – was indicted on four counts of perjury and one count of obstruction of justice stemming from his federal grand jury testimony in connection with the investigation of steroid use in sports in general and, in Bonds’ case, Major League Baseball in particular. Pursuant to the indictment, federal prosecutors alleged that Bonds perjured himself when he denied ever knowingly having taken steroids and human growth hormone, suspected performance-enhancing substances. This day was a long-time in coming, as the federal investigation had dragged on for several months, with the much anticipated and expected indictment the subject of much speculation within the world of Major League Baseball (“MLB”). Now that it had arrived, it was largely greeted with cheers from the commentariat: The New York Times hailed it as “A Good Day for Baseball,” promising that, as a result of the official ferreting out of Bonds, “A Better One Looms” in the future.

Very quickly, Bonds was vilified – compared to other high profile, recently-ousted liars such as entertaining magnate Martha Stewart and government official I. Lewis “Scooter” Libby, Jr., – and portrayed as an outlier: an immoral cog in an otherwise righteous wheel. In fact, the very indictment itself was perceived as an indication of the integrity of the system: it may have its flaws, but it eventually identified and spit out the wrongdoers. A couple of months later, in January, 2008, star shortstop Miguel Tejada found himself in much the same position as Bonds, Stewart and Libby, when he too was investigated for perjury in conjunction with his testimony regarding steroid use to a Congressional committee. In all of these examples, Americans could take solace in the idea that regardless of the ugly facts involved in these cases, evil was rooted out. In the end, the system worked.

Bonds and Tejada, however, were not the lone outliers. On December 13, 2007, another event much anticipated in the world

2. See Id.
3. Id.
4. See Alan Schwarz, Prosecution’s Best Pitch Is Precision, Experts Say, N.Y. Times, Nov. 17, 2007 (“Bonds’s situation and Libby’s situation are particularly similar, in regard to the denials of any kind of wrongdoing,” according to Peter Keane, a professor at Golden Gate University School of Law).
5. See Alan Schwarz, Justice Department Asked to Investigate Tejada, N.Y. TIMES, Jan. 16, 2008 (reporting Tejada may have lied to House committee in 2005).
of Major League Baseball took place: the release of "The Mitchell Report." In the report, former United States Senator George Mitchell, acting upon the request of MLB commissioner Bud Selig, identified dozens of other players who had taken steroids and other suspected performance-enhancing substances in violation of federal law over the past several years. Upon its release, baseball had, in the eyes of Selig, closed a chapter: the outliers were identified, perhaps they would be reprimanded, and baseball had been cleansed. "This report is a call to action," Selig said as he rose his right index finger during the press conference in connection with the release of the Report, "[a]nd I will act." Once again, the system, despite its flaws, ultimately worked. The integrity of MLB remained intact.

Or so the story goes.

Buried beneath the fireworks over the names of the players identified within the Mitchell Report was the true dynamite: namely, a detailed history of the decades-long disregard for federal law on behalf of Major League Baseball. This willful dismissal of the law was on display, as noted by Mitchell in his report, even in Selig’s charge to Mitchell upon handing the investigation over to him. As noted within the report, Selig appointed Mitchell to conduct an investigation:

[T]o determine, as a factual matter, whether any Major League players associated with [the Bay Area Laboratory Co-Operative] or otherwise used steroids or other illegal performance enhancing substances at any point after the substances were banned by the 2002-2006 collective bargaining agreement.

Selig, however, also permitted Mitchell to "expand the investigation and to follow the evidence wherever it may lead," if he felt it necessary to do so. Mitchell took Selig’s opening and ran with it,


9. Id. (quoting Press Release, MLB Officer of Commissioner, Statement of Commissioner Allan H. Selig (Mar. 30, 2006)). In his Report, Mitchell noted, "I welcomed this latitude as necessary to ensure that my findings were reached in the
producing a report that focused on MLB’s historical indifference to the pervasiveness of illegal performance enhancing drugs in its locker rooms, and one which went well beyond Selig’s 2002 start date, generating a treatise that, in the end, most likely gave Selig and MLB much more than they had bargained for.

The Mitchell Report destroyed the myth that Selig and MLB had perpetrated for years: that MLB’s signing of the 2002 collective bargaining agreement along with the Major League Baseball Players Association (the “Players Association”) somehow rendered 2002 as a starting point in the discussion of illegal drug use within the game. By destroying that myth, the Mitchell Report invariably shifted the focus of the blame for baseball’s steroid crisis from “rogue” players such as Bonds, Tejada and the others mentioned within the Report, to MLB itself. By doing so, the Mitchell Report showed that the proper comparison is not between these alleged “outliers” and people like Stewart and Libby – individual malfeasance within the structure of a just system – but between MLB and entities such as Enron and its compatriots – corporate malfeasance amid a culture of corruption and a willful disregard for the law. As such, as the Mitchell Report highlighted, in MLB it was the system itself that was corrupt, with the identified players merely symptoms of the problem rather than the problem in and of themselves.

This article examines how MLB got to this point by analyzing the relationship between MLB and the law and showing that MLB has historically been unofficially exempt from federal law on a wide range of issues due to its unique stature within American society. Although the antitrust exemption is well-known and has been much written about, MLB has, in practice, not been subject to the forces of federal law in many other contexts as well, setting it apart from most other corporations and organizations – even other professional sports leagues. As a result of the wide latitude provided to
MLB by the federal courts and legislature, MLB has largely been free to govern itself pursuant to its own definition of what is in "the best interests of baseball." From its inception in 1876 to the present, MLB has been, in effect, an extra-judicial entity, a society unto itself, answerable to no one in all but the most extreme circumstances.

It is this atmosphere of de facto sovereignty that led to the culture of corruption identified within the Mitchell Report. Through the years, as this article discusses, MLB has denied its players even the most basic and fundamental due process rights without fear of restraint, arbitrarily punished those it has labeled as "rogue" owners and, as demonstrated in the Mitchell Report, willfully violated federal law that has applied to it for decades in theory although not, as further demonstrated within the Report, in practice. As a result, MLB has become a fertile ground for the willful violation of law by players, owners and the office of the commissioner that has, ironically, finally called on Congress to apply federal law to it for the first time – albeit on its own terms.

II. THE MITCHELL REPORT: MLB AS ENRON

A. The Mitchell Report

In his triumphant "call to arms" press conference, Selig’s posture indicated that he had either misunderstood or willfully ignored the true thrust of the Mitchell Report in that it was not the naming of names that was most damning but, rather, the conclusion that MLB should have taken action many years earlier. In its "Summary and Recommendations," the Report concluded that Se-
lig’s assumption that the signing of the 2002 Basic Agreement with the Players Association was of particular relevance was “not accurate.”  

Beginning in 1971 and continuing today, Major League Baseball’s drug policy has prohibited the use of any prescription medication without a valid prescription. By implication, this prohibition applied to steroids even before 1991, when Commissioner Fay Vincent first expressly included steroids in baseball’s drug policy. Steroids have been listed as a prohibited substance under the Major League Baseball drug policy since then, although no player was disciplined for steroid use before the prohibition was added to the collective bargaining agreement in 2002.

Moreover, this prohibition was binding upon the players even absent their express consent to it via a collectively bargained basic agreement. As noted within the Report’s historical review of baseball’s drug policies in theory and in practice:

Many players were suspended for drug offenses before 2002, even though none of those suspensions related to the use of steroids or other performance enhancing substances. Some suspensions were reduced in grievance arbitrations brought by the Players Association, but no arbitrator ever has questioned the authority of the Commissioner to discipline players for “just cause” based on their possession, use, or distribution of prohibited drugs.

As referenced above, in 1991, Commissioner Vincent distributed a memorandum to all twenty six team owners, stressing that baseball’s drug policy expressly prohibited the use of “all illegal drugs and controlled substances, including steroids or prescription drugs for which the individual . . . does not have a prescription.” As such, under “baseball law,” steroids had been banned, at least implicitly, for decades. However, of even more relevance was fed-

13. Id. at 10-11 (footnotes omitted).
15. Id.
16. Memorandum from Francis T. Vincent, Jr., Institutional Affiliation to All Major League Clubs Re: Baseball’s Drug Policy and Prevention Program, at 2 (June 7, 1991); see also Mitchell Report, supra note 6, at 41.
eral law, which, at least in theory, has always applied to baseball. The distribution of prescription drugs of any sort by individuals other than a duly licensed physician acting in furtherance of an individual determination of a proper course of treatment has been prohibited ever since the passing of the Federal Food, Drug and Cosmetic Act of 1938. In 1970, Congress passed the Controlled Substances Act ("CSA") which created five “schedules” of controlled substances subject to varying levels of penalties for misuse, depending on, among other things, their potential for abuse. In 1988 the CSA was amended, making “the distribution of anabolic steroids illegal unless: (1) it was done pursuant to the order of a physician; and, (2) it was for the purpose of treating a disease.” In 1990, the CSA was amended once again, pursuant to the Steroid Control Act of 1990, which “imposed more stringent controls with higher criminal penalties for offenses involving the illegal distribution of anabolic steroids and human growth hormone. That enactment reclassified anabolic steroids as Schedule III controlled substances, effectively raising penalties for their illegal possession or distribution to levels similar to those applicable to narcotics.”

Regardless of the reality that federal law now explicitly criminalized the improper possession of steroids and human growth hormone, MLB paid it little mind. As recalled by Vincent years later, “[m]y memo was totally ignored by all . . . . The point was to alert the baseball world to the recent inclusion of steroids as illegal prohibited substances under federal law. But the union did nothing to underscore my memo and I think the clubs ignored it as irrelevant.”

In fact, the clubs’ perception of the law, as well as of Vincent’s memo, was quite accurate. For all practical purposes, federal law had been irrelevant to MLB for nearly a century by that point; there was no reason to assume that the Steroid Control Act signaled any such shift in this reality. Therefore, they were confident that they not only could willfully ignore the mounting evidence of steroid

abuse within the game from the 1980s through the 1990s and into the early 2000s, they could, in fact, reward the most blatant violators of the law with large contracts in recognition of their inflated statistical achievements attained, at least in some measure, through their possession and use of Schedule III controlled substances in violation of the Steroid Control Act.\textsuperscript{22} As the Mitchell Report likewise made plain, MLB’s frequent refrain that it was unaware of the problem until the release of the Report itself was specious. The evidence to the contrary, as noted in the Report, was overwhelming.

Before the Steroid Control Act was even passed, whispers of steroid abuse within MLB were heard. In 1989, in a well-publicized incident, Oakland A’s slugger Jose Canseco was arrested for possession of a handgun in a Detroit airport.\textsuperscript{23} Pursuant to the search incident to the arrest, authorities discovered steroids.\textsuperscript{24} The next year, Philadelphia Phillies centerfielder Lenny Dykstra arrived at spring training carrying thirty pounds of newly-found bulk, which he credited to the work of “real good vitamins.”\textsuperscript{25} In 1992, Boston Globe columnist Peter Gammons reported that steroid abuse is “much greater than anyone lets on.”\textsuperscript{26} He further wondered if a recent spate of injuries within the game could be attributed to steroid abuse “as players’ muscle mass becomes too great for their bodies, resulting in the odd back and leg breakdowns . . . .”\textsuperscript{27} Los Angeles Times and USA Today baseball writer Bob Nightengale was likewise suspicious and made his suspicions known in 1995 in a series of articles emblazoned with headlines such as: “Baseball Still Doesn’t Get It,” and “Steroids Become an Issue in Baseball: Many Fear Performance-Enhancing Drugs Is Becoming Prevalent and Believe Something Must Be Done,” with the latter article picked up by wire services across the country and revised and reprinted in The

\begin{footnotesize}
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\item \textsuperscript{22} See Phil Sheridan, \textit{Baseball Turned a Blind Eye – and Saw Cash}, PHILA. INQUIRER, Nov. 18, 2007, at E1.
\item \textsuperscript{23} See Mitchell Report, \textit{supra} note 6, at 63 (citing David Bush, \textit{Steroids Found on Canseco’s Friend Incident at Detroit Airport}, S.F. CHRON., Mar. 22, 1989, at D1).
\item \textsuperscript{24} See id.
\item \textsuperscript{25} Id. at 66. Phillies general manager Lee Thomas suspected that Dykstra abused performance-enhancing drugs but never pursued it beyond asking Dykstra if he had used steroids. See id. Dykstra denied using them. See id. at 66-67. In addition, Phillies trainer Jeff Cooper stated that an unnamed player’s use of steroids was “obvious” and that he confronted Thomas with his suspicions. Id. at 67. Thomas told Cooper to confront the player. See id. After the confrontation, the player replied that it was none of Cooper’s business and the matter was dropped. See id.
\item \textsuperscript{26} Id. at 69.
\item \textsuperscript{27} Id. (citing Peter Gammon, \textit{They’ve Met Disappoint}, BOSTON GLOBE, Aug. 16, 1992, at 48).
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Sporting News, historically considered "The Baseball Bible," a few weeks later. In the updated article printed in The Sporting News, steroid use was called "baseball's deep, dark, sinister secret." Regardless of these and other articles, MLB continued to profess ignorance. In all, the Mitchell Report cited eighty-five mainstream media articles focusing on the use and abuse of steroids and other performance enhancing substances within MLB between 1987 and 1998. Throughout this period, however, Selig repeated his refrain, stating at one point that "[i]f baseball has a problem, I must say candidly that we were not aware of it . . . . It certainly hasn't been talked about much."

By 2004, however, Selig's talking points were somewhat different. By then, he professed that, even had he known of such abuse within MLB, there was not much he could have done about it anyway, due to the presence of the Players Association and the National Labor Relations Act ("NLRA"). Although he lauded the toughened standards enacted within the world of amateur athletics, he concluded that such standards were not viable within MLB due to the presence of the Players Association and the constraints placed upon MLB pursuant to the NLRA. Because drug testing was considered a mandatory subject of collective bargaining, MLB's hands were, according to Selig, effectively tied. Specifically addressing the proliferation of "nutritional supplements" such as the bottle of androstenedione found in Mark McGwire's locker in 1998, the only solution, he stressed, was for the federal government to step in and ban or restrict unsafe nutritional supplements. Selig stated:

28. Id. at 69-70.
29. Id. at 70 (quoting Bob Nightengale, Steroids in baseball? Say it ain't so, Bud., SPORTING NEWS, July 24, 1995, at 16).
30. Id. at Appendix C.
33. See id. (predicting that after nutritional supplements are banned, MLB will be able to establish better anti-drug policies).
34. See Mitchell Report, supra note 6, at 67 n.200 (citing Stan Hochman, Thomas: Blame Union, Not Phils, PHILA. DAILY NEWS, Mar. 16, 1991, at 45 ("We are very concerned. But our hands are tied. We're handcuffed by the union.").
35. Id. at 60.
36. See Selig & Manfred, supra note 32, at 48, 58-59 (urging Congress to schedule harmful nutritional supplements as controlled substances).
Congress should not leave the regulation of nutritional supplements to the collective bargaining processes of the four major professional sports leagues. Congress should empower and encourage the Attorney General to schedule certain harmful nutritional supplements as controlled substances under the CSA in order to return to the hands of the FDA the power to effectively regulate nutritional supplements before they arrive on store shelves and in the hands of athletes.

Selig’s recommendation was both ironic and hollow, particularly given that in 1990 the federal government had done with regard to steroids precisely what he was now recommending it do with regard to nutritional supplements and MLB responded by willfully ignoring the law.

Regardless, as the Mitchell Report stressed, the issues relevant to collective bargaining were ancillary to MLB’s ability to control the problem of substance abuse within the game and to enforce the law. Rather, it was MLB’s decision to disregard the law that led to the culture of steroid abuse as personified by the game’s greatest slugger, Barry Bonds. The Report noted that although MLB, through the Commissioner’s Office, lacked the power to directly issue warrants and subpoenas, it could conduct investigatory interviews and compel even union-represented employees, such as those represented by the Players Association, to attend and answer truthfully. This “interview right” is one enjoyed by all employers in order “to ensure that its rules are being followed.” MLB, however, “rarely required” its players “to participate in investigatory interviews regarding alleged performance enhancing substance violations.” With regard to violations of federal law, the Report found that MLB had been similarly non-compliant. The Report noted that, if it wished, MLB could partner with state and federal law enforcement agencies, which have both warrant and subpoena power, and coordinate investigations through the indirect use of these powers. However, prior to the investigation undertaken by Senator Mitchell, MLB made little use of this avenue. In exploring this avenue of investigation, the Report noted that “[o]ne law

37. Id. at 58-59.
38. See Mitchell Report, supra note 6, at 290-91.
39. Id. at 292.
40. Id.
41. See id. at 290-91.
42. See id. at 290.
enforcement official advised us in frustration that there is no clearly
designed person in the Commissioner's Office to call when law en-
forcement does have information. The Report does not indicate
why this is the case. It may, however, be for the simple reason that,
just like Commissioner Vincent's 1991 memo, those within MLB
have historically not wanted to know the substance of the informa-
tion potentially waiting for them on the other end of those calls.

Regardless, as the Mitchell Report made clear, the process of
undertaking an illegal drug possession investigation of a suspected
Major League player can and should be no different than investiga-
tions of employees in any other circumstance; the presence of the
Players Association is, ultimately, irrelevant. In any other walk of
life, the ability to conduct drug testing is not a prerequisite for un-
dertaking such a criminal investigation. Employers have always had
the ability to take reasonable steps to investigate, identify and rid
themselves of drug offenders operating within their employ. Tech-
nically, MLB is no different than any other work environment. Ex-
cept that, for some reason, MLB believes that it is.

In his response to the release of the Mitchell Report, Selig
lauded the numerous (twenty) recommendations contained within;
recommendations calling on MLB to use its powers of investigation,
conduct background checks on clubhouse employees, cooperate
with federal and state law enforcement, and the like. He stated
that he would implement all of the recommendations that did not
require collective bargaining immediately. However, as the Re-
port made clear, MLB, not unlike Dorothy in Oz, had all of these
powers at its disposal all along. Echoing his earlier plea for Con-
gress to regulate nutritional supplements, Selig likewise called on
Congress to classify Human Growth Hormone a Schedule III con-
trolled substance under the CSA, ignoring the fact that steroids

43. Id.
44. See id. at 285-306.
45. See Allan H. Selig, Commissioner, MLB, Statement Before the House
   Committee on Oversight and Government Reform, at 9-10 (Jan 15, 2008).
46. See id. at 15.

I am here to ask for your assistance in this fight. The illegal use of per-
formance enhancing substances is a problem for Baseball – but it is a
social problem that extends beyond this sport or any sport. It is a societal
issue. Senator Mitchell's report identified the difficulties inherent in any
attempt, whether by Baseball, by other professional sports, or by the
Olympics, to stop by itself the use of illegal performance enhancing sub-
stances. We welcome your participation in attacking the problem at its
source. There are a number of bills that have been introduced that we
wholly support, including Representative Lynch's bill (HR 4911) and Sen-
ator Schumer's bill (Senate Bill 877) to make HGH a Schedule III Con-
had been similarly classified a Schedule III controlled substance for eighteen years by that point, to little effect. As such, despite Selig’s attempts to label the players identified within the Mitchell Report as outliers, the Report showed that these players were merely the symptoms of a larger problem: MLB itself. With corporate scandals such as Enron and WorldCom still fresh, the release of the Mitchell Report makes the comparison between MLB and these corruption scandals both inevitable and appropriate.

B. Enron

In Enron, many commentators see “a textbook case of earnings management” in the “active manipulation of accounting results for the purpose of creating an altered impression of [the company].”

For years, management hid debt, inflated profits and supported stock prices that “considerably overstated the firm’s value.” In the end, before the scandal broke and its true image was revealed, Enron had succeeded in creating an erroneous, fictitious portrait of a robust, thriving, company. Upon reflection, considerable evidence existed throughout Enron’s existence that should have led analysts and regulators to question Enron’s confident boasts through the years; yet until management could no longer hide the company’s condition and its collapse was brought into public view, few thought to challenge them. Once out in the open, however, a very different picture of the company emerged; a picture of a company run by executives who believed themselves to be above the law, answerable to no one. As such, without the constraints placed upon them by the legal system, they felt unencumbered and free to massage the company’s image so as to make it appear to be something it most certainly was not. In short, corporate malfeasance led to a culture of active manipulation of results and ignorance of counter-information that otherwise would have caused it to stop


48. Id. at 1057.

49. See id. at 1076 (noting that Enron manipulated financial reports, creating false impressions of financial health).

50. See id. at 1057, 1076 (explaining considerable evidence of Enron’s financial trouble existed long before its ultimate ruin).
and reevaluate its business strategy. In the end, it was not the thousands of Enron employees who brought the company to bankruptcy, it was the people at the top — the ones who created the culture of deceit in which the company operated.

The release of the Mitchell Report cast a similar shadow upon MLB. Upon its release, Selig's long-professed ignorance of the culture of steroid use in Major League locker rooms seemed silly and his repeated assertions of helplessness in combating the problem were ridiculous. Instead, like Enron, the Report made clear that it was not the hundreds of players who brought MLB to this point, it was MLB itself — the entity that perpetuated and thrived within a similar culture of deceit. This revelation is, by itself, stunning. As such, it is easy to see why Selig was so eager to respond to the Report by immediately diverting the public's attention from this to the litany of player names mentioned in the report, most notably that of pitcher Roger Clemens.51 Such a diversion would avoid the most difficult questions of all, namely, how did "America's Game" get to this point? How did our national pastime become infected with greed, corruption and deceit? How did baseball come to represent not only America at its best but also at its worst? The remaining sections of this Article attempt to answer these questions by examining the roots and development throughout the twentieth century of MLB's extra-legal authority. As these sections will show, what started benignly eventually turned malignant as MLB's de facto sovereignty became more and more ingrained until, by the end of the century, MLB could rightly believe that it had become something of a nation unto itself, answerable to no one.

III. THE ROOTS OF MLB'S EXTRA-LEGAL AUTHORITY

A. The Birth of the National League and the "Baseball Creed"

In order to understand the environment MLB existed within at the turn of the twenty-first century, it is necessary to understand the environment that brought MLB into existence over a century earlier. As the nineteenth century turned toward the twentieth, the importance of sport as something symbolic and representative of other values began to take shape within the United States.52 This was out of necessity. The Industrial Revolution — which offered em-

51. See Mitchell Report, supra note 6, at 167-75 (noting at length Clemens' possible use of illegal performance enhancing substances).

ployment to more and more men indoors, operating machines in factories rather than working outside among the elements—combined with the closing of America's frontier, profoundly challenged this male-dominated society's values and determinants of social status.53 “With no frontier to conquer, with physical strength becoming less relevant in work, and with urban boys being raised and taught by women . . . it was feared that males were becoming ‘soft,’ that society itself was becoming ‘feminized.’”54 As such, the definition of “manliness” itself was challenged and had to be redefined.55 Soon, sports replaced work as the defining characteristic of manliness.56 In time, the ideology of athletic prowess as representative of manliness took hold. Boys were encouraged to engage in athletic competition because sports, according to the evolving mantra of the time, built strong character as well as bodies.57 For the first time, leisure activities were considered to be as important, if not more so, than work. Now, it was sport that turned boys into “healthy, respectable men,” not field work.58

Baseball, which by the mid-point of the nineteenth century began to emerge as the most popular sport, was an immediate beneficiary of this national mindset. For if sport contributed to manliness, then no sport contributed to it more so than the nation’s most popular one. In time, a set of values emerged that became synonymous with the game itself; a set of values that has since become known as “the baseball creed.”59 In essence, the creed held that baseball contributed to individual and public welfare by “building manliness, character, and an ethic of success.”60 According to the creed, the values supposedly taught by the game translated into everyday life, as the virtues embodied by baseball could be used to instill the proper values in the nation’s youth as well as educate

53. See id. (highlighting dramatic economic and social changes “alter[ing] the American social landscape”).
54. Id. (quoting Michael A. Messner, Power At Play: Sports and the Problem of Masculinity 14 (Beacon Press 1992)).
56. See Nathan, supra note 52, at 36-37.
57. See id. at 37 (noting holistic benefits of sports participation).
58. Id.
immigrants (which, by the late nineteenth century were streaming into the country in unprecedented numbers) as to the American way of life.61 Through the creed, baseball became elevated in status. It went from a game played in one's off-hours to something mystical and transformative. By the turn of the twentieth century, it was believed by some that "being a true American and being a fan are synonymous."62 Baseball was now the national sport and "occupied a niche just below belief in God and respect for motherhood."63

Unfortunately, America's game, as represented by the professional teams that emerged after the Civil War, and which had initially done much to spark communal pride in the teams now representing the growing industrial cities in the Northeast and Midwest, was rife with problems.64 The National Association of Professional Base Ball Players ("National Association"), the dominant, but by no means only, professional league at the time, was besieged with rumors of gambling and fixed games, causing interest to wane.65 With the game under attack, a group of entrepreneurs saw the opportunity to highlight their association with the national game, save it from disgrace and elevate their societal status all in one fell swoop.66 In short, they created a new league, the National League, which promised to rid the professional game of gambling and other unseemly behavior.67 Rules were seemingly tightened, good conduct was supposedly mandated and the national pastime would once again be in sync with its image.68 These entrepreneurs were not shy about trumpeting their civic accomplishments. They proudly exclaimed that they "rescue[d] the game from its slough of corruption and disgrace," and protected the "respectable and honorable" game by outlawing such vices as (at least for a time) Sunday baseball and alcohol in the stands.69 They, as well as those who

61. See Nathanson, supra note 59, at 73 (noting popular perception that virtues of baseball could be used to instill desirable values in youth).
63. Id.
64. See Nathanson, supra note 59, at 71 (blaming baseball's loose organization as cause of problems).
65. See id. (noting decreasing popularity after allegations of malfeasance became common).
66. See id.
67. See id. (describing attempts by National League to distinguish itself from professional baseball's recent sordid conduct).
68. See id. (explaining differences in National League hierarchy giving rise to changes in league culture).
69. Id.
would follow them in baseball ownership throughout the late nineteenth and into the twentieth centuries, promoted themselves as the gatekeepers of the American way of life, entrusted with the responsibility of protecting American values and ideals. They were overwhelmingly successful in spreading their message.

Much of their message was spread via the conduit of the journalists who covered the teams. Given that many of these journalists were dependant upon the owners for their traveling expenses and other promotional work thrown their way, they were willing accomplices. As such, they were eager, through hundreds of articles written in newspapers and periodicals from coast to coast, to promote both the game’s owners as well as the game itself as essential tools for teaching the American way of life. By the second decade of the twentieth century, their message had permeated the culture. In 1919, philosopher, Morris R. Cohen echoed the prevailing sentiment of the time:

I know full well that baseball is a boy’s game, and a professional sport, and that a properly cultured, serious person always feels like apologizing for attending a baseball game instead of a Strauss concert, or a lecture on the customs of the Fiji Islanders. But I still maintain that, by all the canons of our modern books on comparative religion, baseball is a religion, and the only one that is not sectarian but national.

As the ones entrusted to protect the integrity of this national religion, the owners of Major League baseball teams were thus accorded a responsibility and therefore an authority higher than that of mere law. The courts may have kept the masses in line, but MLB ensured that they remained true Americans.

Of course, the baseball creed is little more than a cultural fiction in that there has always been a substantial disparity between the ideology of the game and its realities. The entrepreneurs who founded the National League did not, after all, prevent gambling,

70. See generally id. (noting National League owners’ willingness to self-promote themselves as saviors of baseball).
71. See id. at 74 (describing journalists’ motives for serving as league owners’ mouthpiece).
72. See id. (explaining conflict of interests created by journalists and league owners).
74. See generally, Nathanson, supra note 59 (explaining that owners perceived “themselves as the gatekeepers of the American way of life”).
game fixing and the other vices that existed beforehand. Regardless, the ideology affected the ways in which people behaved and thought about the game – it was of little matter that the creed was sheer fantasy. Ultimately, however, the disparities between the myth and reality were exposed to the extent that the creed was jeopardized. The revelation of this disparity would test the theory of baseball as America, and, ironically, result in an even greater elevated status of the game within American society.

B. Scandal and Redemption Through Extra-Legal Means

As stated above, despite MLB owners’ protestations to the contrary, the national game hardly rid itself of gambling and rumors of game fixing through the creation of the National League. Regardless, the cultural fiction of the baseball creed remained dominant as these rumors remained just that due to MLB’s hesitance to investigate them. And if it was hesitant to confront these rumors directly, MLB certainly was unwilling to turn to the law to investigate and potentially punish its players. Consequently, players of “doubtful loyalty” were tolerated and continued to play Major League ball from one year to the next out of fear that exposure would damage the creed irreparably, resulting in a loss of societal status of the “magnates” who owned the teams and who had appointed themselves the gatekeepers of America’s national image.

Eventually, MLB had no choice but to confront the issue, as rumors of fixed games grew louder in the early part of the twentieth century. Even before the Black Sox scandal of 1919, rumors abounded. Shortly before the infamous World Series contest between the Cincinnati Reds and the Chicago White Sox that season, reports surfaced that two of the greatest stars of the game – Ty Cobb and Tris Speaker – conspired to fix a Detroit victory over Cleveland in an otherwise meaningless game. Predictably, MLB

75. See Lowell L. Blaisdell, The Cobb-Speaker Scandal, 13 NINE: A JOURNAL OF BASEBALL HISTORY & CULTURE 54-55 (2004) (explaining owners’ reluctance to rely on courts to police its players). League owners enjoyed significant negotiating advantages at the time and were unwilling to submit to the courts for fear of disrupting their cartel-like influence over players. Id.

76. See id. (describing MLB’s unwillingness to unsettle public perceptions about baseball).

77. See NATHAN, supra note 52, at 16 (noting rumors of game fixing preceded Cobb-Speaker controversy).

78. See id. at 16-17 (describing initial inning-by-inning investigation of questionable plays).
ignored these reports.\textsuperscript{79} When, however, a few weeks later rumors began spreading that the World Series itself was fixed, tarring the pinnacle moment of celebration of America's "civil religion," MLB was, reluctantly, goaded into action.\textsuperscript{80} Its response would cement its status as a de facto sovereign entity.

For months, MLB refused to investigate the rumors that Chicago had conspired to throw the Series to Cincinnati.\textsuperscript{81} It is likely that MLB would have been successful in stonewalling any investigation of the Series were it not for the tenacity of a sportswriter who clearly was not beholden to MLB's ownership cabal (at least in this instance) – Hugh Fullerton.\textsuperscript{82} Fullerton covered the Series and grew suspicious of what he saw and pressed MLB to take action to investigate the allegations, but to no avail.\textsuperscript{83} He tried to publicly admonish MLB for its inaction through the media but found himself stonewalled when Chicago's largest newspaper – the \textit{Chicago Herald and Examiner} – refused to run his stories, partly out of concern that challenging baseball's pristine status would hurt newspaper sales.\textsuperscript{84} Eventually, he found an outlet for his stories and turned the heat up on MLB, contending that the image of the game had been sullied by the rumors and would continue to be sullied unless the allegations were investigated.\textsuperscript{85} Still, he was ignored. Finally, he pressed the button that brought action, alleging that it was the status of the owners themselves that was at stake. Discussing the diminishing stature of the game, Fullerton asserted that:

\begin{quote}
[F]ault for this condition lies primarily with the owners. Their commercialism is directly responsible for the same spirit among the athletes and their failure to punish even the appearance of evil has led to the present situation, for
\end{quote}
the entire scandal could have been prevented and the future of the game made safe by drastic action . . . . 86

For a time, MLB still refused to act, rebutting his allegations as "improbable muckraking." 87 Eventually, however, it realized that it had no choice but to act in order to protect the sanctity of the cultural fiction of the baseball creed.

In a grand gesture, American League president Ban Johnson publicly proclaimed that he was providing $10,000 in league funds and hiring two "special prosecutors" to investigate Fullerton's allegations. 88 These actions were permissible under an Illinois statute that allowed interested private parties to intervene and assist in the criminal prosecution of certain cases. 89 Soon after, the Illinois State Attorney's Office indicted eight members of the White Sox and five reputed gamblers for conspiring to fix the 1919 World Series. 90 With the nexus of baseball and the American legal system now at hand, MLB recognized the reality that it must take bold and affirmative action in order to protect its image or risk losing control of it as it was knocked from its pedestal and treated as any other nefarious business. The Black Sox scandal was merely the tip of the iceberg. If even a few of the numerous other rumors of game fixing were exposed through investigations by state and local prosecutors, the game's sacred status would be tarnished forever.

Upon Fullerton's urging, MLB dissolved the league's "National Commission" - a structurally weak tripartite body that ostensibly ruled the game - and replaced it with a powerful, autocratic commissioner. 91 To fill this position MLB likewise followed Fullerton's recommendation and hired Kenesaw Mountain Landis, a longtime friend of MLB who demonstrated his fealty in 1914 when, as a federal judge, he presided over but refused to rule on the Federal

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86. Nathan, supra note 52, at 18 (quoting Kenneth Jenkins, Re-Thinking History 5 (Routledge 1991)).

87. Id. at 19 (quoting David Q. Voigt, American Baseball: From the Commissioners to Continental Expansion 126 (Pennsylvania State University Press 1983)).


89. See id. (explaining cooperation between American League and State of Illinois in developing prosecution's case).

90. See id. at 573-74 (chronicling indictments on nine counts of conspiring to defraud individuals and institutions in Illinois); see also Nathan, supra note 52, at 4.

91. See Nathan, supra note 52, at 4 (discussing Landis's appointment); see also Carney, supra note 85, at 43 (explaining decision by owners of American League and National League to establish baseball commissioner).
League’s antitrust suit against the National and American leagues, choosing instead to wait out the Federal League until it had virtually exhausted itself out of existence. His public persona fit the role for which it was designed – protector of the American way of life – in that he had gained the reputation as a “hanging judge” who was not intimidated by powerful people or institutions. He famously fined Standard Oil a whopping $29,240,000 for antitrust violations (which was overturned, as were many of his rulings, on appeal), challenged the authority of labor leader Big Bill Haywood and even tried to exercise jurisdiction over Kaiser Wilhelm I for Germany’s sinking of the Lusitania. He looked the part as well, with his shock of white hair and perpetual sneer he had “the visage of an Old Testament prophet who had looked around and was not amused by what he had seen.” And of course there was the name itself: rock solid, larger than life. Not surprisingly, he was a proponent of the baseball creed, remarking at one point that “[b]aseball is something more than a game to an American boy; it is his training for life work. Destroy his faith in its squareness and honesty and you have destroyed something more; you have planted suspicion of all things in his heart.” In Landis, MLB had

92. See Klein, supra note 88, at 558 (describing Judge Landis’s ruling resulting in outcome favorable to MLB). By refusing to rule on the Federal League’s case, Landis forced a settlement between the Federal and Major Leagues which, effectively, dissolved the Federal League. See id. (crediting settlement on Judge Landis withholding judgment). One Federal League team, Baltimore, refused to join in the settlement and pursued its antitrust case against MLB. See id. at 559 (filing suit against National League, American League and National Commission). Eventually, the case reached the United States Supreme Court and became the infamous case in which MLB’s antitrust exemption was carved out. See Fed. Baseball Club of Baltimore, Inc. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200, 208-09 (1922) (holding that MLB is not subject to federal antitrust laws).

93. See Pachman, supra note 11, at 1415 (noting Judge Landis’s willingness to challenge powerful individuals and organizations).

94. See Klein, supra note 88, at 558 (noting damages awarded in United States v. Standard Oil Co., 155 F. 305, 321 (N.D. Ill. 1907), rev’d, 164 F. 376, 389 (7th Cir. 1908), cert. denied, 212 U.S. 579 (1909)).

95. See Pachman, supra note 93, at 1415 (explaining perception that Judge Landis’s personality and reputation made him well-suited to reform baseball’s dubious recent history).


98. Rader, supra note 55, at 120.

found the image necessary to elevate the game above the mundane once more.

Landis was not so easily convinced to accept the position, however. Perhaps taking into account the numerous times he had been reversed upon appeal, he was unwilling to accept such humiliations anymore, stating that he would only take on the role if he were granted absolute power, answerable to no one either within or outside of Major League Baseball.¹⁰⁰ Despite MLB’s assurances that he would have this power, he refused to accept the job until a new Major League Agreement was drafted, one that cemented his authority and insulated him from the vagaries of the appellate process.¹⁰¹ Left with no choice, MLB eventually relented and ceded the authority to him that he demanded.¹⁰² With that, Landis stepped into his new role and proceeded to remove the stain upon the national pastime’s image.

Although acting in his official capacity as the game’s protector, Landis’s investigation into gambling and game fixing within MLB was exceedingly limited in scope. Rather than tackling the numerous rumors that swirled around the game, Landis chose to investigate the alleged World Series fix only, proceeding on the “single sin myth” that the 1919 fix was the only instance of foul play within MLB.¹⁰³ In this way, he could rather easily restore the game’s image: simply punish the lone transgressors and return the game to its lofty perch.¹⁰⁴ The potential morass involved in investigating the culture of corruption that led the 1919 fix would be avoided due to its unwieldy nature. Very quickly, it became clear that Landis was out to “solve” the Black Sox scandal, rather than address the underlying problems that led to it, and to return MLB to its elevated status as quickly as possible. In this way, he would reassert the cultural fiction of the baseball creed, evidence to the contrary be damned,


¹⁰¹. See id. at 220-21 (“Landis would not accept the position until a new National Agreement was drafted.”).

¹⁰². See id. (noting owners’ relinquishment of power and approval by owners and Landis of new Major League Agreement).

¹⁰³. See NATHAN, supra note 52, at 7 (citing David Q. Voigt, The Chicago Black Sox and the Myth of Baseball’s Single Sin, in AMERICA THROUGH BASEBALL 65, 73 (Chicago: Nelson-Hall 1976)) (explaining why Black Sox scandal has endured all these years).

¹⁰⁴. See id. (noting that Landis would tag this scandal for punishment only to maintain feeling that this was sole transgression).
that nevertheless was prevalent before Hugh Fullerton intervened and exposed it as myth. He would be aided in this regard by the new Major League Agreement he had insisted upon as conditional to taking the position. Soon, through his handling of the Black Sox scandal as well as his indifference to other, similar allegations, Landis would accomplish what MLB had set out to do when it hired him—return baseball to its elevated plane, immune from the reach of federal law.

C. The 1921 Major League Agreement, the Black Sox, and Their Immediate Aftermath

As stated above, Landis was adamant that he would not accept the position of commissioner without the grant of absolute, unquestioned authority. Accordingly, when, during the final drafting session of the 1921 Major League Agreement the owners added a clause that would make the commissioner’s power to suspend or expel club or league officials or employees advisory rather than final, Landis threatened to walk away from the job.\(^{105}\) With the image of America’s game hanging in the balance, the owners were left with no choice but to accede to Landis’s demand: the offending provision was struck and Landis was granted absolute power.\(^{106}\) The finalized Major League Agreement bestowed unparalleled power in the hands of one man: Landis was to be the final arbiter of disputes between leagues, clubs and players, the determinant of punishment for any conduct he deemed to be contrary to the best interests of the game, and the arbiter of disagreements over proposed amendments to league rules.\(^{107}\) In a catch-all provision that he would invoke numerous times throughout his tenure, and which would provide authority for virtually any action he wished to take, the Agreement permitted him “to take other steps as he might deem necessary and proper in the interest and morale of the players and the honor of the game.”\(^{108}\) And perhaps most importantly, (and most indicative of the owners’ desperation for the moral salvation of their game), the owners expressly waived any rights to chal-

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105. See Reinsdorf, supra note 100, at 246-47 (“Landis response made it clear, however, that he would not accept the position if the clause was not removed from the contract . . . .”).

106. See id. at 247 (“Needless to say, the clause was withdrawn and the owners believed they were giving Landis the powers he requested.”).

107. See id. at 221-22 (delineating authority granted to Landis as commissioner via new Major League Agreement); see also Pachman, supra note 11, at 1415 (listing numerous powers granted to Landis in his position as commissioner).

108. Major League Agreement art. I, § 4 (1921); see also id. § 2 (enumerating other powers of commissioner).
lenge Landis’s rulings in court, “no matter what would be the severity of the new Commissioner’s discipline.”109 Taken together, the Agreement anointed Landis with “autocratic power over everyone in baseball, from the humblest bat boy to a major league president.”110 Through the 1921 Major League Agreement, Landis would be able to rule from a perch high above the judicial branch, allowing him to restore public confidence in the game and to diminish the role of the legal system in baseball’s affairs all at once, a point he was not shy about making. “Just keep in mind,” he once said, “that regardless of the verdict of juries, baseball is entirely competent to protect itself against the crooks both inside and outside the game.”111

Landis wielded his power from the moment he assumed his new role. On August 2, 1921, the eight indicted players and five indicted gamblers were acquitted by a jury of all charges.112 Landis was unmoved despite the jubilated courtroom and relieved baseball fans across the nation. The next day he asserted MLB’s superior moral authority by banishing all eight players from the game anyway.113 He stated:

Regardless of the verdict of juries, no player who throws a ball game, no player that sits in conference with a bunch of crooked players and gamblers where the ways and means of throwing a game are discussed, and does not promptly tell his club about it, will ever play professional baseball.114

In his newly-appointed role as the moral conscience of the national pastime, Landis did not need to investigate the allegations on his own, nor preside over a hearing in order to reach his verdict. Rather, his job was to administer a “character bath” to the game, regardless of the vagaries of the legal system.115 For this he was widely hailed. By banishing the Black Sox, he effectively, in the

109. Pachman, supra note 11, at 1415; see also Major League Agreement art. VII, § 2 (1921) (stating that all parties to contracts in baseball shall “submit themselves to the discipline of the commissioner.”).
110. J. Spink, JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL 76 (1947).
111. Id. at 84.
112. See NATHAN, supra note 52, at 5 (explaining trial of Black Sox scandal participants).
113. See id. at 31 (stating that Landis “gave the incident closure” by throwing out players).
114. Id.
115. See id. (noting that “[t]hrough his action the verdict became an acquittal only in a technical sense.”).
words of one baseball historian, "reaffirmed professional baseball's position as a respectable social institution whose ethical standards were demonstrably superior to those of the law." He stayed true to his reputation as a jurist who administered "tough justice," and his decision signaled the return of integrity to America's game. He took the law into his own hands and administered what many believed to be justice, irrespective of the jury's verdict. In the end, to many Americans, truth had prevailed even though the law did not. The Black Sox may have been found innocent within the world of law but Landis insisted that they face judgment in a higher court - his. In the process, the extra-legal and sovereign authority of Major League Baseball was firmly established. Landis's punishment of the Black Sox set the precedent for his tenure as Commissioner, where he ruled not with a sword of justice but with an "extra-legal scythe" to be used at his pleasure and whim. This was particularly true given that, regardless of his ministrations, there was nothing that anyone within MLB could do to check him - the owners had forfeited their right to access to the courts in the 1921 Agreement.

Shortly after the Black Sox scandal, Landis once again wielded his scythe in an effort to protect MLB's position as an institution with its own system of justice, separate and apart from that of federal law. In 1926, two members of the banned Black Sox announced that a series of games between the White Sox and the Detroit Tigers in 1917 had been similarly fixed. In fact, Landis had been made aware of this accusation four years earlier, in 1922, but chose to ignore it in order to protect the integrity of the "single sin myth" surrounding the 1919 World Series. Now, however, with the accusation aired in public, Landis was forced into action. He held a series of "hearings" over the course of several days, where he served not only as judge, but as prosecutor, defense attorney and

116. Id. at 50.
117. See id. at 62 (describing Landis as "baseball's czar").
118. See Anderson, supra note 1 (comparing Bonds indictment with Black Sox scandal, praising Landis in ignoring judicial acquittal of Black Sox, and stating, "[t]ruth had prevailed, as it usually does.").
121. See id. at 41 (describing circumstances of earlier revelation to Landis); see also Voigt, supra note 103, at 73.
jury as well.\textsuperscript{122} He permitted oral testimony only, refused to call independent witnesses or to release the box scores of the games – which would have revealed a curious pattern of play – to the public.\textsuperscript{123} He also treated the witnesses for the prosecution and defense differently: he required the testimony of the accusers to take place in the presence of the defense witnesses who could then mold their subsequent testimony to rebut that of what they had just heard; the accusers, however, were permitted only sporadic opportunities to respond to contrary testimony.\textsuperscript{124} In addition, although Landis encouraged the exposure of inconsistencies in the accusers’ testimony through this procedure, he failed to follow up on likely misleading or inconsistent testimony presented by the defense witnesses.\textsuperscript{125} In the end, there was only one verdict that was possible – the verdict that Landis had orchestrated through his actions in organizing and presiding over the hearing.\textsuperscript{126} The players were exonerated and the single sin myth remained intact. Most importantly, the accusation was “resolved” by MLB itself, quickly and emphatically, before the legal system had time to intervene. In his handling of this affair, Landis made sure that he would provide closure to the episode. There would be no replay of the Black Sox trial in open court, subject once again to the whim of juries and the requirements of due process.

Around the same time, Landis was confronted with yet another scandal, this one involving two of the greatest stars of the game. Once again, he administered “baseball justice” in an effort to maintain jurisdiction for misdeeds within the game in-house rather than in the legal system. In 1926, the rumors of game fixing by Ty Cobb and Tris Speaker, which had briefly surfaced in 1919 shortly after the games in question were played, reemerged.\textsuperscript{127} Coming on the heels of the Detroit-Chicago “hearings,” Landis had no choice but to take action. And once again he did so both swiftly and with finality. Two weeks after exonerating the Tigers and the White Sox, he

\textsuperscript{122} See Blaisdell, \textit{supra} note 120, at 32-33 (explaining Landis’s hearings in 1927 responding to Chicago game fixing allegations).

\textsuperscript{123} See \textit{id.} at 36 (criticizing the limited procedural safeguards imposed during hearings).

\textsuperscript{124} See \textit{id.} (noting methodological disadvantages leveraged against those alleging game fixing).

\textsuperscript{125} See \textit{id.} (highlighting uneven treatment of accusers and defendants).

\textsuperscript{126} See \textit{id.} at 41-42 (identifying Landis’s behavior in shaping outcome of hearings).

\textsuperscript{127} See \textit{id.} at 61 (noting resentful feelings existing between Cobb and his accuser).
did the same to both Cobb and Speaker.\textsuperscript{128} This time, however, he convened no hearings, heard no testimony, considered no evidence.\textsuperscript{129} He refused to release the box scores and game descriptions to the public, some of which hinted at the possibility that the game in question proceeded in a curious fashion.\textsuperscript{130} Interestingly, however, and in tacit recognition that there was more to the matter than he was otherwise letting on, Landis proclaimed that, although Cobb and Speaker were cleared of any wrongdoing, they would need to play for different teams in the upcoming season if they wished to continue to play Major League baseball.\textsuperscript{131}

The lack of consistency in Landis's rulings, as exposed through his handling of the three scandals noted above, indicate his desire to mold his verdicts to whatever he predetermined would best protect the image of America's game. For instance, Landis expelled Buck Weaver of the Black Sox for merely having knowledge of the fix (there was no evidence that he took money or participated in it) in his effort to "cleanse" the game. On the other hand, he exonerated both Cobb and Speaker who, even if they did not participate in a fix of the game in question, at a minimum had knowledge of an attempt to do so. He did this to protect the image of a game that had presumptively already been cleansed.\textsuperscript{132} Landis massaged investigations, or refused to even conduct them, such that they would uniformly result in verdicts that exalted baseball and not in ones that damaged its reputation. In his twenty-four years in office, Landis banned thirteen men for various crimes committed against baseball.\textsuperscript{133} He likewise fined numerous others for sins such as offensive language, barnstorming in the off-season and other similar offenses.\textsuperscript{134} All of this was done with a singular goal: to present a façade of a pristine, all-American game that jibed with the cultural fiction of the baseball creed. In so doing, and in reassuring the public that "a firm patriarchal hand of justice ruled over the na-

\textsuperscript{128} See id. at 65 (explaining Landis's verdict and conditions thereto).
\textsuperscript{129} See id. (questioning Landis's decision to eschew a formal investigation).
\textsuperscript{130} See id. at 61-62 (noting common suspicions arising from failure to release box scores).
\textsuperscript{131} See id. at 65 (characterizing this requirement as trivial).
\textsuperscript{132} See id. at 66 (positing how Landis's judicial experience may have influenced his approach to allegations and investigations).
\textsuperscript{133} See Pachman, supra note 11, at 1415-16 (noting that crimes ranged "from gambling to the suggestion by a pitcher that he would leave his club so that it would not win the pennant.").
\textsuperscript{134} See id. (highlighting Landis's power and willingness to punish offenders including, notably, club president and Babe Ruth).
tion's pastime," its societal role as an elevated, sovereign institution remained firmly intact.135

IV. JUDICIAL ACKNOWLEDGEMENT OF THE EXTRA-LEGAL AUTHORITY OF MLB

A. Baseball's Antitrust Exemption

The legal system historically has been all too eager to play into this fiction, deferring to MLB and its "law of baseball" whenever possible, and allowing it to manage its own affairs without fear of judicial or Congressional oversight. This was first officially recognized in the Supreme Court's 1922 ruling in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs,136 where it upheld the D.C. Circuit's ruling that MLB was exempt from federal antitrust laws.137 In so doing, the Supreme Court skirted around the obvious - that MLB was a business not unlike any other, engaging in interstate commerce - and held that it was somehow different, transcendent, above such mundane acts of legislation as the Sherman Act.138 To hold otherwise, would be to hold that America's game was no different than a shirt factory, and this simply would not do.139 The cultural fiction of the baseball creed would not permit it. Thirty-one years later, when presented with the opportunity to reverse itself in Toolson v. New York Yankees,140 the Court refused to do so, holding instead that it was up to Congress to demystify the national pastime if it so chose.141 It would not be the body that would smash the myth. Finally, in 1972, in Flood v. Kuhn,142 the Court admitted that it had erred in Federal Baseball when it held that MLB was not engaged in interstate com-

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135. Norman L. Rosenberg, Here Comes the Judge!: The Origins of Baseball's Commissioner System and American Legal Culture, 20 JOURNAL OF POPULAR CULTURE 140 (Spring 1987).
136. 259 U.S. 200 (1922).
137. See id. at 208-09 (holding that because interstate transport of players is incidental, not essential to baseball, baseball may be characterized as non-commerce).
138. See Nathanson, supra note 59, at 77-79 (noting three important twentieth century Supreme Court rulings on business nature of baseball).
139. See id. (noting Supreme Court's treatment of baseball as occupying unique niche in American heritage).
140. 346 U.S. 356 (1953) (per curiam).
141. See id. at 357 (declining to subject baseball to antitrust regulation in accordance with Congressional intent to maintain such exemption for baseball); see also Nathanson, supra note 59, at 78-79 (highlighting Supreme Court's refusal to demystify baseball).
merce. But, nevertheless, the Court refused to overturn the decision or to render the Sherman Act applicable to MLB. Instead, in a telling passage, the Court held that the Federal Base Ball and Toolson decisions were “aberration[s] confined to baseball.” Further, in justifying the perpetuation of these aberrations, Justice Blackmun, after engaging in a long, syrupy, retelling of the mythical history of America’s game, announced in plain terms that baseball was indeed something different than anything else:

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

No other industry, not even another professional sports league, was to be granted such deference by the highest court in the land. Baseball was special. The antitrust exemption was merely one way of acknowledging this reality. If there was ever any doubt that baseball was not subject to the ordinary rules governing the rest of society, Blackmun’s opinion in Flood removed any trace of it.

B. Judicial Deference to the Powers of MLB’s Commissioner

The antitrust exemption is not the only area in which courts have deferred to baseball law. The U.S. legal system has likewise been very willing to defer to MLB in other areas as well, treating it once again unlike other businesses and even unlike other professional sports leagues. This first became apparent in 1931, in Milwaukee American Association v. Landis, when the Northern District of Illinois recognized the unique and powerful authority inherent

143. See id. at 282 (referring to exemption from antitrust laws as “aberration”).
144. See id. (noting that Federal Baseball had been established fifty years prior).
145. Id.
146. Id. at 266-67 (quoting Flood v. Kuhn, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)).
147. 49 F.2d 298 (N.D. Ill. 1931).
in Judge Landis’s Commissioner’s office. As stated above, upon accepting the position in 1921, Landis sought complete, autocratic, unchallenged control over MLB and the Major League Agreement was drafted in order to provide him with it. From the moment it was first tested in federal court ten years later, it was clear that Landis’s goal had been realized.

The facts of Milwaukee American Association were somewhat convoluted and labyrinthine. The case involved the repeated reassignment and optioning of a player who at one point had been under contract to the St. Louis Cardinals but whose contractual status had become questionable given that each team he was assigned to was either owned or controlled by the Cardinals. Before the case, Commissioner Landis had ruled that St. Louis’s option of the player to Milwaukee of the minor league American Association was void and that the player must either be returned to St. Louis, be transferred to a club not controlled or owned by St. Louis (unlike Milwaukee) or be released unconditionally. Landis was no fan of St. Louis’ pioneered “farm system” in which one main club owned or controlled several minor league clubs and shuffled the players from club to club. Pursuant to the power granted to him under the 1921 Major League Agreement, he took a strong stand against such joint ownership in ruling that such shuffling was contrary to the “best interests” of the game. At issue before the court was whether Landis’s “best interests” power held any legal weight when challenged in a court of law.

At the outset of the opinion, the court made clear that in fact it did. The court took notice of the broad swath of power granted to the Commissioner by MLB in an effort to “preserve discipline and a high standard of morale,” concluding that this “disclose[s] a clear intent upon the part of the parties to endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias.” With the Black Sox scandal less than a decade in the past, the court was quite willing to defer to MLB in its efforts to preserve a code of conduct above and beyond that required by the legal system. As such, although it recognized the reality of Landis as an “absolute despot,” it was not uncomfortable with this designation.

148. See id. at 299 (describing Commissioner as being endowed with “all the attributes of a benevolent but absolute despot”)

149. See id. at 299-300 (describing factual background of player’s trade history).

150. Id. at 299.
Further, the court held that the "best interests" provisions of the Major League Agreement that granted the Commissioner not only the power to resolve disputes brought to him, but also the power to initiate investigations on his own volition and to decide on whatever remedial action he deemed appropriate were not limited in any fashion:

[T]he provisions are so unlimited in character that we can conclude only that the parties did not intend so to limit the meaning of conduct detrimental to baseball, but intended to vest in the commissioner jurisdiction to prevent any conduct destructive of the aims of the code. . . . So great was the parties' confidence in the man selected for the position and so great the trust placed in him that certain of the agreements were to continue only so long as he should remain commissioner.151

Given the deference to baseball law, the court was not uncomfortable ceding authority to a system that embraced the rule of man over the rule of law – the polar opposite of the most basic tenet of the American legal system. This deference would prove troublesome over a half century later when Pete Rose would find himself deprived of a property right as a result of this inverted system of justice.

A further indication of the extent to which the court was willing to defer to the authority of Commissioner Landis was its response to the argument that the provision of the Major League Agreement wherein the club owners expressly waived their right of access to the courts was in violation of public policy in that it deprived the court of its jurisdiction. Once again, the court appeared to be untroubled by this unfettered, unchecked grant of absolute power to one man. While acknowledging that most such provisions are "commonly held void," here, the court held that submission of a dispute to Commissioner Landis as arbiter was not, provided that his decision was not unsupported by the evidence or "unless the decision is upon some basis without legal foundation or beyond legal recognition."152 What was left unsaid was how these determinations were to be made if all access to the courts was barred. In a roundabout fashion, the court soothed itself by concluding that the baseball commissioner's rulings could never be considered arbitrary or improper because they were necessarily made in further-

151. Id. at 302.
152. See id. at 303 (acknowledging the broad grant of arbitration powers).
ance of his pursuit "to keep the game of baseball clean." When and if this pursuit tramples the rights of others who may get in his way was not a question the court appeared willing to answer. In a case that, on its face, would seem to raise red flags, and one in which the court recognized the presence of absolute, unchecked, despotic power, the court curiously identified these qualities as justification for deferring to a private body rather than stepping in and acting as a judicial check. Legal instinct and common sense would seem to dictate a contrary result. But such senses are of little use when the legal system is confronted with America's game.

After Landis's death in 1944, MLB revised the Major League Agreement, removing the prohibition of access to judicial review and reigning in future commissioners' power by requiring that only conduct that violated a specific league rule could violate the "best interests" clause. These limitations, however, lasted only twenty years. In 1964, outgoing commissioner Ford Frick convinced club owners to strike these changes and return to the office of the commissioner the broad array of unchecked powers enjoyed by Judge Landis. And once again, the federal judiciary confirmed both that these powers had been restored in full and that it would defer to MLB just as it had under Commissioner Landis.

In June of 1976, Oakland A's owner Charles O. Finley sold some of his star players to the Boston Red Sox and New York Yankees rather than risk losing them to free agency at the end of the season. Commissioner Bowie Kuhn nullified the sales, asserting that they would debilitate the A's, upset the competitive balance of the American League and violate the "best interests" clause. Finley challenged Kuhn's ruling in federal court and the case eventually reached the Seventh Circuit Court of Appeals in 1978. In upholding Kuhn's actions, the court reiterated Justice Blackmun's refrain in Flood that "baseball cannot be analogized to any other business or even to any other sport or entertainment." Likewise, the court noted that baseball's Commissioner was similarly unique in that no other sport or business had a comparable position; one

153. See Milwaukee Am. Ass'n v. Landis, 49 F.2d 298, 303 (N.D. Ill. 1931) (finding that Landis's decisions were made with proper motives).
154. See Pachman, supra note 11, at 1416-17 (noting significant changes to Major League Charter).
155. See id. at 1417 (highlighting restoration of Landis-era powers).
156. See Finley v. Kuhn, 569 F.2d 527, 530-32 (7th Cir. 1978) (explaining player trades giving rise to dispute).
157. See id. at 531 (noting Commissioner Kuhn's concerns).
158. Id. at 537.
designed to protect and promote the "morale of the players and the honor of the game." 159 “While it is true,” the court announced, “that professional baseball selected as its first Commissioner a federal judge, it intended only him and not the judiciary as a whole to be its umpire and governor.” 160 Moreover, the court tacitly recognized the cultural fiction of the baseball creed and the unique role of baseball in American society when it noted that in 1957, the Supreme Court held that, unlike baseball, the antitrust laws do in fact apply to professional football. This, the court reasoned, was a “substantive pronouncement” with regard to the nexus between baseball and the legal system in that it indicated that baseball was something special and, as such, should be treated differently by the legal system than other professional sports. 161

The court then expanded upon the holding in Landis by ruling that the actions of the Commissioner can even be arbitrary and in direct contradiction of previous rulings without running afoul of either the Major League Agreement or the law. 162 Finley contended that, at a minimum, the Commissioner’s actions must be consistent with “prior baseball tradition” and that his power was limited to ruling only on those violations that were either immoral or unethical or which were in contradiction to posted league rules. 163 The court rejected these claims and thereby rejected any limitations placed upon the power of the Commissioner to act, unchecked, pursuant to the “best interests” clause. 164 It does not appear from the language of the Landis opinion that the court was ever willing to go that far, citing as it did the requirement that the Commissioner’s actions be consistent with “legal foundation.” 165 The Finley court’s recognition of the power of the Commissioner to act in an arbitrary fashion appears to reject this most basic limitation.

159. Id.
160. Id.
161. See id. at 541 (noting common law precedent for unique legal treatment of baseball).
162. See id. at 536-37.
163. See id. (outlining Finley’s complaints over Kuhn’s decision).
164. See id. at 539.
165. See Spink, supra note 110, at 303.
The *Finley* court did, however, establish a two-pronged test to determine when the judiciary would be justified in interceding in baseball's affairs. The test, however, was couched in an excess of language deferential to the autonomy of MLB such that it was unclear precisely when a court could intervene pursuant to this test. Specifically, the court held that MLB must "follow the basic rudiments of due process of law." In addition, MLB had to follow its own rules and regulations. Failure to adhere to either of these parameters would constitute exceptions to the nonreviewability clause. Absent these facts, the courts were content to steer clear of the legal business of baseball. "Any other conclusion would involve the courts in not only interpreting often complex rules of baseball to determine if they were violated but also, as noted in the *Landis* case, the 'intent of the (baseball) code,' an even more complicated and subjective task." Of course, courts have been more than willing to intercede into the affairs of other organizations with similarly confusing, Byzantine codes of conduct. But those other organizations are not Major League Baseball.

On the heels of *Finley* came *Atlanta National League Baseball Club v. Kuhn*. In this case, the Northern District of Georgia was presented with a squabble between Commissioner Kuhn and Atlanta Braves owner Ted Turner that emanated from boasts made by Turner at an October 1976 cocktail party. At the party, Turner told San Francisco Giants owner Bob Lurie that he was willing to spend whatever it took to lure free agent Gary Matthews (who had just completed his option year with the Giants and who was soon to be a free agent) from the Giants to his Braves. The Braves had previously been fined for tampering with Matthews a month earlier and, as an additional punishment, Kuhn denied the Braves their selection in the first round of the January 1977 amateur draft. Lurie filed a complaint with Kuhn and Kuhn held that Turner's comments were in violation of the "best interests" clause on several grounds. As a result, although Kuhn did not disapprove the Braves' signing of Matthews (which occurred between the date of Turner's boast and the date of Kuhn's hearing on the matter), he did sus-

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166. See *Finley v. Kuhn*, 569 F.2d 527, 544 (7th Cir. 1978) (limiting MLB's autonomy).

167. See *id.* (explaining that nonreviewability of private actions is contingent on adherence to organization's rules and regulations).

168. See *id.* (noting that adherence to organization's rules and adherence to basic due process are required).

169. *Id.* at 539.

170. 432 F. Supp. 1213 (N.D. Ga. 1977) [hereinafter *Atlanta*].
pend Turner for one year and reaffirmed the stripping of the Braves’ first round draft choice in the 1977 amateur draft. Turner filed a complaint in federal court and, once again, the extent of the Commissioner’s “best interests” powers were examined by the judiciary. Once again, the judiciary read them to be remarkably broad.

Initially, the court rejected Kuhn’s assertion that Finley held that the nonreviewability clause deprived the court of subject-matter jurisdiction. Instead, and seemingly in conflict with Finley the court held that the actions of the commissioner cannot be arbitrary and that the arbitrary nature of a Commissioner’s decision is one for the courts to decide. What it gave with one hand, however, it took with the other as, in exercising this judicial oversight function, the court demonstrated just how far it was willing to go in order to defer to MLB and how differently it was willing to treat MLB from any other professional sports league. This becomes clear when Atlanta is contrasted with a case that was factually similar in many respects other than the most important one: namely, that it did not involve MLB.

Three years prior to Atlanta, the Western District of Texas heard Professional Sports, Ltd. v. Virginia Squires Basketball Club, Ltd. a case that involved the powers of the Commissioner of the American Basketball Association (“ABA”), which, at the time, was a struggling rival of the established National Basketball Association (“NBA”). In that case, the plaintiffs, the San Antonio Spurs, purchased a player, George Gervin, from the Virginia Squires, for $225,000. Upon his review of the proposed purchase, the ABA’s Commissioner vetoed the sale, citing his authority under the ABA’s by-laws that permitted him to settle any and all disputes in which either a player or coach is a party. Similar to the Major League Agreement, the ABA’s by-laws stated that “[the Commissioners] decision[s] in such matters shall be final.” The Spurs challenged

171. See id. at 1218 (finding that extent of Commissioner Kuhn’s power is properly within court’s jurisdiction).
173. See id. at 953 (limiting commissioner’s power to assign player’s contract).
174. See id. at 948-49 (explaining that the Commissioner exercised his arbitration authority).
175. Id. at 949 (quoting ABA by-laws). The relevant portion of the ABA’s by-laws (Art. IV, § 5) stated:
The Commissioner shall hear and finally decide any dispute to which a player or a coach is a party. In all matters pertaining to the eligibility of players and all disputes arising between clubs relative to title to players’ contracts, the Commissioner shall make such investigation, and call such witnesses and demand such papers as he deems necessary, and his decision in such matters shall be final.
the Commissioner's authority to intervene in the sale and the court agreed that the Commissioner had acted improperly. The court held that, although the Commissioner did have the power to act as an arbiter to settle disputes, he did not have such power when it was the Commissioner himself who created the dispute. Here, as the court noted, both teams agreed upon the terms of the deal. Only the Commissioner objected to the arrangement. As such, the court held that "[w]hile the by-laws clearly contemplate arbitration by the Commissioner of disputes between clubs when he is acting impartially, it would be unreasonable and unrealistic to believe that the club members ever intended to authorize him to settle disputes which he himself had instigated . . . ."

Although the league's by-laws further empowered the Commissioner to "cancel or terminate any contracts . . . for violation of the provisions of the Certificate of Incorporation and By-Laws or for any action detrimental to the welfare of the League or professional basketball," the court held that this "best interests" clause would not save him in this case, given that the Commissioner's actions were taken without the required notice and hearing. The court held:

[T]he principles of fundamental fairness, as well as the by-laws themselves, contemplate a meaningful "notice and hearing" in actions taken under these sections, and since proceedings of this nature could have the effect of depriving a party of some property right, these terms should be construed to require at least the minimum essentials of "due process."

In sum, "[t]he simple truth is that the member clubs have not given the Commissioner the power and authority he claims."

The Atlanta court acknowledged the holding in Pro Sports Ltd. but concluded that it was ultimately inapplicable to the issues

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176. See id. at 950 (stating holding).
177. Id.
   No notice of any hearing to be held at a specified time and place was given either orally or in writing; there is no indication that the Commissioner apprised the plaintiff of the nature of the charges; and he certainly did not apprise plaintiff of the basis for his authority to act. There could have been no "meaningful" hearing, for the parties had no opportunity to present witnesses, documents or other relevant information . . . .

179. Id.
180. Id. at 952.
before it. In dismissing Braves’ owner Ted Turner’s argument that both Pro Sports Ltd. and Atlanta involved disputes generated by the Commissioner himself, the court held that here, Commissioner Kuhn was not acting pursuant to his power as an arbiter (which presumably would be improper in this instance according to Pro Sports Ltd.) but rather, pursuant to his “best interests” power which authorized him to investigate any act, either upon complaint or upon his own initiative, alleged or suspected to be in violation of the “best interests” of the game, and to determine the appropriate punishment, if any.\footnote{See Atlanta Nat’l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213 (N.D. Ga. 1977) (discussing article 1, section 2 of Major League Agreement which gives Commissioner authority to determine when punitive action is appropriate).} The court, however, ignored the remainder of Pro Sports Ltd., which contemplated the “best interests” clause of the ABA’s by-laws and held that any actions taken pursuant to this clause with the potential to affect a property right must be accompanied by “at least the minimum essentials of due process.” Unlike the Pro Sports Ltd. court, the Atlanta court did not investigate whether the Major League Agreement included any form of notice or hearing provisions in conjunction with the Commissioner’s “best interests” power, and if so, whether they were adhered to in this case at all, let alone, in a “meaningful” way. Even the Finley court made passing mention of how “the basic rudiments of due process of law” must be followed;\footnote{See Finley v. Kuhn, 569 F.2d 527, 544 (7th Cir. 1978) (noting that Major League Agreement’s waiver of recourse clause is generally valid, except (1) when rules, regulations or judgments of association are in contravention to laws of the land or in disregard of charter or bylaws of association or (2) when association has failed to follow basic rudiments of due process of law).} however, when put to the test, the Atlanta court was not prepared to hold MLB to this requirement.

The dichotomy between Pro Sports Ltd. and the MLB cases evidences the differences in treatment by the federal judiciary of members of professional sports leagues in general and those within MLB. Non-MLB members are afforded at least some level of judicially protected due process – perhaps not Constitutional due process, but some level of fundamental fairness. On the other hand, MLB members do not seem to enjoy the same privilege. This becomes particularly acute when it is the rights and interests of athletes that are involved. Taken together, the Landis, Finley and Atlanta cases appear to stand for the proposition that MLB can waive the rudimentary due process rights of its players via the Major League Agreement, of which the Players Association is not a signatory, regardless of any potential property interests that may be at
issue. This was evidenced in the Black Sox case in 1922 and would become clear once more in 1989 when Pet Rose would face a similar banishment from MLB. As shown by the court's holding in Pro Sports Ltd., the ABA, or any other professional sport, would most likely face stern judicial resistance if it attempted to similarly punish a player after the cursory hearings held first by Commissioner Landis and later by Bart Giamatti.

Some commentators have suggested that the sheer simplicity of the Major League Agreement causes federal courts to avoid the intricacies of Major League Baseball's internal affairs. In the NFL charter, the powers of the Commissioner are spelled out in stunning breadth and depth, with the range of acceptable punishments explicitly detailed. In the NBA, the “standard player contract” specifies that players may be suspended only for activities related to gambling; all other “detrimental” activities may be redressed by way of fine only. Because the Major League Agreement contains none of the specificity or limiting provisions as those contained within the relevant NFL and NBA documents, some have concluded that courts defer to this seemingly broad, unlimited grant of power to MLB’s Commissioner. This argument, however, appears to cut against the case for judicial deference in that this broad grant of unlimited power would necessarily fail the “fundamental fairness” tests of both Pro Sports Ltd. and Finley due to vagueness. Without clearly demarcated procedures designed to en-

183. See Pachman, supra note 11, at 1417-19 (explaining how detailed and strict provisions of NFL and NBA are more easily strictly regulated by American courts, because of their specificity and clarity; conversely, short and vague provisions of MLB are more nebulous and are assumed to be governed by MLB and thus, are avoided by outside courts).

184. See id.

185. See id. (“An exception is found in the National Basketball Association (NBA) standard player contract. The provisions of that document indicate that NBA players acknowledge the commissioner’s right to suspend them for activities related to gambling, but that other ‘detrimental’ activities are restricted to punishment by fine.”).

186. See id. (making argument through contrasting MLB to other sports associations).
sure at least "the most rudimentary level of due process," the MLB Commissioner’s broad swath of power would seem to cry out for judicial oversight and intervention. Yet, judicial deference is more often the response.

The bald reality, as exposed by the baseball cases, that many of the laws and legal safeguards that apply to the majority of society simply do not apply to MLB, registered some unease in the Atlanta court but apparently not enough to cause it to rethink its holding: "The court therefore concludes, with some misgivings, that under this provision, the Commissioner did have the authority to punish plaintiffs."187 Why federal courts time and again defer to MLB even in the face of precedent that requires them to slalom through their reading of the law in order to reach their desired outcomes is, perhaps, not clear on the surface; maybe it is not even clear to these courts themselves. Rather, the rationale rests within a notion that has become so ingrained in the American subconscious that it is most likely driving these decisions from the backseat – not in the face of the decision makers, but a forceful presence nonetheless. Very likely it is an even more forceful presence because it is beneath the surface, lingering and nagging at every turn. It is the concept of baseball as something greater, something transcendent, something that speaks to the soul of America. Something that would be sullied if forced to comply with the mundane concepts of due process and other legal niceties. Something that has convinced a large swath of Americans that its very status as our national symbol justifies its treatment in the most un-American of ways.

187. See id. at 1422 (noting how Atlanta court did step in with regard to power of MLB’s Commissioner to issue sanctions, holding that he may not impose sanction not explicitly enumerated within Major League Agreement). As such, the court held that Kuhn’s denial of Brave’s first round draft choice was improper because denial of draft choice is not enumerated within list of possible sanctions within Major League Agreement. See id. Specifically, Article I, section 3 lists punitive measures Commissioner may take as (a) reprimand; (b) deprivation of Major League Club of representation in joint meetings; (c) suspension or removal of any officer or employee of Major League or Major League Club; (d) temporary or permanent ineligibility of player; and (e) fine, not to exceed $5,000 for Major League Clubs and not to exceed $500 for any officer, employee or player. See Atlanta Nat’l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1225 (N.D. Ga. 1977) (explaining Atlanta court held that neither Landis nor Finley courts had ruled on issue and reasoned “in light of the fact that this contract purports to authorize the imposition of a penalty or forfeiture, it must be strictly construed”). The limitation on Commissioner’s powers is quite minor when compared with seemingly unfettered ability he has to take action pursuant to his “best interests” clause, as would be later demonstrated to devastating effect in 1989 Pete Rose scandal. Id.
V. Societal Acceptance of the Extra-Legal Status of MLB

Because of the widespread acceptance of the cultural fiction of the baseball creed, as well as its treatment by the courts, baseball has, through the course of the twentieth century, become what it was touted to be a century earlier: something greater than merely a game, something that transcends everyday life and something which, therefore, is justifiably treated with kid gloves by the American legal system. This special treatment, through the antitrust exemption as well as the deference paid to MLB’s Commissioner, repeatedly heightened the pedestal upon which the game stood such that, in circular fashion, with each act of judicial deference, the exalted status of the game became more and more ingrained.

In fact, by the middle of the twentieth century, the game had become something much more to many Americans: it had become as close to a national religion as this country was ever going to get. One sociologist referred to it as a “civil religion.”188 “By civil religion,” he wrote, “I refer to that religious dimension, found I think in the life of every people, through which it interprets its historical experience in the light of transcendent reality.”189 Once the analogy had been made, the comparisons between the two became obvious to anyone wishing to make the connection: the ballparks were referred to as “green cathedrals” and spoken about in reverent tones with, in the words of one believer in the church of baseball, “the awe generally reserved for the great cathedrals of Europe.” Even rickety, minor league ballparks, replete with inadequate plumbing, peeling paint and overrun with rodents, were thought of as “somebody’s place of worship.”190 The Sporting News, which for years was devoted to baseball primarily and other sports only when space permitted, gained the moniker of “baseball’s bible.” Albert Spalding, the nineteenth century player and sporting goods magnate who brought the game to many parts of the world through his barnstorming world tour of Major League players during the winter of 1888, became “the baseball messiah.”191 Of course, every religion requires a spiritual center and baseball was no different. The


189. Id.


191. Id.; see also Mark Lamster, Spalding’s World Tour: The Epic Adventure that Took Baseball Around the Globe – And Made It America’s Game (PublicAffairs 2006) (explaining Spalding and two baseball teams went on globe-
National Baseball Hall of Fame in Cooperstown, NY (the mythical—although largely discredited—birthplace of the game) filled that role admirably with its congregants hoping to make "pilgrimages," referred to by some as "sacred journeys," to this baseball "Mecca" at least once in their lifetimes. Given the ready comparisons, it is no wonder the judicial system has attempted to steer clear of this quasi-sacred institution whenever possible.

Beyond religion, baseball wore its mythical status well when presented through literature, as it was used time and again to "express the psychological nature of American life and its moral predicament," most notably, although certainly not exclusively, in Bernard Malamud's "The Natural." Malamud attempted to portray the early and mid-century baseball star as a mythic hero, assigning to his protagonist, Roy Hobbs, attributes of real baseball players. He grounded his story in reality before propelling his readers into a tale that transcends reality, thereby draping his tale, and the game itself, with mythical, transformative qualities. For instance, the Hobbs character was largely based on the greatest baseball star of the first half of the twentieth century, Babe Ruth (among other similarities he was a pitcher before becoming a slugger and he makes good on a promise to hit a home run for a boy on his death bed in the hospital). Moreover, Hobbs was shot by a deranged female fan, not unlike Eddie Waitkus in 1949. These "real life" attributes provide a realistic basis for the story which then dips into the world of romance and fantasy (witness Hobbs's bat, "Wonder Boy" carved out of a lightning-struck tree; his first game-winning hit miraculously bringing rain to the parched field; his team, the "Knights," led by the mythic hero propelled, Arthurian spanning goodwill tour, endorsed by President Cleveland, to introduce baseball to world).

192. See Newman, supra note 190, at 51 (defining "pilgrimage" and noting how certain baseball terms have religious associations).


194. BERNARD MALAMUD, THE NATURAL (Farrar, Straus & Giroux 1980) (writing fictional account of relationship between divine intervention and player determined to "be the best ever").

195. See Carino, supra note 193, at 72-73 (describing qualities of Malamud's fictional protagonist that appear to be adopted from real-life characteristics of Babe Ruth).

196. See id. at 72.

197. See id. at 73.
style, by his Excalibur-like bat, and on and on). These elements work “reciprocally to add an element of reality to myth and an element of myth to history.” In the end, the message is clear: baseball is a medium that transcends the everyday. Just as it would appear unseemly to require King Arthur to show two forms of identification before purchasing a pint of ale, it likewise feels wrong to require baseball’s Commissioner to hold a full and fair hearing before banishing someone from the game.

The link between baseball and “American-ness” even extends, naturally enough, to the White House where the link between the two is forced, but nonetheless stressed. One need look no further than the official White House web site to see a story focusing on the alleged tale of George Washington playing an early version of the game on the fields of Valley Forge. This link has been exploited for as long as both institutions have been around. President Herbert Hoover once quipped that “[n]ext to religion, baseball has furnished a greater impact on American life than any other institution.” During times of national crises, baseball has been used to rally the country, as evidenced by President Franklin Roosevelt’s “green light letter,” in which he gave his blessing for the game to continue through World War II. Roosevelt commented, “I honestly feel that it would be best for the country to keep baseball going.” The national interest was not similarly considered with regard to football.

Despite popular sentiment to the contrary that football has now usurped baseball in both popularity and connection to the national spirit, recent evidence shows that this is hardly the case. In the 2004 presidential election, Democratic nominee (and Massachusetts senator) John Kerry blundered when he stated that his favorite player on his favorite team was “Manny Ortez” – a bungled confabulation of the two Red Sox stars Manny Ramirez and David Ortiz. George W. Bush, who previously proclaimed that there were two sacred places on American soil: The White House and

198. See id. at 69.
199. Id.
202. Id. at 53-54.
203. See id. at 55.
Yankee Stadium, 204 pounced, using Kerry's blunder to portray him as out of touch with the soul of America. 205 A similar gaffe with regard to Kerry's favorite players on the New England Patriots would most likely have had little political and symbolic value. To many Americans, baseball is representative of something deeper. The baseball creed has succeeded in worming itself into the fabric of America, to the point where the game is seen as central to our shared, core American values. As such, it only makes sense that, all realities aside, baseball be afforded an exalted place in our society and, therefore, our legal system.

VI. BANISHMENT AND PETE ROSE: THE DANGERS OF EXTRA-LEGAL STATUS ON DISPLAY

As a general notion, those who argue for the self-regulation of all sports, at least to a degree, base their arguments on the theory that because sporting events depend on both the actual and apparent honesty and integrity of the competition, an internal system must be in place that is able to dole out "justice" quickly and firmly. Because time is of the essence, and even a waft of corruption or foul play can be enough to taint an entire league, reliance on the judicial system, with its formal procedural rules and multiple layers of appeal, is considered inappropriate. Integrity must be kept intact and this can only be done if action is taken swiftly and severely. 206 Given the connection between baseball and America, this argument only resonates more strongly with regard to MLB. As such, banishment, "the ultimate sanction," is seen as a necessary and just response to certain "crimes" committed according to the internal social, political and legal standards of those who oversee the game (as opposed to the external, formal legal standards that govern the rest of society). 207 Banishment, however, affects the victim in ways that extend beyond the games themselves. As a result, courts' deference to professional sports leagues (most notably MLB, where the deference is most pronounced) in decisions and procedures with regard to banishment raises legal issues that are all too often ignored in the rush to protect the "integrity of the game." Commis-
sioner Landis’s expulsion of the Black Sox in 1922 most famously displayed these banishment issues, but the same issues have reappeared several times since then.

In 1970, for example, Commissioner Kuhn indefinitely suspended Detroit Tigers pitcher Denny McLain for associating with gamblers.\[208\] Although McLain was never convicted, charged with a crime, or even accused of throwing a game, Kuhn doled out “justice” nevertheless. After conducting an internal investigation Kuhn amended McLain’s suspension to a three-month ban, which itself was derided by many as being much too lenient, regardless of the reality that McLain had seemingly violated no law yet was being punished through the denial of a property interest (his salary) anyway.\[209\] *Newsweek* lamented that “baseball, like all sports, is a very special segment of that society – one that depends for its very existence on the complete confidence of the public. McLain shook that confidence as badly as anyone in the last 50 years, and Kuhn’s action last week compounded the error.”\[210\] To many, Kuhn’s sentence violated their sense of justice – not of the legal variety – but one emanating from somewhere else entirely; a higher sense, one which MLB was expected to dole out in order to protect the integrity of the game and, therefore, the American soul.\[211\] Saddled with this responsibility, and empowered by the legal system to seemingly act unchecked, it is little wonder that a culture of corruption would eventually set in as a sense of entitlement and indifference to the rule of law and to the societal boundaries of acceptable conduct became ingrained within MLB. All of this would be on display in the Pete Rose affair. And from the Rose affair, it certainly was a short trip to the Enron-like system of corruption exposed by the December, 2007 release of the Mitchell Report.

As the generation that could recall the Black Sox scandal died out, successive generations would receive their own lesson of baseball justice through the Rose affair, which in many ways was Black Sox redux.\[212\] By the late 1980’s, however, there was over sixty years of precedent for MLB’s exertion of extra-legal authority. As such, the abuse of Rose’s rights was far more blatant. Nevertheless, these abuses were easily brushed off by an organization which, by this

\[209\] See id.
\[210\] Id. at 137-38.
\[211\] See id. at 137.
\[212\] See id. at 185.
point, was confident that the federal legal system was highly unlikely to step in and challenge its authority.

The facts of the Rose case were relatively straightforward. In 1985 and 1986, Rose, who at the time was managing the Cincinnati Reds (the beneficiaries of the thrown 1919 World Series), was alleged to have placed a series of wagers on 390 Major League games including 52 involving his Reds.213 Betting sheets were uncovered, complete with Rose’s fingerprints, along with the betting records of Rose’s bookies, including one of Ron Peters, a bookmaker from suburban Cincinnati.214 If proven, this activity would violate Baseball Rule 21(d) which forbids any player, umpire, club or league official or employee from betting on any baseball game. If the game was one in which the bettor had no connection, the penalty is a one-year suspension; if, however, the game was one in which the bettor “has a duty to perform,” the penalty would be the ultimate sanction: permanent banishment from the game.215 Upon receipt of this information, Commissioner Peter Ueberroth invoked his power to investigate and, in February 1989, hired John M. Dowd to conduct an inquiry into the allegations.216 On April 1, 1989, Bart A. Giamatti succeeded Ueberroth as Commissioner and the investigation continued with Dowd focusing on the bookies, particularly Ron Peters, who was staring down federal charges of cocaine distribution and tax evasion and who was, therefore, in a vulnerable position himself.217 In order to coax out his testimony, Dowd informed Peters that, in exchange for his “full and truthful cooperation with the Commissioner,” Giamatti would agree to bring to the attention of Peters’ Federal District Court judge the fact that Peters was “of assistance to us and that we believe that you have been honest and complete in your cooperation.”218 Peters agreed and then implicated Rose. Thereafter, Giamatti wrote to U.S. District Court Judge Carl Rubin: “It is my purpose to bring to your attention the significant and truthful cooperation Mr. Peters has provided to my special counsel . . . . Based upon other information in our possession, I am

213. See Klein, supra note 88, at 570.
214. See id.
216. See Klein, supra note 88, at 575-76.
217. See id.
218. Id.
satisfied Mr. Peters has been candid, forthright and truthful with my special counsel."\(^{219}\)

Rose took exception to Giamatti’s letter, alleging that it constituted evidence that Giamatti had prejudged the case, given that, prior to the hearing and the introduction of Rose’s evidence in defense of the charges against him, Giamatti had apparently already concluded that the chief witness against him, Ron Peters, had been “candid, forthright and truthful.” Rose claimed that his upcoming hearing was little more than window dressing, as his fate had already been determined. Therefore, he sued Giamatti in state court to prevent the hearing from going forward. Rose based his suit on several theories, the most pertinent of which drew from the dicta in Finley and was based on a breach of contract theory where he claimed that Giamatti was contractually bound to conduct his hearing in accordance with the Rules of Procedure contained within the Major League Agreement which stated that such proceedings should be run “in general like judicial proceedings.”\(^{220}\) He also alleged that the procedures he was to be subject to prevented him from properly confronting his accusers and from cross-examining them (particularly those named within what became known as the “Dowd Report”).\(^{221}\) Rose’s claim echoed the court in Pro Sports Ltd. by raising substantive and procedural due process issues, claiming that public policy, as well as Ohio law, required “reasonable notice and a hearing with a fair opportunity to defend the charges.”\(^{222}\) Finally, he called on Giamatti to recuse himself from the proceeding, given his biased opinion as expressed in his letter to Judge Rubin.\(^{223}\)

Wisely, Rose filed his case in state, rather than in federal, court. As such, without the history of deference behind it, he stood a better chance of at least having his voice heard. In June of 1989, the state court granted his motion for a temporary restraining order, holding that despite the legal system’s tradition of deference to MLB, here, there was no choice but to step in, given the strong likelihood that Giamatti had prejudged Rose’s case and that the subsequent hearing would be “futile, illusory, and the outcome a

\(^{219}\) Id. at 576.

\(^{220}\) Id. at 580-81 (discussing Rules of Procedure contained within Major League Agreement); see also Rose v. Giamatti, 1989 WL 111386 (Ohio Com. Pl. 1989).

\(^{221}\) See Klein, supra note 88, at 580-81.

\(^{222}\) Durney, supra note 62, at 592.

\(^{223}\) See Klein, supra note 88, at 580-81.
foregone conclusion.” MLB, however, removed the case to federal court where the Sixth Circuit eventually denied Rose’s objection to the removal, thereby setting into motion the process for the “futile, illusory” hearing that could now finally take place. Although Rose had one formal legal avenue still open to him – a hearing on his motion for a permanent injunction against Giamatti, albeit this time in federal, rather than state, court – Federal District Court Judge John D. Holschuh strongly hinted that he would abide by tradition and defer to the substantive and procedural rules as defined by MLB, irrespective of how it chose to implement them. With state court closed off to him and the federal court clearly hinting that it would provide him no relief, Rose was effectively at the mercy of Giamatti. Therefore, on August 23, 1989, Rose consented to his permanent banishment from the game, signing a document in which he “recognize[d], agree[d] and submit[ted] to the sole and exclusive jurisdiction of the Commissioner” to hear and determine this matter, as well as any other determined by the Commissioner to be “not in the best interests of the national game of baseball.” In the end, despite the absence of a formal finding that Rose bet on baseball, let alone his Reds, and without so much as even the “futile and illusory” hearing contemplated by the Ohio state court, Rose was banished for life.

The agreement did toss Rose a couple of bones. Although it was technically a “permanent” banishment, it provided for the possibility of his reinstatement after one year. More importantly, and perhaps a nod to the denial of due process and lack of a hearing prior to banishment, it contained the following language: “[n]othing in this agreement shall be deemed either an admission or a denial by Peter Edward Rose of the allegation that he bet on any major league baseball game.” Combined, these two apparent concessions by MLB seemingly paved the path for Rose’s eventual return to the game; as such, they most likely contributed to his assent to the agreement and his dropping of the legal case, regardless of the ultimate futility of his pressing onward. Now, pursuant to the

224. Murray Chase, Judge Blocks Giamatti’s Hearing on Betting Charges Against Rose, N. Y. TIMES, June 26, 1989, at A1 (discussing Judge’s decision to prevent Giamatti from holding hearing on Rose charges).
225. See Klein, supra note 88, at 583-84.
228. Id.
terms of the agreement, Rose could see his way out of the forest, however, almost immediately MLB made it very clear that any such path was illusory.

Upon the announcement of the agreement, Giamatti stated that irrespective of the language agreed upon by both he and Rose, he believed that Rose had bet on baseball.\textsuperscript{230} Instantly, for all practical purposes, the terms of the agreement had been changed unilaterally by MLB—in order to successfully apply for reinstatement, Rose would most likely have to admit that he bet on baseball. This was something that was not contemplated by the agreement and added yet another layer of injustice to MLB's handling of the Rose affair: not only was banishment carried out in the absence of a hearing and in the absence of due process, but both the banishment agreement, as well as the terms of reinstatement, were altered unilaterally and after the fact. To further complicate matters, eight days later, Giamatti died of a heart attack, thereby sealing Rose's fate.\textsuperscript{231} At this point it was extremely unlikely that future Commissioners were going to take steps to undo the agreement of their predecessor, an individual immensely admired. This was made explicit in 1995 when (then acting) Commissioner Selig stated that he would not revisit Rose's banishment because "Bart Giamatti was one of the best friends I've ever had in the world, and I have great faith in his decision. His decision still stands, and as far as I'm concerned, his decision should stand."\textsuperscript{232} Legal niceties and issues of fundamental fairness were not the issue in Selig's eyes. Instead, it was the reputation of a friend that hung in the balance.

Taken together, the many stages of the Rose affair, as well as its ultimate resolution, are indicative of a system embracing the rule of man rather than the rule of law—the polar opposite of the principle upon which the American legal system allegedly rests. Yet somehow, despite the reality that baseball has been governed in such fashion since the days of Judge Landis, it is still seen as symbolic of America. If so, this raises serious questions about what this says about both institutions. Rose's case illustrates that even the most basic concessions to the applicability of the rule of law as outlined

\textsuperscript{230. See id. During the question and answer session of the announcement of the agreement between MLB and Rose, Giamatti's response to the first question posed to him ("Did Rose bet on Baseball?") was: "In the absence of a hearing and therefore in the absence of evidence to the contrary . . . . I am confronted by the factual record of Mr. Dowd. On the basis of that, yes, I have concluded that he bet on baseball." Id.}

\textsuperscript{231. See Nathan, supra note 52, at 187.}

\textsuperscript{232. See Rychlak, supra note 215, at 900.}
in *Finley* were little more than dicta. When they stood in the way of “baseball justice” they were to be pushed to the side as well. *Finley*’s two-pronged test regarding the Major League Agreement’s waiver of recourse to the courts called for judicial intervention when the Commissioner does not follow baseball’s internal rules or when he violates the basic rudiments of due process of law.233 Giamatti violated both prongs of the *Finley* test yet Federal District Court Judge John D. Holschuh strongly hinted that this was of little matter as he was prepared to defer to Giamatti regardless.

Giamatti, like Landis before him, initiated and presided over an affair where he was the investigator, prosecutor, judge and jury, acting in so many different capacities so as to exceed, at least according to *Finley*, even the broad powers granted him within the Major League Agreement. Outside of the context of MLB, courts have held that such a concentration of power in one office raises serious concerns, as there exists an obvious potential for abuse.234 On top of this, the fact that the decisions made by this powerful individual are not subject to judicial review absent extraordinary circumstances is likewise a factor that, in non-MLB contexts, has caused concern by several courts, including the Supreme Court.235 The institutionalized, structural biases inherent in such a system — one in which there appears to be no restraint upon a Commissioner to punish people without proper review and safeguards, as well as one in which the Commissioner himself is free to set forth the rules of procedure which he will then follow (or not, as the Rose affair demonstrated) — are obvious and odious.236 Yet the judicial system continues to defer.

In the absence of a judicial check, a culture of abuse was allowed to fester as MLB was free to conduct its affairs however it


234. *See Durney*, *supra* note 62, at 609-10; *see also* Auto. Serv. Councils of Mich. v. Sec’y of State, 267 N.W. 2d 698, 705 (Mich. App. 1978) (“The danger of unfairness is particularly great in an agency in which there is a high degree of concentration of both prosecuting and judicial functions, especially where the functions are combined in the same men. The courts have pointed out that in such situations the agency members must be zealous in the recognition and preservation of the right to a hearing by impartial triers of the facts, and such fusion of functions has been subjected to considerable criticism.” *Id.* (quoting 1 AM. JUR. 2D. Administrative Law § 78)).

235. *See Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) (holding United States Arbitration Act allows removal of arbitration award when arbitrator found to be partial). “We should . . . be even more scrupulous to safeguard the impartiality of arbitrators . . . since [they] have completely free rein to decide the law as well as the facts and are not subject to appellate review.” *Id.* at 149.

pleased in order to achieve other goals. In Rose’s case, as in the case of the Black Sox, it was to protect the image of the game, to present it as one with its integrity intact despite the actions of alleged outliers such as Rose and the 1919 White Sox. The prospect of a full and fair investigation and resulting hearing, complete with the possibility of exoneration of the suspects, was something MLB was not willing to risk, particularly when it did not have to, given its elevated role within American society which made judicial interference highly unlikely.

VII. CONCLUSION

After the Rose affair, the extra-legal status of Major League Baseball was more assured than ever. Accordingly, MLB was free to establish its own rules and then break them whenever and however it wished, federal law notwithstanding. In this environment, it is not surprising that suspicion and evidence regarding illegal drug and steroid use was ignored throughout the 1980s, ‘90s and ‘00s, particularly when acknowledgment of such abuses would likely dampen enthusiasm for the game and threaten its integrity as an un tarnished sport and an emblem of American values. This pressure became increasingly acute after the labor unrest and resulting work stoppage, which wiped out the 1994 World Series and damaged the popularity of the game. Upon its return in 1995, baseball was looking for a return to its exalted status, much as it was in the wake of the Black Sox scandal. Eventually, it found the path through power hitters such as Mark McGwire, Sammy Sosa and Barry Bonds, who threatened home run records and brought people back to the game, just as Babe Ruth had in the early 1920’s. As pitcher Greg Maddux said in a promotional spot for MLB at the time, “chicks dig the long ball.” Without the threat of legal action hanging over its head for non-compliance with existing federal law, MLB had no incentive to comply with it and every incentive to ignore it, blissfully and willfully. As a result, players got bigger and home run records that had stood unchallenged for decades were smashed and then smashed again as the baseball record book was rewritten with each passing season. In its considered ignorance, MLB encouraged the culture of corruption that emerged in team clubhouses throughout the league and profited from it both in terms of dollars and status. The Mitchell Report exposed it, but, despite the machinations of Selig to deflect attention away from MLB and onto players such as Barry Bonds, the exposure was not in
the form of a window into the secret workings of a Major League locker room, but instead, that of a mirror, where what was exposed was merely a reflection of the inner workings of MLB itself.