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The Supreme Court (of Baseball)

"No man in this country is so high that he is above the law."

—United States v. Lee, Dec. 4, 1882[1]

"[N]o individual is superior to the game."

—Commissioner A. Bartlett Giamatti, Aug. 24, 1989[2]

INTRODUCTION

At his 2005 confirmation hearing, Chief Justice Roberts explained that he viewed the job of a Supreme Court Justice as similar to that of an umpire, declaring, "Umpires don't make the rules; they apply them. . . . They make sure everybody plays by the rules. . . . And I will remember that it's my job to call balls and strikes, and not to pitch or bat."[3] That analogy was an "instant success" and has become the dominant paradigm in media accounts of the judicial role.[4] In a 2010 essay, I traced the history of the judge-umpire analogy from 1888 to the present and found that the judge-umpire analogy was originally intended to apply to trial court judges and was advanced as a model

1. 106 U.S. 196, 220 (1882).

2. Office of the Comm'r of Major League Baseball, Statement of A. Bartlett Giamatti (Aug. 24, 1989) [hereinafter Giamatti Statement], *reprinted in* 68 MISS. L.J. 903, 905 (1999).

3. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr.).

4. Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702 & n.5 (2007).

expressly to be rejected.[5] In place of the judge-umpire analogy, I proposed that a Supreme Court Justice is more appropriately analogized to the Commissioner of Baseball.[6]

This Essay reinforces the Justice-Commissioner analogy in two ways. First, it traces the Justice-Commissioner analogy back over a century, finding that the Commissioner of Baseball has been compared to the Supreme Court since the Office of the Commissioner was created.[7] This is no coincidence: both Justices and Commissioners play the same structural roles in their respective systems. Neither a Justice nor a Commissioner is a fact-finder searching for a clear right answer to a specific question—for example, was the ball in the strike zone?[8] Rather, both make inherently difficult, controversial, and value-influenced decisions at high levels of abstraction;[9] both interact with and modify the rules of their respective systems in order to preserve their respective institutions' core values, such as fair play and due process. In short, being a Justice and a Commissioner is hard: there are not always clear right and wrong answers.[10]

Second, this Essay illustrates the similarity of Justices and Commissioners through nine paired case studies where Justices and Commissioners have, in their respective capacities, (1) provided guidance, (2) refrained from error correction, (3) undertaken rulemaking, (4) exercised countermajoritarian powers, (5) provided explanations for their decisions, (6) protected the fundamental values of their respective institutions, (7) employed special

5. Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 114-17 (2010), http://yalelawjournal.org/2010/03/03/zelinsky.html.

6. *Id.* at 118-25.

7. Indeed, as noted *infra* Part I, the comparison existed even prior to the creation of the Office of the Commissioner.

8. Even this seemingly simple question is more difficult than it appears. *See* Michael McCann, *Evaluating Judge John Roberts' Analogy of Justices to Umpires*, SPORTS L. BLOG (Sept. 14, 2005, 6:25 PM), http://sports-law.blogspot.com/2005/09/evaluating-judge-john-roberts-analogy.html; Howard Wasserman, *More Against the Judge-Umpire Analogy*, PRAWFSBLAWG (Aug. 5, 2008, 8:00 AM), http://prawfsblawg.blogs.com/prawfsblawg/2008/08/some-recent-dis.html.

9. This is not to argue that every decision Justices and Commissioners make is value driven; doubtless, many are relatively easy. However, the most prominent and difficult decisions are influenced by ideology, since they "are not dictated by the unambiguous language of authoritative documents." Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 9 (2006).

10. *Cf.* A LEAGUE OF THEIR OWN (Columbia Pictures 1992) ("It's supposed to be hard. . . . The hard is what makes it great.").

masters for fact-specific inquiries, (8) decided on statutes of limitations, and (9) exercised finality.[11] This Essay concludes that Chief Justice Roberts had the right sport but the wrong position: Justices are not umpires; they are Commissioners.

I. THE HISTORY OF THE JUSTICE-COMMISSIONER ANALOGY

Like the judge-umpire analogy, the Justice-Commissioner analogy has a long historical pedigree. However, unlike the judge-umpire analogy, the Justice-Commissioner analogy was originally intended as a model to be embraced, not rejected. The role of Baseball Commissioner was inspired by—and designed to function as—the role of Supreme Court Justice. This Part describes the history of the Justice-Commissioner analogy, beginning with the creation of the Commissioner's predecessor, the National Commission, in 1903 and extending through to the present.

1. The Commission as Justice: 1903-1919

In the beginning, baseball was a game played by the wealthy for their leisure.[12] By 1858, money arrived in the form of admissions fees at the New York/Brooklyn All-Star Game.[13] By the 1860s, players began collecting salaries from their teams.[14] In 1876, the National League (NL) was founded, joined by the American League (AL) in 1900.[15] In 1903, the AL and NL signed the National Agreement, outlining terms of cooperation between the two leagues,[16] including the creation of the National Commission. Article IV of the National Agreement declared:

11. For more on theories of paradigm cases, see Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1986 (2006), which describes paradigm cases as those "shaping the doctrine as exemplary holdings around which the rest of the case law is organized."

12. [William S. Stevens], Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1476 (1975).

13. WARREN GOLDSTEIN, PLAYING FOR KEEPS: A HISTORY OF EARLY BASEBALL 70 (1989).

14. *Id.*

15. SPALDING'S OFFICIAL BASE BALL RECORD 304, 382 (Henry Chadwick et al. eds., 1919).

16. G. EDWARD WHITE, CREATING THE NATIONAL PASTIME 60 (1996). For more on the development of these two Leagues, see JOHN STEWART BOWMAN & JOEL ZOSS, THE AMERICAN LEAGUE: A HISTORY (1992); and JOHN STEWART BOWMAN & JOEL ZOSS, THE NATIONAL LEAGUE (1986).

> A commission of three members, to be known as the National Commission, is hereby created with power to construe and carry out the terms and provisions of this Agreement, excepting when it pertains to the internal affairs of the National Association. One member shall be the President of the National League and one the President of the American League. These two members shall meet, on or before the first Monday of January in each year, to elect by majority vote a suitable person as the third member.[17]

In cases where both AL and NL teams attempted to sign the same player, this third member, the Chairman of the Commission, was granted the authority to "determine the case on the law and evidence"[18] and to award the player to one team or the other. The Commission was also empowered to hear final appeals from the minor leagues regarding salary arbitration.[19] In cases of dispute between a player and his team, the National Agreement provided that "the testimony shall be heard and the case adjudicated by the Chairman of the Commission and the representative of the [non-involved] League."[20] Thus the Commission, by design, possessed many of the powers of a supreme court. It had the final word in construing the National Agreement, it possessed the power to adjudicate cases based on "law and evidence," and it had relatively narrow original jurisdiction combined with broad-ranging powers of appellate review.

Given the judicial character of these ultimate powers, it is no surprise that the National Commission often has been analogized to the U.S. Supreme Court.[21] In 1917, in a piece titled "The Supreme Court of Baseball," attorney Charles Jacobson remarked:

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17. NATIONAL AGREEMENT FOR THE GOVERNMENT OF PROFESSIONAL BASE BALL CLUBS art. IV (1903) [hereinafter NATIONAL AGREEMENT], *available at* http://roadsidephotos.sabr.org/baseball/1903NatAgree.htm.

18. *Id.* This provision (as well as, in many ways, the National Agreement itself) was designed to address the issues brought up by disputes over players like Nap Lajoie, who, in those days, were viewed as jumping unfairly from league to league to get the best deal. *See* BENJAMIN G. RADER, BASEBALL: A HISTORY OF AMERICA'S GAME 88 (2008).

19. Henry Beach Needham, *Play Ball: The Story of Our National Game*, SUCCESS MAG., Aug. 1907, at 526.

20. NATIONAL AGREEMENT art. IV (1903).

21. *See, e.g.*, ALRED H. SPINK, THE NATIONAL GAME 77 (1910) ("In the business end of the sport Cincinnati has kept to the front of late years by furnishing the chairman of the National Baseball Commission, the supreme court of baseball . . . ."); Ross E. Davies, *It's No Game: The Practice and Process of the Law in Baseball, and Vice Versa*, 20 SETON HALL J. SPORTS & ENT. L. 249, 284 (2010) (describing the Commission as the Supreme Court of Baseball); Malcolm W. Bingay, *When Both Teams Won on the Same Error*, BASEBALL DIG., Oct. 1967, at

> Unique in the annals of contemporaneous jurisprudence is *the supreme court of baseball*, otherwise officially known as the National Commission. Supreme in the finality of its decisions, it is the sine qua non of our national sport, the last resort for disputatious players and owners. It is a tribunal which, when acting within its jurisdiction, admits of no appeal from its mandates except to the courts of the country, and the strength and justice of its existence and activities is shown in the minimum number of controversies which find their way into the courts.[22]

Other contemporary authors described, in constitutional terms, how

> [t]he owners, weary of the ruinous strife and compelled to cease their efforts to ruin each other for safety's sake . . . reached the "National Agreement" which is the basis of all baseball law. The [Leagues] ratified *the agreement as the supreme law of the game*, arranged for the establishment of *a supreme court of baseball* to sit en banc (or en bunc) on disputes of all kinds, agreeing to accept decisions as final.
>
> This Court was called the National Commission, and it constitutes perhaps the most extraordinary judicial and legislative body in the history of America.[23]

The National Commission was kept busy; during the 1905 season alone, the "Supreme Court of Baseball" decided seventy-three cases involving disputes between teams over players.[24] Contemporaries conducted empirical studies of the "decisions" of the National Commission. These studies were reminiscent of analyses that would be carried out nearly a century later on the Supreme Court of the United States.[25] One such study declared:

21, 21 ("[T]he supreme court of baseball was what they called the old National Commission."); Hugh S. Fullerton, *Baseball—The Business and the Sport*, 63 AM. REV. OF REVIEWS 417, 418 (1921) (referring to the National Commission as the "Supreme Court of baseball, with power over all leagues").

22. Charles Jacobson, *The Supreme Court of Baseball*, CASE & COMMENT: LAW. MAG., Jan. 1917, at 665, 665 (emphasis added).

23. JOHN J. EVERS & HUGH S. FULLERTON, TOUCHING SECOND: THE SCIENCE OF BASEBALL 47 (1910) (emphasis added).

24. DAVID QUENTIN VOIGT, BASEBALL: AN ILLUSTRATED HISTORY 119 (1987).

25. *See, e.g.*, Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 18, 2010, http://www.nytimes.com/2010/12/19/us/19roberts.html ("The chamber's success rate is but one indication of the Roberts court's leanings on business issues. A new study, prepared for The New York Times by scholars at Northwestern University and the

> Close examination of the records of *the supreme court of baseball* since its establishment in 1903 . . . reveals the fact that about 82 per cent of cases between major and minor leagues have been decided in favor of the major leagues, and almost ninety per cent . . . between players and club owners have been decided against the players. The ratio of decisions favoring the strong against the weak appears disproportionate.[26]

Despite its important adjudicative role, however, the National Commission lacked independence. Two members of the Commission were the Presidents of the Leagues, and they constituted a veto-proof block on many issues. For much of its history, the Commission was dominated by one man: Ban Johnson, the "hard-driving and hard-drinking AL president."[27] The Commission lacked the power to act in the "best interests of baseball"—a power that its successor would be granted. Nevertheless, the National Commission oversaw baseball for almost two decades.

This was until the Black Sox Scandal[28] ended its run as the "Supreme Court of Baseball."[29] In response to the gambling allegations against Shoeless Joe Jackson and his teammates on the Chicago White Sox, critics turned on the National Commission, arguing that it had "[done] nothing while the game was being debauched" because of "its own petty politics."[30] The National Commission could no longer protect the core values of the game. "The so-called practical baseball men have all but killed the game. [The National Commission] needs new blood and ideals to bring back the lost faith of the fans."[31] After animated debate, the owners agreed that a replacement court was

University of Chicago, analyzed some 1,450 decisions since 1953. It showed that the percentage of business cases on the Supreme Court docket has grown in the Roberts years, as has the percentage of cases won by business interests.").

26. EVERS & FULLERTON, *supra* note 23, at 46 (emphasis added).

27. RADER, *supra* note 18, at 110.

28. For a description of the Black Sox Scandal, see ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (1963).

29. For a more comprehensive view of the decline of the Commission, see Jonathan M. Reinsdorf, *The Powers of the Commissioner in Baseball*, 7 MARQ. SPORTS L.J. 211, 215-20 (1996), which discusses the "four incidents [leading] to the dissolution of the Commission."

30. ROBERT C. COTTRELL, BLACKBALL, THE BLACK SOX, AND THE BABE: BASEBALL'S CRUCIAL 1920 SEASON 239 (2002) (quoting W.O. McGeehan, *In All Fairness*, N.Y. TRIB., Oct. 11, 1920, at 11). The Black Sox scandal was not an isolated incident; its implications echo down through history. DANIEL A. NATHAN, SAYING IT'S SO: A CULTURAL HISTORY OF THE BLACK SOX SCANDAL (2003); *see also* FIELD OF DREAMS (Universal Studios 1989) ("I think it means that if I build a baseball field out there that Shoeless Joe Jackson will get to come back and play ball again.").

31. COTTRELL, *supra* note 30, at 239 (quoting McGeehan, *supra* note 30, at 11).

needed; they scrapped the National Commission and create a more independent office, the Commissioner of Baseball.[32]

2. The Commissioner as Justice: 1920-1944

As originally proposed in 1920, the Commission of Baseball was a three-person tribunal, similar to the National Commission, which it was intended to replace.[33] Unlike the National Commission, which had two owner representatives as ex officio members, the new Commission would be composed of "representatives of the public . . . with absolute power over both major and minor leagues."[34] These independent members would cure the central failing of the National Commission: that it "represented really the best interests of major league owners only" and not the best interests of the sport itself.[35] The *Chicago Herald and Examiner* expressly compared the new proposed Commission to the Supreme Court, noting that "the new Commission would be the supreme court of baseball. All troubles between players, managers and the public which supports the great game would be for its final settlement. And settlement by such a Commission would be final. There would be no chance of crookedness or complaint."[36] However, when the owners approached Judge Kenesaw Mountain Landis about serving on the Commission, Landis indicated that he would only take the position if he served alone.[37] The owners consented, and on January 12, 1921, Kenesaw Mountain Landis became the first Commissioner of Baseball and the second "supreme court of baseball."[38]

32. For a detailed account of the struggle to create the Office of the Commissioner, see *id.* at 239-44.

33. *See* LEVERETT T. SMITH, JR., THE AMERICAN DREAM AND THE NATIONAL GAME 166 (1975). General John J. Pershing and Senator Hiram Johnson were rumored to be the intended occupants of two of the seats, along with Judge Kenesaw Mountain Landis, who would ultimately become the lone Commissioner. ROBERT PEYTON WIGGINS, THE FEDERAL LEAGUE OF BASE BALL CLUBS 303 (2009).

34. SMITH, *supra* note 33, at 166.

35. *Id.*

36. *Id.* at 167 (quoting Editorial, CHI. HERALD & EXAMINER, Oct. 2, 1920).

37. *Major Baseball Leagues Accept Fundamentals of Lasker Plan and Appoint Judge Landis Supreme Dictator*, ASSOCIATED PRESS, Nov. 12, 1920 [hereinafter *Judge Landis Supreme Dictator*]. As the Associated Press headline indicates, the judicial comparison was not the only one in circulation. *See also* SMITH, *supra* note 33, at 175 (referring to contemporary news accounts of "the coronation of Judge K. M. Landis" as the "supreme head" of baseball).

38. WHITE, *supra* note 16, at 108.

The Major League Agreement of 1921, later referred to as "the Major League constitution,"[39] established the Office of the Commissioner in Article I and granted the Commissioner substantial judicial-type powers. First, the Commissioner was given the power to act in the "best interests of the national game of base ball."[40] Second, the Commissioner was given the "authority to summon persons and to order the production of documents, and in case of refusal to appear or produce, to impose . . . penalties."[41] Third, the Commissioner was granted the power to "hear and determine finally any dispute between the major leagues which may be certified to him for determination by the president of either major league."[42] Fourth, the Commissioner's jurisdiction was extended to "all disputes to which a player is a party."[43] Finally, the Commissioner was given the power "[t]o formulate[] and . . . announce the rules of procedures to be observed."[44] Thus, the 1921 Agreement created a Commissioner in the judicial mold: an independent individual with the ability to hear cases, issue summonses, impose punishments, compel production, act to protect the best interests of the system, and draft his own rules of procedure. Finally, if the Leagues failed to choose a successor to Judge Landis, the Major League Agreement provided that "either major league may request the President of the United States to designate a Commissioner,"[45] thereby designating the same nominating authority for the Commissioner as for the Supreme Court.

Journalists of the time immediately seized on the connection between Commissioner Landis and a Supreme Court Justice. The *New York Times* immediately cast Landis as "the new one-man Supreme Court of baseball."[46] Not only was Landis himself a federal district judge, but he was replacing a body long described as the "supreme court of baseball" and was granted the institutional powers of a judicial official. In another article, the *Times* also

39. LARRY MOFFI, THE CONSCIENCE OF THE GAME: BASEBALL'S COMMISSIONERS FROM LANDIS TO SELIG 102 (2006).

40. MAJOR LEAGUE AGREEMENT OF 1921, art. I, § 2 [hereinafter MAJOR LEAGUE AGREEMENT], *available at* http://www.bizofbaseball.com/index.php?option=com_content.&view=article&id=58.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* art. I, § 6. In fact, the President was given even more power in baseball, since his nominee for Commissioner was not subject to Senate confirmation. No President has been called upon to nominate a Commissioner.

46. *Pomp and Splendor Mark Service Game*, N.Y. TIMES, Nov. 28, 1920, at 1.

noted that Judge Landis's salary was reduced by the $7500 he continued to make as a federal district judge (although he soon left the bench to be a full-time Commissioner): "instead of receiving $50,000 a year as the Supreme Court of baseball, he would get $42,500."[47] The Associated Press described how Landis would have the power of finality over the Leagues: "When Judge Landis accepted the 'chairmanship of professional baseball,' he became *the final court of appeal* in all matters of administration which may come up between the National and American Leagues and any minor leagues which voluntarily join in the proposed reorganization of baseball."[48] The *New York Evening World*, describing Commissioner Landis's decision to ban Shoeless Joe Jackson and the Black Sox from baseball even after the courts had found them not guilty of gambling, declared that "[t]he supreme court of baseball is not governed by the same restrictions as a court of law."[49] As one later writer noted, since the Commissioner "presid[ed] as a one-person court of both first instance and last resort, baseball could contend that there was no need for the public legal system to intervene in its perfectly ordered affairs."[50] A 1922 book highlighting "Famous Leaders of Character in America" titled a chapter, "Judge Kenesaw Mountain Landis: The Supreme Court of Baseball."[51]

The Justice-Commissioner analogy was invoked throughout Landis's tenure. In 1935, the *Schenectady Gazette* discussed the case of Edwin "Alabama" Pitts, a former Sing Sing inmate who wanted to join the minor league Albany Senators but was prohibited from doing so by the President of Minor League Baseball, William Bramham, since Pitts was a convicted felon.[52] The *Gazette* opined that "under the circumstances it is to be hoped that Judge Landis, the supreme court of baseball, will quickly reverse the ruling and allow Pitts an opportunity to display his undoubted talents as soon as possible."[53] The *Gazette*

47. *The Man Who Rescued Baseball*, N.Y. TIMES, Nov. 12, 1920, at 1. The *Times* reported Landis's appointment prior to the finalization of the written agreement but after Landis's verbal acceptance of the position.

48. *Judge Landis Supreme Dictator*, *supra* note 37 (emphasis added).

49. *Making the "Black Sox" White Again*, LITERARY DIG., Aug. 20, 1921, at 13, 14 (quoting the *New York Evening World*).

50. Norman L. Rosenberg, *Here Comes the Judge! The Origins of Baseball's Commissioner System and American Legal Culture*, J. POPULAR CULTURE, Spring 1987, at 129, 141.

51. EDWIN WILDMAN, FAMOUS LEADERS OF CHARACTER IN AMERICA FROM THE LATTER HALF OF NINETEENTH CENTURY 299 (1922).

52. *The Case of "Alabama" Pitts*, SCHENECTADY GAZETTE, June 12, 1935, at 12. For a discussion of the Pitts case, see NEIL LANCTOT, NEGRO LEAGUE BASEBALL: THE RISE AND RUIN OF A BLACK INSTITUTION 211 (2004).

53. *The Case of "Alabama" Pitts*, *supra* note 52, at 12.

got its wish: the Commissioner approved Pitts's contract.[54] A year later, the *New York Times* reported that "[t]he rumor . . . was that Landis, J., of the Supreme Court of Baseball, had been sitting tight on a couple of interesting cases and might be ready to render a few decisions."[55] In 1943, the *Hartford Courant* discussed Landis's suspension of Frank Crosetti from the 1943 World Series and declared, "Commissioner Landis, the one-man supreme court of baseball, is boss of the World Series and what he says goes."[56] Thus, contemporaries understood that the "Supreme Court of Baseball" was beholden to no man. The Commissioner owed no special allegiance to the players, the owners, or the fans. He followed the best interests of one entity, identified by the sign on his door, which read simply: Baseball.[57]

3. The Justice-Commissioner Analogy: 1944-Present

When Landis died in 1944, the Office of the Commissioner lost some of its stature. For over two decades, Landis had personified baseball; he had accumulated substantial political capital, which his successors—new to the job—would lack. Following Landis's death, the owners acted swiftly, amending the Major League Baseball Constitution to strip the countermajoritarian power of the Commissioner to void rules that ran contrary to the "best interests of baseball."[58] The Commissioner was thus no longer authorized to overturn rules made by a majority of the owners. He was no longer the ultimate authority in interpreting the Constitution in every case. Commissioners who followed were weaker than Landis, since they lacked both the de jure and de facto powers Landis possessed. As a consequence, the Justice-Commissioner analogy faded from the public's mind.[59]

54. LANCTOT, *supra* note 52, at 211. Unfortunately, Pitts did not perform well in the minors and, tragically, was stabbed to death six years later. *Id*.

55. *Sports of the Times: From the Bench*, N.Y. TIMES, Mar. 29, 1936, at S2.

56. Whitney Martin, *Martin Asks Justice for Ball Player: Thinks Yankees Should Appeal 30 Days Suspension of Frank Crosetti by Landis*, HARTFORD COURANT, Apr. 3, 1943, at 9. The article also noted, "You might say Frankie Crosetti lacks appeal, for after all that's what it comes right down to when the highest court is the one which fixes punishment." *Id.*

57. ROBERT S. FUCHS & WAYNE SOINI, JUDGE FUCHS AND THE BOSTON BRAVES 16 (1998).

58. *See* Reinsdorf, *supra* note 29, at 224. However, the bully pulpit of the Commissioner's Office still provided for countermajoritarian power, particularly on the critical issue of racial integration. *See infra* Section II.4.

59. *See* ERIC M. LEIFER, MAKING THE MAJORS: THE TRANSFORMATION OF TEAM SPORTS IN AMERICA 92 (1995). Since Landis was the only Commissioner who had ever served as a judge, the rhetorical ease of comparison was more difficult after Landis retired as well.

However, some accounts still described the Office of the Commissioner as analogous to the Supreme Court. A 1965 Associated Press article entitled "Return to Kenesaw?", discussing the impending retirement of Commissioner Ford Frick, declared:

> [T]he owners want to determine what type of commissioner they want before they start mentioning names. There has been some feeling for a return to the Judge Landis type of stern judicial figure who would act as a supreme court of baseball. Others think the public relations angle should be emphasized.[60]

Of course, even Commissioners less assertive than Landis still possessed many of the same structural powers that underpinned the analogy of the Commissioner to a Supreme Court Justice. For instance, former Major League Baseball player Dave Winfield, in discussing a 1981 dispute regarding the purchasing of game tickets for underprivileged children, recounted that he "had to present [his] arguments to the Supreme Court of baseball, Commissioner Bowe Kuhn."[61] A 1991 account of Commissioner Fay Vincent's decision to uphold Roger Clemens's suspension for inappropriate on-field language described, "And so concludes the issue, Vincent being the Supreme Court of baseball."[62] As the next Part illustrates, while the Justice-Commissioner analogy has faded from the spotlight in the modern era, it continues to be functionally accurate: Commissioners and Justices play the same structural roles within their respective institutions.

II. JUSTICES AND COMMISSIONERS: PARADIGM CASES

The similarity between the roles played by Supreme Court Justices and Baseball Commissioners is no coincidence, since both make inherently difficult, controversial, and value-influenced decisions at high levels of abstraction, and both interact with and modify the rules of their respective systems to preserve their institutions' core values, such as fair play and due process. This Part focuses on nine paradigm instances illustrating these similarities, matching a Supreme Court decision with a comparable action by the Commissioner of Baseball. In particular, this Section highlights how both Justices and Commissioners (1) provide guidance, (2) refrain from error correction, (3)

60. *Baseball Council To Study Function of Commissioner*, SPOKESMAN REV., Aug. 11, 1964, at 14.

61. DAVE WINFIELD WITH TOM PARKER, WINFIELD: A PLAYER'S LIFE 135 (1988).

62. Mark Kreidler, *Say the Magic Word and Vincent Turns Ump into Buffoon*, SAN DIEGO TRIB., Apr. 27, 1991, at C1.

undertake rulemaking, (4) exercise countermajoritarian powers, (5) provide explanations for their decisions, (6) protect the fundamental values of their respective institutions, (7) employ special masters for fact-specific inquiry, (8) decide on statutes of limitations, and (9) exercise finality.

1. *Providing Guidance:* Chevron *and the Strike Zone*

Both Supreme Court Justices and Commissioners are tasked with providing interpretive guidance to their subordinates. At their cores, the jobs of both Justices and Commissioners are to ensure the proper interpretation of rules. This common structural role can be observed in the Court's landmark administrative law decision, *Chevron v. Natural Resources Defense Council*,[63] and the Commissioner's long history of regulating interpretation of the strike zone.

In *Chevron*, the Supreme Court provided guidance to subordinate judges regarding the appropriate standard of review that should be applied to an agency interpretation of a statute that it administers. In adopting a default rule of substantial deference, the Court held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[64] *Chevron* and its progeny provided an approach for how to interpret agency statutes, allowing for a virtually unfettered range of acceptable actions in the agency's "strike zone"—any actions that are substantiated by a "permissible construction" of the governing statute.[65] Thus, the Supreme Court did not define the exact boundaries of agency authority in *Chevron* but provided guidance for how lower courts should assess administrative actions.

Similarly, the Commissioner of Baseball has long grappled with providing the proper interpretive guidance to umpires regarding calling balls and strikes. On their face, the Major League Rules define the strike zone clearly:

> The strike zone is that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow

63. 467 U.S. 837 (1984).

64. *Id.* at 843.

65. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008). Of course, agency interpretations "outside the strike zone"—decisions contrary to the "unambiguously expressed intent of Congress"—are not entitled to deference. *See Chevron*, 467 U.S. at 843.

> beneath the knee cap. The Strike Zone shall be determined from the batter's stance as the batter is prepared to swing at a pitched ball.[66]

Yet enforcement of the strike zone has been a controversial issue: umpires have often declined to follow the official rules and, in particular, have not called high strikes. In 2001, seeking to speed up the pace of the game and help pitchers, current Commissioner Allan "Bud" Selig instructed that umpires more strictly enforce the strike zone as written, resulting in more strikes being called.[67] In taking action in this manner, Selig did not alter the rulebook;[68] instead, he provided guidance to subordinates on how existing rules should be interpreted.[69]

2. *Refraining from Error Correction:* Magnum Import Co. v. Coty *and Armando Galarraga*

Just as Justices and Commissioners provide interpretive guidance, so too do they generally refrain from correcting individual errors. This similarity between these two offices is evident in the Court's decision in *Magnum Import Co. v. Coty*,[70] where the Court explicitly described its guidance function, and in Commissioner Bud Selig's 2010 decision to leave intact umpire Jim Joyce's blown call, which robbed Armando Galarraga of a perfect game.[71]

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66. OFFICIAL R. BASEBALL 2.00, *available at* http://mlb.mlb.com/mlb/official_info/official_rules/definition_terms_2.jsp (last visited Sept. 27, 2011).

67. *See New Strike Zone Brings Changes*, ASSOCIATED PRESS, May 2, 2001, *available at* http://articles.latimes.com/2001/may/02/sports/sp-58406.

68. The strike zone has been altered before, however, in the official rules. *See Strike Zone: A Historical Timeline*, MLB.COM, http://mlb.mlb.com/mlb/official_info/umpires/strike_zone.jsp (last visited Sept. 27, 2011).

69. This comparison is not unique to the Selig era. *See, e.g.*, Douglas O. Linder, *Strict Constructionism and the Strike Zone*, 56 UMKC L. REV. 117 (1987) (using the interpretation of the strike zone as a metaphor for Robert Bork's jurisprudence). Moreover, debate over enforcement of the strike zone remains an issue today. *See* Stuart Miller, *A Slow Burn over a Reluctance To Call High Strikes*, N.Y. TIMES, Aug. 8, 2010, http://www.nytimes.com/2010/08/09/sports/baseball/09highstrike.html. Comissioner Giamatti's campaign in the late 1980s for stricter enforcement of the existing balk rule is another example of the interpretive guidance role of Commissioners. *See* Zelinsky, *supra* note 5, at 119.

70. 262 U.S. 159 (1923). *Coty* involved a trademark infringement claim brought by a perfume company alleging rebottling.

71. *See* Tyler Kepner, *Perfect Game Thwarted by Faulty Call*, N.Y. TIMES, June 2, 2010, http://www.nytimes.com/2010/06/03/sports/baseball/03detroit.html. In baseball, a perfect

The Supreme Court is not in the error-correction business. Supreme Court Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[72] In *Magnum Import Co. v. Coty*, baseball's greatest Justice (and one-time candidate for Commissioner),[73] Chief Justice William Howard Taft, declared for the majority:

> The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given . . . to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.[74]

There are sound reasons for this policy. The Court "position[s] itself as a source of structure, guidance, and uniformity, not as a traditional court of appeals that reviews the correctness of lower court opinions."[75] It does so to keep its docket under control and to ensure that it considers cases only after they have received careful review by multiple lower courts.[76] Justice Breyer has described this structural feature of the Court: "[T]he Supreme Court does not generally determine whether the lower courts have correctly disposed of a particular case. . . . Rather than correcting errors, then, the Supreme Court is charged with providing a uniform rule of federal law in areas that require one."[77]

Similarly, the Commissioner of Baseball does not review the on-field calls of umpires for error; rather, he provides general guidance to the umpires on how to interpret the rules. For example, consider the case of Armando

game occurs when a pitcher (or pitchers) retires each batter on the opposing team, in a game lasting at least nine innings, without any of them reaching base.

72. SUP. CT. R. 10.

73. Taft's attachment to baseball was greater than that of any Supreme Court Justice before or since. *See* ROGER ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 155 (2001). Taft is even credited by some with inventing the seventh inning stretch. *See* Zelinsky, *supra* note 5, at 118 n.27.

74. *Coty*, 262 U.S. at 163.

75. Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 275 (2006).

76. *Id.* This is not a recent phenomenon. *See id.* at 278 & n.27 (citing Supreme Court Justices Vinson and Brennan, reiterating that error correction is not the role of the Court).

77. Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006).

Galarraga. On June 2, 2010, Galarraga took the mound for the Detroit Tigers. Through eight and two-thirds innings, Galarraga was pitching a perfect game (twenty-six up, twenty-six down).[78] Had Galarraga gotten the last batter out, he would have been the twenty-first pitcher in Major League history to throw a perfect game.[79] The twenty-seventh batter, Cleveland Indians shortstop Jason Donald, hit a grounder down the first base line. Tigers first baseman Miguel Cabrera left the bag to field the grounder, and Galarraga ran to cover first base. Cabrera's throw to Galarraga easily beat the runner to first, and thus he should have been called out.[80] Instead, first base umpire Jim Joyce erroneously called the runner safe, ending Galarraga's perfect game.[81]

Upon viewing the video replay, Joyce immediately realized that he had made the wrong call, lamenting that "I had a great angle, and I missed the call,"[82] and that "I just cost that kid a perfect game."[83] Unfortunately, there was nothing Joyce could do to remedy the situation; the official record showed Galarraga's game as *near*-perfect, having retired twenty-six batters in a row.[84] Inside and outside of baseball, many observers were unhappy with Joyce's call.[85] However, the final decision on whether to reverse Joyce's call rested with Commissioner Selig.

78. Kepner, *supra* note 71.

79. *Id*.

80. Jason Beck, *Missed Call Ends Galarraga's Perfect Bid*, MLB.COM (June 3, 2010, 1:34 AM), http://mlb.mlb.com/news/article.jsp?ymd=20100602&content_id=10727590.

81. *Id.* Technically, the perfect game ended when the official scorer, Chuck Klonke, marked down Donald's hit.

82. *Id*.

83. Larry Lage, *Umpire's Reaction: "I Just Cost That Kid a Perfect Game,"* ASSOCIATED PRESS, June 3, 2010, *available at* http://articles.sfgate.com/2010-06-03/sports/21655118.

84. Beck, *supra* note 80. Both Joyce and Galarraga acquitted themselves honorably, reconciling privately after the game and then publicly the following evening when Galarraga submitted the roster to Joyce, who was working as home plate umpire. Ben Walker, *Selig Won't Overturn Call that Cost Perfect Game*, ASSOCIATED PRESS, June 3, 2010, *available at* http://nbcsports.msnbc.com/id/37479309.

85. For instance, Michigan Governor Jennifer Granholm issued a proclamation declaring "Armando Galarraga to have pitched a perfect game." Charles Riley, *Granholm Declares Galarraga's Gem a Perfect Game*, CNN: POL. TICKER BLOG (June 4, 2010, 1:01 PM), http://politicalticker.blogs.cnn.com/2010/06/03/granholm-declares-galarragas-gem-a-perfect-game. White House spokesman Robert Gibbs stated, "I hope that baseball awards a perfect game to [Galarraga]." Josh Gerstein, *Obama, Gibbs, Split over Perfect Game*, POLITICO (June 8, 2010, 10:32 AM), http://www.politico.com/blogs/joshgerstein/0610/Obama_Gibbs_split_over_perfect_game.html.

In the days following the game, the Commissioner actively considered reversing Joyce's call and awarding Galarraga a perfect game.[86] In the end, Selig declined to reverse the single error in the application of settled law, but he contemplated a larger systemic change to Major League Baseball's policy about instant replay:

> [T]here is no dispute that last night's game should have ended differently. While the human element has always been an integral part of baseball, it is vital that mistakes on the field be addressed. Given last night's call and other recent events, I will examine our umpiring system, the expanded use of instant replay and all other related features.[87]

The Commissioner's message was clear: even though Joyce had clearly erred in applying a settled rule (by awarding Donald a base to which he was not entitled), the Commissioner's job, like that of a Supreme Court Justice, is not error correction.[88]

3. Rulemaking: Miranda v. Arizona *and Harvey Haddix*

The Commissioner and the Court also share the structural responsibility for rulemaking in their respective systems. A classic instance of this rulemaking power in the Supreme Court was its decision on police interrogation in *Miranda v. Arizona*.[89] As for the Commissioner, a comparable instance of rulemaking was the Commissioner's reconsideration of the definition of a perfect game in the case of Harvey Haddix. In both instances, to quote Judge

86. *See* Keith Olberman, *Sources: Commissioner Selig Reviews Galarraga Game*, MLB PRO BLOG (June 3, 2010, 9:48 AM), http://keitholbermann.mlblogs.com/2010/06/03/sources-commissioner-selig-reviews-galarraga-game.

87. Press Release, Allan H. (Bud) Selig, Commissioner, Major League Baseball, Statement Regarding Last Night's Game in Detroit (June 3, 2010), *available at* http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20100603&content_id=10760448&vkey=pr_mlb&fext=.jsp.

88. Interestingly, one commentator questioned whether Selig should overturn Joyce's call on the grounds that it would "turn the commissioner's office into the supreme court of baseball." *This Week: Allen, Kerry, and Cornyn* (ABC television broadcast June 6, 2010), http://abcnews.go.com/ThisWeek/week-transcript-allen-kerry-cornyn/story?id=10838756.

89. 384 U.S. 436 (1966).

Posner, the Supreme Court and the Commissioner "chang[ed] the rules" of their respective games.[90]

In *Miranda*, the Court ruled that evidence obtained from a suspect in police custody is not admissible in the courts, unless the suspect is informed of his right to counsel and right against self-incrimination and then makes a voluntary waiver of his rights.[91] The Court threw out Ernesto Miranda's conviction not as a misapplication of settled law but because the lack of warnings violated his right to Due Process. In changing the Fifth Amendment rules, the Court discarded the old "totality of circumstances" test. The *Miranda* Court instead set new standards for the lower courts in terms of admissibility and dictated constitutionally mandated procedures for police interrogations of criminal suspects.[92] *Miranda* did not "merely" grant the appellant "another hearing;" it was an instance of the Court promulgating new rules for a large set of cases in the lower courts.[93]

Similarly, in 1991, Commissioner Vincent convened a "Committee for Statistical Accuracy" to create rules for determining authoritatively what constitutes a perfect game.[94] The Committee decided that a perfect game should require both "at least nine innings" and that "no batter reach[] any base during the course of the game."[95] As a result, Harvey Haddix's 1959 game, where he pitched twelve perfect innings before yielding a hit, was retroactively declassified as a perfect game, since Haddix had given up a hit in the thirteenth inning.[96] The cases of both *Miranda* and Haddix suggest that neither the

90. Posner, *supra* note 9, at 9.

91. 384 U.S. at 469-70.

92. *Id*. at 503 (Clark, J., dissenting).

93. *Cf. supra* notes 74-77 and accompanying text (describing instances of the Court being a source of structure and guidance).

94. Jerome Holtzman, *Finally, 30 Years Later, Maris Receives His Crown*, CHI. TRIB., Sept. 5, 1991, at C1. The Committee also considered Roger Maris's regular-season home-run record, ruling that Maris was the all-time record holder, even though he had benefited from a longer regular season than Babe Ruth. *Id*.

95. Major League Baseball, *MLB Miscellany: Rules, Regulations and Statistics*, MLB.COM http://mlb.mlb.com/mlb/official_info/about_mlb/rules_regulations.jsp (last visited Sept. 27, 2011).

96. Holtzman, *supra* note 94, at C1. In addition, under analogous logic, fifty no-hitters were stricken from the books. *Id*. For the record, the author has strong doubts regarding the 1991 ruling of the Statistical Accuracy Committee with respect to Haddix. Anyone who pitches twelve perfect innings deserves at least some recognition. Luckily, given the difficulty of this feat, the problem does not appear "capable of repetition, yet evading review." *Cf.* S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911) (finding that a terminal company's suit to enjoin an order issued by the Interstate Commerce Commission

Commissioner nor the Supreme Court, in Justice Breyer's words, is generally engaged in "correcting errors . . . [but] is charged with providing a uniform rule."[97]

4. *Countermajoritarianism:* Brown v. Board of Education *and Jackie Robinson*

Both the Court and the Commissioner have a mixed record with respect to racial integration. The Court's nadir came in its decision upholding the "separate but equal" doctrine in *Plessy v. Ferguson*.[98] For the Office of the Commissioner, the low point was Kenesaw Mountain Landis's strong resistance to integration and strong support for racially segregated leagues.[99] However, both institutions ultimately vindicated themselves in landmark events: the repudiation of "separate but equal" in *Brown v. Board of Education*,[100] and the signing of Jackie Robinson to play for the Brooklyn Dodgers.[101]

At first, both the Court and the Commissioner hid behind the fallacy of "separate but equal." In *Plessy*, the Court identified "the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."[102] In other words, separate *could* be equal. For baseball, the equivalent argument for separate leagues was that "players of both races have been permitted to develop in their own environments and rise to the heights of stardom within their own circles."[103]

In upholding racial segregation, the Court was more frank about its actions than was the Commissioner. While the Court was explicit about its embrace of

(ICC) was not moot, even though the ICC order had expired, because otherwise the ICC could avoid judicial oversight by issuing "short-term orders" that would be "capable of repetition, yet evading review").

97. Breyer, *supra* note 77, at 92.

98. 163 U.S. 537 (1896).

99. *See* CHRISTOPHER THRESTON, THE INTEGRATION OF BASEBALL IN PHILADELPHIA 50 (2002) (noting "[a] common perception . . . that Commissioner Landis proved the most significant barrier to the integration of major league baseball").

100. 347 U.S. 483 (1954).

101. *See generally* THRESTON, *supra* note 99.

102. 163 U.S. at 551.

103. Editorial, *No Good from Raising Race Issue*, SPORTING NEWS, Aug. 6, 1942, at 4. For more on the history of the Negro Leagues, see LESLIE A. HEAPHY, THE NEGRO LEAGUES, 1869-1960 (2003).

separate but equal, Landis was duplicitous. He publicly claimed that "Negroes are not barred from organized baseball by the commissioner and no rule forbids their entry."[104] In private, however, he was more candid, telling owner Bill Veeck that he would "invalidate any contract [Veeck] made with a black player and, for conduct detrimental to the game, he would bar Veeck from organized baseball for life if he hired one."[105] Thus, in reality, the Commissioner, like the Court, acted as the structural bulwark of "separate but equal" within his institution.

Just as the Court and the Commissioner both grievously erred by supporting segregation, so too were they subsequently at the vanguard of ending the practice. In so doing, both the Court and the Commissioner took countermajoritarian actions with long-lasting social impact.[106] Both national institutions strongly confirmed the values of nondiscrimination and equality and thereby made important contributions to the civil rights movement. And there is yet another parallel: the military's experience with nondiscrimination played a critical role in the decisions of the Court and the Commissioner to desegregate.

In *Brown v. Board of Education*, the Court famously declared that "separate educational facilities are inherently unequal."[107] In so doing, the *Brown* Court unanimously overturned laws that were, in many states, strongly supported by the public.[108] At the time *Brown* was decided, the U.S. military had already been integrated by President Harry Truman's 1948 Executive Order.[109] Truman's Order strongly encouraged popular acceptance of integration prior to the *Brown* decision and was cited by amici in *Brown* who supported desegregation.[110] And, as some scholars have argued, military desegregation

104. ROGER KAHN, INTO MY OWN: THE REMARKABLE PEOPLE AND EVENTS THAT SHAPED A LIFE 155 (2006).

105. *Id.* (quoting Bill Veeck).

106. For a discussion of the Court's countermajoritarian role, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

107. 347 U.S. 483, 495 (1954).

108. *See, e.g.*, Tony Badger, *"The Forerunner of Our Opposition": Arkansas and the Southern Manifesto of 1956*, 56 ARK. HIST. Q. 353 (1997) (describing segregationist sentiment in Arkansas).

109. *See* Exec. Order No. 9981, 3 C.F.R. § 722 (1948).

110. Brief for Am. Fed'n of Teachers as Amicus Curiae Supporting Petitioner, *Brown*, 347 U.S. 483 (No. 1), 1953 WL 48692, at *22; Brief for Am. Veterans Comm., Inc., as Amicus Curiae Supporting Petitioner, *Brown*, 347 U.S. 483 (Nos. 1, 4-5), 1954 WL 45716, at *20; *see also* John L. Newby, II, Note, *The Fight for the Right To Fight and the Forgotten Negro Protest Movement: The History of Executive Order 9981 and Its Effect upon* Brown v. Board of

had a strong impact on the Court's decision to hold separate-but-equal schooling unconstitutional.[111]

Seven years before *Brown*, Major League Baseball broke its own color wall. In 1947, Jackie Robinson joined the Brooklyn Dodgers as the first black major leaguer of modern times.[112] Some commentators have attributed as much or more long-term social significance to Robinson's breaking the color barrier than to the *Brown* decision.[113] And it was Commissioner Happy Chandler who proved pivotal in the integration of Baseball.[114] Whereas Landis had supported the "separate but equal" status of the Negro Leagues, Chandler came to support racial integration of Baseball strongly, even against the will of the majority of the owners.[115]

Just as the military's integration provided an impetus for the Court's decision in *Brown*, Chandler pointed to the military as a leading reason to favor integration on the playing field. Although Truman had not yet ordered the military desegregated at the time Robinson joined the Dodgers, Chandler was aware that white and black units fought alongside each other effectively in

Education *and Beyond*, 10 TEX. J. C.L. & C.R. 83 (2004) (noting the effect that the right to fight and Executive Order 9981 had on *Brown* and the civil rights movement).

111. *See, e.g.*, Constance Baker Motley, *The Historical Setting of* Brown *and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 14 (1992) ("In retrospect, it now seems clear that the members of the Supreme Court, in reaching their decision in *Brown I*, were undoubtedly influenced by the fact that, in 1948, President Truman ordered an end to segregation in the nation's Armed Forces, the foremost symbol of our home-grown racism.").

112. *See* ARNOLD RAMPERSAD, JACKIE ROBINSON: A BIOGRAPHY 168-69 (1998).

113. *See, e.g.*, Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 440 (1999) ("More importantly, desegregation was achieved less by legal enactment than by the moral leadership of persons such as Rosa Parks, Martin Luther King, and Jackie Robinson. When Jackie Robinson stole home, some people changed their minds.") (footnotes omitted); Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 T. JEFFERSON L. REV. 17, 36-37 (2002) ("[T]he integration of baseball was a major blow against America's culture of racism. Jackie Robinson, Satchel Paige, Larry Doby, Branch Rickey, and Bill Veeck were, in their own ways, as critical to the civil rights revolution as Thurgood Marshall, Spottswood Robinson, Jack Greenberg, and Linda Brown.").

114. *See* Samuel O. Regalado, Book Review, 17 J. SPORT HIST. 92, 93 (1990) (reviewing ALBERT BENJAMIN CHANDLER & VANCE TRIMBLE, HEROES, PLAIN FOLKS, AND SKUNKS: THE LIFE AND TIMES OF HAPPY CHANDLER (1989)) ("Chandler's 'blessing' was not unimportant and, indeed, accelerated the eventual integration of blacks into the game."). *But see* JULES TYGIEL, BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY 82 (1983) (arguing that Chandler was a minor player in the events leading to integration).

115. *See* DAVID QUENTIN VOIGT, AMERICAN BASEBALL: FROM POSTWAR EXPANSION TO THE ELECTRONIC AGE 46-47 (1983).

World War II. As Chandler put it, "If they can fight and die on Okinawa, Guadalcanal, [and] in the South Pacific, they can play baseball in America."[116] The parallel cases of *Brown* and Robinson demonstrate that, as protectors of the fundamental values of their respective systems, both Justices and Commissioners must sometimes take unpopular countermajoritarian action in order to advance the evolving core values of their institutions.

5. *Providing Explanations:* Boumediene v. Bush *and Giamatti's 1988 Statement*

Both Supreme Court Justice and Baseball Commissioner do more than make decisions: they explain themselves to the larger public.[117] Consider, for example, the Court's landmark decision in *Boumediene v. Bush*, in which a divided Court held that the constitutional protections of habeas corpus extend to detainees held at Guantanamo Bay.[118] The *Boumediene* majority discussed the "history and origins of the writ,"[119] and Justice Souter noted the role of the writ as "something of value both to prisoners and to the Nation."[120] The majority emphasized the lack of assistance of counsel for detainees and their consequent deprivation of a voice in the process against them.[121] In response, Justice Scalia in dissent crafted a competing historical narrative[122] and contextualized the decision as one that would "cause more Americans to be killed."[123] In *Boumediene*, both the majority and the dissent exercised their explanatory functions, placing their respective opinions in the context of a larger narrative.

Baseball Commissioners play a similar role in explaining their decisions to the public by situating such decisions in the context of the "national pastime" and its values. For instance, when Commissioner Giamatti banned baseball's

116. Gerald Bazer & Steven Culbertson, *Baseball During World War II: An Exploration of the Issue*, *in* THE COOPERSTOWN SYMPOSIUM ON BASEBALL AND AMERICAN CULTURE, 2000, at 117, 127 (William M. Simons ed., 2001).

117. Professor Adam Benforado cites the Justices' provision of public explanations in his critique of the Justice as Commissioner analogy. Adam Benforado, *Color Commentators of the Bench*, 38 FLA. ST. U. L. REV. (forthcoming 2011) (manuscript at 2), *available at* http://ssrn.com/abstract=1701100. While Professor Benforado accurately describes what Justices do, he fails to recognize that Commissioners also play this role.

118. 553 U.S. 723 (2008).

119. *Id.* at 739.

120. *Id.* at 801 (Souter, J., concurring).

121. *Id.* at 783-84 (majority opinion).

122. *Id.* at 844 (Scalia, J., dissenting).

123. *Id.* at 828.

all-time hits leader, Pete Rose, for gambling, Giamatti issued a detailed statement to the American public, explaining the reasons for his decision.[124] Giamatti placed the Rose case in historical context, declaring that "there had not been such grave allegations since the time of Landis."[125] He discussed Major League Baseball's obligation to its "fans and well-wishers."[126] Like the *Boumediene* Court, Commissioner Giamatti took his explanatory role seriously, seeing the "sorry" Rose case as an opportunity to discuss the core values for which baseball stands.[127]

6. Due Process and Best Interests: Roe *and Rose*

Both the Supreme Court and the Commissioner are tasked not only with explaining the fundamental values of their respective systems, but also with protecting those core values. For the Supreme Court Justice, this often means protecting the "due process of law"[128]; for the Commissioner, this means protecting the "best interests of baseball."[129] Commissioner Fay Vincent described the structural similarities between the Due Process and Best Interest Clauses:

> The best interests of the game . . . . It's like "due process" or any other of the wonderful statements that govern our lives. I mean, what does due process mean? The fourteenth amendment has a huge affect [sic] on our daily life. And the same thing is true with phrases like "the best interests." The wonderful thing about the "best interests" is that it is not susceptible to easy definition, and it was written by Landis, to

124. *See* Giamatti Statement, *supra* note 2.

125. *Id.* at 904.

126. *Id.* at 905.

127. *Id*. at 903.

128. *See, e.g.*, U.S. CONST. amend. V.

129. This is not to argue that the "best interests of baseball" and the "due process of law" are synonymous; rather, they are both at the foundation of their respective systems. *See* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 537 (7th Cir. 1978) ("Standards such as the best interests of baseball, the interests of the morale of the players and the honor of the game . . . are not necessarily familiar to courts and obviously require some expertise in their application."). *Compare Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 327 (2006) ("[N]o person . . . is above the law.") (statement of Samuel A. Alito, Jr.), *with* Giamatti Statement, *supra* note 2, at 905 ("[N]o individual is superior to the game.").

> generate authority for his ability to make rulings that he thought were [just].[130]

Interpretation of both the Due Process Clause and the Best Interests Clause can be controversial. Such controversy is unsurprising, since, in exercising the Due Process and Best Interests powers, the Court and the Commissioner claim to speak for the deepest values of the system. When others do not share such values or disagree about the appropriate application of those values, the response is typically strong and heartfelt.

Consider *Roe v. Wade*.[131] In *Roe*, the Supreme Court famously declared that "[a] state criminal abortion statute . . . that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment."[132] The Court did not invoke the Due Process Clause lightly, noting that it was limited to "only [those] personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"[133]

Commissioner Giamatti similarly protected Major League Baseball's deepest values in the Pete Rose incident by invoking the Best Interests Clause. Rose had been accused of gambling on Baseball.[134] In response, Giamatti permanently banned Rose from Baseball (with the potential for reinstatement at a later time).[135] Giamatti based his decision to ban Rose on the Best Interests Clause,[136] to "protect[] the integrity of the game of baseball—that is, the game's authenticity, honesty and coherence."[137] Giamatti invoked the Best Interests Clause to preserve the core foundations of the game. In Giamatti's words,

> I believe baseball is an important, enduring American institution. It must assert and aspire to the highest principles—of integrity, of professionalism of performance, of fair play within its rules. It will

130. MOFFI, *supra* note 39, at 28-29.

131. 410 U.S. 113 (1973).

132. *Id.* at 164.

133. *Id.* at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

134. For one account of Rose's alleged misbehaviors, see MICHAEL SOKOLOVE, HUSTLE: THE MYTH, LIFE, AND LIES OF PETE ROSE 15-19 (2005).

135. *See* Pete Rose/A. Bartlett Giamatti Agreement, Aug. 23, 1989, *available at* http://www.baseball-almanac.com/players/p_rosea.shtml.

136. *Id.*

137. Giamatti Statement, *supra* note 2, at 904.

> come as no surprise that like any institution composed of human beings, this institution will not always fulfill its highest aspirations. I know of no earthly institution that does. But this one, because it is so much a part of our history as a people and because it has such a purchase on our national soul, has an obligation to the people for whom it is played—to its fans and well-wishers—to strive for excellence in all things and to promote the highest ideals.[138]

For Giamatti, the Best Interests Clause served the same structural purpose in the Rose incident as the Due Process Clause did in *Roe:* to safeguard the "fundamental" principles of the institution he was duty-bound to protect.

Unsurprisingly, invoking such a structural power in such contexts does not come without controversy. The phenomenon of "*Roe* Rage"[139] is well known. Similarly, much ink has been spilled debating whether Giamatti appropriately exercised his powers in banishing Rose—what one might call 'Rose Rage.'[140] The invocation of either Clause is strong medicine; the structural interpretation of "fundamental" values can land Justice or Commissioner in a pickle.[141] However, protecting the basic values of their respective systems is at the core of their roles.

7. Special Masters: The Ellis Island Case *and the Dowd Report*

Though the Commissioner and the Court generally seek to provide guidance to lower courts on questions of law, their original jurisdictions sometimes necessitate fact-intensive inquiries. Nevertheless, the Commissioner and the Supreme Court are both ill-suited for the task of factfinding. Consequently, both rely on special masters to engage in factfinding for them. Particularly instructive is a comparison of the Court's use of a special master in a dispute over Ellis Island[142] with the Commissioner's use of a special master to investigate allegations of gambling.

138. *Id.* at 904-05.

139. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

140. *See, e.g.*, BILL JAMES, THE BASEBALL BOOK 1990, at 128-29 (1990) (discussing the backlash against Giamatti's Rose ruling).

141. *Cf.* THE SANDLOT (Twentieth Century Fox 1993) (finding Benny "The Jet" Rodriguez caught in a pickle between bases).

142. New Jersey v. New York (*The Ellis Island Case*), 523 U.S. 767 (1998).

In 1993, New Jersey sued New York before the Supreme Court, contesting the ownership of Ellis Island.[143] Rather than engage in the time-consuming process of factfinding, the Court appointed Paul Verkuil as a special master, granting him

> authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.[144]

The Court's appointment of a special master was not unusual; indeed, the Supreme Court's "appointment of Special Masters in original jurisdiction cases [is] standard practice."[145] In these cases, the Court grants substantial deference to the Special Master's findings but does not surrender judicial control. As the Court declared in an earlier case, "Though the Master's findings on these issues deserve respect and a tacit presumption of correctness, the ultimate responsibility for deciding what are correct findings of fact remains with us."[146]

Pursuant to the Court's order, Special Master Verkuil conducted his hearings and submitted a report to the Court summarizing over four thousand pages of trial record.[147] Verkuil's report ultimately determined that "New York's sovereign authority was limited to the original area of the Island . . . which he pegged to the mean low-water mark of the original Island."[148] After

143. *Id.* For a thorough description of the procedural aspects of the case and an analysis of the Supreme Court's original jurisdiction, see Patrick T. Mottola, Note, *Article III, Section 2, Clause 2: Original Jurisdiction of the United States Supreme Court*, 9 SETON HALL CONST. L.J. 1113 (1999).

144. New Jersey v. New York, 513 U.S. 924, 924 (1994) (mem.).

145. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 628 (2002).

146. Colorado v. New Mexico, 467 U.S. 310, 317 (1984) (citations omitted).

147. *See* Carstens, *supra* note 145, at 658.

148. *The Ellis Island Case*, 523 U.S. at 779. Since the Island had been so enlarged by fill over the past two centuries, such a report was tantamount to awarding much of the Island to New Jersey, a point that did not go unnoticed across the Hudson. *See, e.g.*, David M. Herszenhorn, *At Gateway to America, Just Another Spring Day*, N.Y. TIMES, May 27, 1998, http://www.nytimes.com/1998/05/27/nyregion/ellis-island-verdict-island-gateway-america-just-another-spring-day.html ("No matter what the Supreme Court does—and I have great respect for the Supreme Court, and this ends it as a matter of law—they're still not going to convince me that my grandfather, when he was sitting in Italy, thinking of coming to the

hearing oral argument, the Supreme Court upheld the Special Master's findings with the exception of a "miniscule detail."[149]

Like the Supreme Court in *The Ellis Island Case*,[150] Commissioner Giamatti appointed a special master in the Pete Rose case, a procedure later followed by Commissioner Selig when he appointed Senator Mitchell to investigate allegations of steroid use.[151] Instead of conducting a factual inquiry himself, the Commissioner recognized that "[t]o pretend that serious charges of any kind can be responsibly examined by a Commissioner alone fails to recognize the necessity to bring professionalism and fairness to any examination."[152] Thus, the Commissioner engaged John Dowd, a former Department of Justice prosecutor, "to investigate these and any other allegations that might arise and to pursue the truth wherever it took him."[153] Giamatti explained that "such a process, whereby an experienced professional inquires on behalf of the Commissioner as the Commissioner's agent, is fair and appropriate."[154]

Dowd produced a 225-page report with eight volumes of exhibits, concluding that Rose had, in fact, gambled on Major League Baseball games.[155] Giamatti scheduled a hearing to review Dowd's report with Rose, just as the Supreme Court had reviewed Verkuil's report, but Rose declined to attend.[156] Giamatti then banned Rose from Baseball and issued a public statement explaining his actions.[157]

United States, and on the shores getting ready to get on that ship in Genoa, was saying to himself, 'I'm coming to New Jersey'" (quoting Rudolph Giuliani, Mayor, New York City)).

149. 523 U.S. at 808.

150. Admittedly, this analogy is a bit of a stretch. *See* JOSH PAHIGIAN, THE SEVENTH INNING STRETCH: BASEBALL'S MOST ESSENTIAL AND INANE DEBATES 267 (2010) (describing the "seventh-inning-stretch ritual at ballparks from coast to coast"); *cf.* THE SANDLOT, *supra* note 141 ("Did you plan that? Of course I did. Been planning it for years."). Special Counsel Dowd was actually somewhere between a special prosecutor and a special master, since he presided over little in the way of adversarial process. For a listing of some of the commentary critical of the Dowd Report, see NATHAN, *supra* note 30, at 265 n.134.

151. Dowd's investigation concerned a single person in an adversarial proceeding, while Mitchell's investigation touched on many players. Consequently, this Section focuses on Dowd's report.

152. Giamatti Statement, *supra* note 2, at 903.

153. *Id*.

154. *Id.*

155. *See* Jeffrey A. Durney, Note, *Fair or Foul? The Commissioner and Major League Baseball's Disciplinary Process*, 41 EMORY L.J. 581, 592 n.60 (1992).

156. Giamatti Statement, *supra* note 2, at 903.

157. *See id.*

Like the Supreme Court in *The Ellis Island Case*, the Commissioner recognized the impediments to personally undertaking a fact-intensive inquiry in the exercise of his original jurisdiction. Furthermore, like the Court, the Commissioner did not accept automatically the report of his special master. Rather, attempting to promote "a process that . . . embodies integrity and fairness,"[158] the Commissioner gave the accused an opportunity to contest the special master's findings.

8. Statutes of Limitations: Ledbetter v. Goodyear *and the Chalmers Trophy*

Deciding when the statute of limitations has run is a fundamental task of Justices and Commissioners, as they decide who can seek redress before them. This Section compares the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,[159] where the Court interpreted the statute of limitations applicable to Title VII of the Civil Rights Act, with Commissioner Kuhn's 1981 decision to leave undisturbed Ty Cobb's hit record, thereby confirming the outcome of the 1910 Chalmers Trophy race.[160]

Lilly Ledbetter was a Goodyear Tire employee from 1979 to 1998.[161] After retiring, Ledbetter commenced a Title VII pay discrimination claim, arguing that

> during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment.[162]

The District Court allowed Ledbetter's claim to proceed, and the jury found in her favor.[163] On appeal, Goodyear maintained that Ledbetter's "claim was time barred with respect to all pay decisions made prior to September 26, 1997," because Title VII's statute of limitations barred actions not filed within 180

158. *Id.* at 904.

159. 550 U.S. 618 (2007).

160. *See* L. Jon Wertheim, *The Amazing Race: How Ty Cobb, Nap Lajoie, a Grudge-Holding Manager, a Clumsy Bride, Shoddy Record-Keeping and a Very Cool Car Made the Batting Title Chase a National Obsession 100 Years Ago*, SPORTS ILLUSTRATED, Sept. 20, 2010, at 76, 84, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1174416.

161. 550 U.S. at 621.

162. *Id.* at 622.

163. *Id.*

days "after the alleged unlawful employment practice occurred."[164] In response, Ledbetter argued that her pay within the last 180 days of her employment was lower as a "result of intentionally discriminatory pay decisions that occurred outside the limitations period,"[165] and therefore her pay "was unlawful because it 'carried forward' the effects of prior, uncharged discrimination decisions."[166]

In a 5-4 decision, the Court rejected Ledbetter's argument and held that "[t]he . . . charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[167] Justice Ginsburg, in dissent, argued that Lebdetter had no way of knowing that discrimination was taking place since "[p]ay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time."[168] The Court's decision was clear: even if the violation was unknown (and functionally unknowable) at the time the violation occurred, the statute of limitations still applied.[169]

Commissioner Kuhn faced a similar issue when he decided to leave intact the outcome of the heated 1910 batting title even though new evidence had come to light that was not available at the time the title had been awarded.[170] In deciding to affirm the outcome of the "Chalmers Race," Kuhn "essentially said the statute of limitations had lapsed," even though new, previously unknown evidence had surfaced.[171]

The 1910 season began with two new baseball milestones: President Taft started a tradition of Chief Executives throwing the first pitch of the season,[172] and car executive Hugh Chalmers promised that he would give a new car to whomever had the highest batting average at the season's end.[173] "The Great

164. *Id.* at 622, 624.

165. *Id.* at 623.

166. *Id.* at 625 (citing Reply Brief for Petitioner at 20, *Ledbetter*, 550 U.S. 618 (No. 05-1704), 2006 U.S. S. Ct. Briefs LEXIS 1151).

167. *Id.* at 628.

168. *Id.* at 645 (Ginsburg, J., dissenting).

169. As the Court noted, Congress was free to (and later did) amend the law to extend that statute of limitations. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

170. *See* Wertheim, *supra* note 160, at 76.

171. *Id.*

172. *Id.* at 78.

173. *Id.*

American Automobile Race" seized the public's attention.[174] Over the course of the season, the batting average lead went back and forth between Detroit's outfielder, Ty Cobb, and Cleveland's second baseman, Nap Lajoie.[175]

With two games remaining in the season, Cobb decided to rest on his lead, citing a "flare up in his vision problems," but the fans believed that Cobb was trying to coast to victory by sitting out the last two games.[176] Cobb's plan seemed destined to work. The outlook wasn't brilliant for Lajoie that day:[177] he would need a hit every time he came up to bat in his final two games, an October 9th doubleheader against the Browns.[178] In his first at bat, Lajoie hit a triple off the center field wall.[179] In his next at bat, Lajoie bunted and made it safely to first.[180] His next time up, Lajoie bunted again. "And again. And again. And again and again and again."[181] In all, Lajoie bunted safely seven times.[182] This was anomalous, to say the least, since "[t]hen as now players might go an entire season without logging seven bunt singles."[183] Many in the press complained that the Browns had been complicit in defrauding Cobb of his title. Nevertheless, it appeared Lajoie had won: he had batted .384 to Cobb's .383.[184]

Ban Johnson, President of the American League, was "irate" when he heard what had transpired. He ordered his statistician to go back and recheck all of the data.[185] Amazingly enough, the statistician found that "[t]he Tigers had played a doubleheader on Sept. 24, yet the league statistician only recorded the first game," and "Cobb had gone 2 for 3 in that missing game," enough to put him ahead of Lajoie for the batting crown.[186] Johnson declared that he would

174. *See* RICHARD BAK, TY COBB: HIS TUMULTUOUS LIFE AND TIMES 67 (1994).

175. Wertheim, *supra* note 160, at 76.

176. *Id.* at 83.

177. *Cf.* Ernest Lawrence Thayer, *Casey at the Bat: A Ballad of the Republic, Sung in the Year 1888*, EXAMINER (S.F.), June 3, 1888, at 4, *reprinted in* MARTIN GARDNER, THE ANNOTATED CASEY AT THE BAT 21 (2d ed. 1984) ("The outlook wasn't brilliant for the Mudville Nine that day.").

178. Wertheim, *supra* note 160, at 83.

179. *Id.* at 84. There were allegations that the centerfielder purposely misfielded the ball to let Lajoie get on base. *See* C. Paul Rogers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. REV. 325, 342 (2002).

180. Wertheim, *supra* note 160, at 84.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

"'certify . . . that Cobb has a clear title to the leadership of the American League batsmen for 1910 and is therefore entitled to the Chalmers trophy.'"[187] (Chalmers, for his part, gave both of the ballplayers cars.)[188]

From 1910 to 1981, the Chalmers race, Cobb's self-benching, and Lajoie's seven bunts were largely forgotten. Then, in 1981, the *Sporting News* reported that Cobb's "lost" game, contrary to the statistician's finding, had actually been recorded in the first place.[189] Lajoie was the true winner of the Chalmers trophy after all.[190] Cobb did not, in fact, have the all-time record of nine straight batting titles. Nor did Cobb's all-time hit record stand at 4,191; Pete Rose needed only 4,189 to break it.[191]

Faced with this new evidence seventy years later, Commissioner Bowie Kuhn had to decide whether to award the 1910 batting title to Lajoie retroactively and to take away two of Cobb's record number of hits. Ultimately, Kuhn elected to leave the record books intact.[192] Kuhn faced a statute of limitations question similar to the issue that confronted the *Ledbetter* Court: long after the initial event, information had come to light that, had it been known at the time, would have led to a different outcome. Both the Commissioner and the Supreme Court decided that the statute of limitations had lapsed, that some issues were beyond their control, and thus that there was nothing that could be done to help the aggrieved party.

9. *Finality:* Bush v. Gore *and the 2002 All-Star Game*

Both Justices and Commissioners have the power of finality within their respective systems.[193] As Justice Jackson put it, "[w]e are not final because we are infallible, but we are infallible only because we are final."[194] Likewise, when he assumed the Office of the Commissioner, Landis "made clear the necessity

187. *Id.* at 86.

188. *Id.*

189. Paul Mac Farlane, *Lajoie Beats Out Cobb*, SPORTING NEWS, Apr. 18, 1981. at 3.

190. Wertheim, *supra* note 160, at 86.

191. *Id.* As it turned out, Rose would smash Cobb's record.

192. *Id.*

193. Some argue that umpires too have finality in their system. *See, e.g.*, OBJECTIVITY IN LAW AND MORALS 17 (Brian Leiter ed., 2001) ("Because umpires have the final say on the interpretation and application of the rules of baseball, we might be tempted to say that the rules of baseball are what the umpires say they are.").

194. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

of having the final word," reminding the owners that "[y]ou have told the world that my powers are to be absolute."[195]

The power of finality is most controversial when it is perceived to have been exercised prematurely, truncating a legitimate process. In December 2000, the Supreme Court ended the Florida recount with its decision in *Bush v. Gore*.[196] Unsurprisingly, this exercise of finality was met with strong criticism. Many turned to sports analogies to describe what Professor Laurence Tribe called the Court's "ending the game before the matter could reach Congress."[197] Nevertheless, the Supreme Court's power of finality carried the day: the decision in *Bush v. Gore* ended over seven weeks of legal fighting regarding the presidential election outcome.

Similarly, the Commissioner's use of the power of finality was exercised in controversial fashion when the Commissioner appeared *literally* to end a game too early: the 2002 All-Star Game.[198] After eleven innings, the AL and NL Teams were tied 7-7 and were both down to the last pitchers on their rosters.[199] Facing the prospect that no team would have any remaining pitchers, Commissioner Selig ordered that the game be declared a "tie" at the close of the eleventh inning if neither team had the lead.[200] Selig's decision to end the game was not well received by fans: they started chanting "let them play"[201] and "refund" and threw beer bottles onto the field.[202] Nevertheless, Selig's decision as Commissioner was final: the Game was over, and no appeal was

195. George Vass, *Is Major League Baseball on the Brink of Revolution?*, BASEBALL DIG., Feb. 1993, at 31, 36.

196. 531 U.S. 98 (2000).

197. Laurence H. Tribe, eroG .v hsuB*: Through the Looking Glass*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 39, 58 (Bruce Ackerman ed., 2002); *see also* Milton Heumann & Lance Cassak, *The Supreme Court and* Bush v. Gore*: Resolving Electoral Disputes in a Democracy*, *in* THE FUTURE OF AMERICAN DEMOCRATIC POLITICS 161, 176 (Gerald M. Pomper & Marc D. Weiner eds., 2003) ("[T]he U.S. Supreme Court . . . stopped the clock and ended the game.").

198. This is not to say that the 2002 All-Star Game was the most important instance of the Commissioner's exercising of his finality power, present in instances such as the banishment of Shoeless Joe and Pete Rose. However, the 2002 Game did present a truncation of an ongoing process and thus makes for a useful comparison.

199. Bob Nightengale, *Tie in '02 All-Star Game Mattered*, USA TODAY, July 11, 2007, http://www.usatoday.com/sports/baseball/allstar/2007-07-10-AllStartiegamefeature_N.htm.

200. *Id.*

201. *Cf.* THE BAD NEWS BEARS IN BREAKING TRAINING (Paramount Pictures 1977) ("Let them play! Let them play! Let them play!").

202. *See* Nightengale, *supra* note 199.

possible.[203] Justices and Commissioners are not final because they are infallible; they are infallible because they are final.

CONCLUSION

Supreme Court Justices are not umpires; they are Commissioners. Unlike the judge-umpire analogy, the Justice-Commissioner analogy has a venerable pedigree and stands on sound footing. The Commissioner of Baseball has been expressly and convincingly analogized to the Supreme Court since the Office's inception. This is no accident, since both Justices and Commissioners play the same structural roles in their respective systems: they provide guidance, refrain from error correction, undertake rulemaking, exercise countermajoritarian powers, provide explanations for their decisions, protect the fundamental values of their respective institutions, employ special masters for fact-specific inquiries, decide on statutes of limitations, and exercise finality.

Justices and Commissioners do not always do their respective jobs perfectly. However, even when they act imperfectly, they act in similar ways. Each makes inherently difficult, controversial, and value-influenced decisions at high levels of abstraction, and each interacts with and modifies the rules of their respective systems in order to preserve the institution's core values, such as fair play and due process. These are not easy jobs, but they are necessary ones. Shortly before his passing, Commissioner Giamatti declared, "I will continue to locate ideals I hold for myself and for my country in the national game as well as in other of our national institutions."[204] Those ideals can, and should, be found in both Justice and Commissioner.

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203. For a more charitable view of Selig's decision, see Mike Lopresti, *4 Non-Players Who Deserve To Be in Hall*, USA TODAY, July 20, 2010, http://www.usatoday.com/printedition/sports/20100720/lopo20_st.art.htm ("[T]he infamous 2002 All-Star Game tie was one of the great bum raps in baseball history. Selig did not exhaust his entire roster that night in Milwaukee; the managers did. He was just the guy in charge handed a no-win scenario."). However, Selig could have also moved to postpone the game for continuation at a later time (presumably after the pitchers had rested) or declared that *someone* had to pitch, regardless of whether that player was a pitcher.

204. Giamatti Statement, *supra* note 2, at 905.

other members of The Yale Law Journal *who worked on this piece, solid closers if there ever were any. All hits are theirs; all errors are his own.*

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