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## The Justice as Commissioner: Benching the Judge-Umpire Analogy

### I. INTRODUCTION

The judge-umpire analogy has become “accepted as a kind of shorthand for judicial ‘best practices’”<sup>1</sup> in describing the role of a Supreme Court Justice.<sup>2</sup> However, the analogy suffers from three fundamental flaws.<sup>3</sup> First, courts historically aimed the judge-umpire analogy at trial judges. Second, courts intended the judge-umpire analogy as an illustrative foil to be rejected because of the umpire’s passivity. Third, the analogy inaccurately describes the contemporary role of the modern Supreme Court Justice.<sup>4</sup> Nevertheless, no

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1. Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1710 (2007). Indeed, the analogy is not limited to American jurisprudence. In Hebrew, the same word, שופט, is used for “judge” and “umpire.”
  2. See, e.g., Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702 & n.5 (2007) (describing the “instant success” of Justice Roberts’s analogy); Kristina Moore, Posting of 17:01 EDT, SCOTUSBlog, July 13, 2009, <http://www.scotusblog.com/wp/box-score-calling-balls-and-strikes-at-sotomayors-confirmation-hearing> (noting the “frequent[] use[]” of the analogy during the Sotomayor hearings). As noted below, this analogy is not without its critics. See sources cited *infra* note 4.
  3. Cf. OFFICIAL R. BASEBALL 6.05, available at [http://mlb.mlb.com/mlb/downloads/y2008/official\\_rules/06\\_the\\_batter.pdf](http://mlb.mlb.com/mlb/downloads/y2008/official_rules/06_the_batter.pdf) (“A batter is out when . . . A third strike is legally caught by the catcher.”).
  4. See, e.g., McKee, *supra* note 1, at 1710 (arguing that the judge-umpire analogy “obscures a complex dynamic that is far more amorphous, elusive and troublesome than its simplistic appeal suggests”); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006) (“No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S.

workable substitute for the judge-umpire analogy has been advanced. This Essay proposes that the appropriate analog for a Justice of the Supreme Court is not an umpire, but the Commissioner of Major League Baseball.

This Essay is divided into three parts.<sup>5</sup> The first Part traces the judicial history of the judge-umpire analogy from the late 1880s, finding that the analogy was originally intended for trial judges, and was expressly advanced as a model to be rejected. The second Part proposes a new paradigm for describing the role of Supreme Court Justices: the Justice as Commissioner. Both Supreme Court Justices and Major League Baseball Commissioners fulfill four critical characteristics which separate them from trial court judges and umpires: they provide interpretive guidance to subordinates, undertake extended deliberation, take countermajoritarian action, and wield substantial rulemaking power. This Essay concludes that Justices are not Umpires: they are Commissioners.

## II. THE JUDICIAL HISTORY OF THE JUDGE-UMPIRE ANALOGY

The judge-umpire analogy has a long historical pedigree. From its first judicial invocation over a century ago, the analogy was intended as a judicial model for the lower courts to avoid.<sup>6</sup> Thus, the modern application of the judge-umpire analogy is doubly anachronistic. First, it was meant to apply to trial court judges, not Supreme Court Justices. Second, the judge-umpire analogy was advanced as a model to be rejected.

Courts first invoked the judge-umpire analogy in 1886.<sup>7</sup> In *State v. Crittenden*,<sup>8</sup> the Louisiana Supreme Court considered whether a trial judge could prevent a witness from answering a leading question, even though the prosecution had not objected. Justice Hicks held that the trial judge had the

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Supreme Court, are given to them the way the rules of baseball are given to umpires.”); Siegel, *supra* note 2, at 701 (identifying “tensions between the understanding of the judicial role animating the umpire analogy and the actual practice of constitutional adjudication in race-conscious student assignment cases”). Given the large volume of criticism, this Essay concentrates largely on the creation of a new paradigm rather than a critique of the old.

5. Admittedly, nine would be more appropriate.
6. This Part is not intended to be an exhaustive documentation of every occurrence of the judge-umpire analogy, but rather an illustrative tour of its judicial origins and intended uses. This Part focuses on the analogy in judicial opinions, and thus begins with 1886. The analogy grew in legal literature alongside its judicial development. See, e.g., Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906) (discussing the “sporting theory of justice”).
7. This occurrence was identified in the comments thread of Orin Kerr, Posting of 13:41 EDT, Volokh Conspiracy, Aug. 2, 2008, <http://www.volokh.com/posts/1217698870.shtml>.
8. 38 La. Ann. 448 (1886).

power to do so since “[a] trial is *not* a mere *lutte* between counsel, in which the judge sits merely as an umpire to decide disputes which may arise between them.”<sup>9</sup> In 1886 baseball was young;<sup>10</sup> professional umpires had been introduced only seven years earlier.<sup>11</sup> Thus, Judge Hicks used the more familiar wrestling umpire, referring to the sport by its French name, *lutte*.<sup>12</sup> Nevertheless, Judge Hicks’s intent is clear: the trial judge was not meant to serve “merely as an umpire.”

In 1910, the baseball judge-umpire analogy first appeared in a judicial opinion. In *Morrison & Snodgrass Co. v. Hazen*,<sup>13</sup> the Ohio Court of Common Pleas considered whether a trial judge could question a witness directly, and held that “[a] judge presiding at the trial of a jury case *is not a mere umpire* of a game of ball, to call balls and strikes.”<sup>14</sup> Just as in *Crittenden*, the *Hazen* Court explicitly stated that an active judicial role was necessary for the pursuit of justice, and that the judge had “active duties to perform” to ensure that the “truth is developed.”<sup>15</sup>

The judge-umpire analogy jumped to the federal bench in 1912. Judge Killits, in *Young v. Corrigan*, declared, “the criticism of the court here made must proceed on . . . the ‘sporting theory’ of a trial, with the judge as a mere umpire to see that the rules of the game are observed.”<sup>16</sup> No sooner did Judge Killits introduce the judge-umpire analogy than he promptly knocked it down, quoting Professor Wigmore’s popular treatise on evidence: “[t]he judge must *cease to be merely an umpire* at the game of litigation.”<sup>17</sup> Indeed, Wigmore, like the *Crittenden* and *Hazen* courts, explicitly intended the judge-umpire analogy

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9. *Id.* at 450 (emphasis added).

10. It was only in the late 1860s that baseball had “escaped the confines of both New York and club fraternalism.” WARREN GOLDSTEIN, *PLAYING FOR KEEPS: A HISTORY OF EARLY BASEBALL* 101 (1991). The National League had been founded less than a decade earlier. SPALDING’S OFFICIAL BASE BALL RECORD 304 (Henry Chadwick et al. eds., 1919) [hereinafter *BASE BALL RECORD*].

11. *BASE BALL RECORD*, *supra* note 10, at 304.

12. See generally SCOTT M. BEEKMAN, *RINGSIDE: A HISTORY OF PROFESSIONAL WRESTLING IN AMERICA* 2-11 (2006).

13. 22 Ohio Dec. 772 (1910), *rev’d*, 23 Ohio C.D. 512 (Ohio Cir. 1911).

14. 22 Ohio Dec. at 778 (emphasis added).

15. *Id.*

16. 208 F. 431, 437 (N.D. Ohio 1912). This occurrence of the judge-as-umpire analogy was first pointed out by Eric Muller on the comments thread of the Volokh Conspiracy. Ilya Somin, Posting of 05:33 EDT, Volokh Conspiracy, Aug. 2, 2008, <http://volokh.com/posts/1217669631.shtml#409665>.

17. 208 F. at 437 (citing WIGMORE ON EVIDENCE (1910)) (emphasis added).

to be a straw man rather than a valid judicial paradigm.<sup>18</sup> Moreover, Judge Killits himself declared, “A long line of federal decisions assert the function of the judge to be something *more than a mere arbitrator* to rule upon objections to evidence and to instruct the jury upon the law . . . .”<sup>19</sup>

Nearly seven decades after its introduction in *Hazen*, the application of the judge-umpire analogy changed. In 1951, Justice Jackson spoke to the American Bar Association, lauding Judges Learned and Augustus Hand, and declared:

[T]he test of an independent judiciary is a simple one—the one you would apply in choosing an umpire for a baseball game. What do you ask of him? You do not ask that he shall never make a mistake or always agree with you, or always support the home team. You want an umpire who calls them as he sees them. And that is what the profession has admired in the Hands.<sup>20</sup>

Justice Jackson’s invocation of the judge-umpire analogy differed in four ways from its historical predecessors. First, Justice Jackson described the work of appellate judges, rather than trial courts. Second, Justice Jackson sought to emphasize the impartiality of judges, rather than the degree of involvement they should have in proceedings. Third, Justice Jackson’s comparison took place in a speech rather than a judicial opinion, where it would have received more scrutiny.<sup>21</sup> Fourth, Justice Jackson invoked the analogy in a positive light, rather than in the derogatory terms in which the analogy had been cast for the proceeding sixty-five years.

Chief Justice Roberts’s invocation of the judge-umpire analogy falls into neither the trial judge framework of *Crittenden* and its progeny, nor Justice Jackson’s model of judicial independence and equanimity. Chief Justice Roberts stated: “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

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18. See WIGMORE ON EVIDENCE § 784 (1904).

19. 208 F. at 438 (emphasis added). These views were echoed at the state level as well. A decade later, the California Court of Appeals declared, “[t]he duty of a trial judge, particularly in criminal cases, is more than that of an umpire.” *People v. Golsh*, 63 Cal. App. 609, 614 (1923).

20. Justice Robert H. Jackson, Address to the American Bar Ass’n Annual Dinner: Why Learned and Augustus Hand Became Great (Dec. 13, 1951).

21. Moreover, Justice Jackson was not himself a baseball fan. John Q. Barrett, Posting of 20:41 EDT, PrawfsBlawg, Mar. 21, 2009, <http://prawfsblawg.blogs.com/prawfsblawg/2009/03/this-post-was-written-by-john-q-barrett-of-st-johns-and-the-robert-h-jackson-center-it-was-sent-to-the-jackson-list-and.html>.

job to call balls and strikes and not to pitch or bat.”<sup>22</sup> Chief Justice Roberts intended the judge-umpire analogy as a model of judicial restraint. This application is, at best, unmoored from its historical roots and firmly opposed to its original meaning.

Chief Justice Roberts’s analogy is diametrically opposed to the *Crittenden* line of cases, which explicitly applied the analogy to trial judges. Trial judges are better characterized as umpires: they make a large number of rapid calls repeatedly throughout their careers on relatively settled issues of law.<sup>23</sup> In contrast, appellate court judges decide a small number of questions after much deliberation. Moreover, the *Crittenden* line of cases repeatedly declared that even a trial court judge was not a “mere umpire,” who simply called “balls and strikes.” Similarly, Justice Jackson’s analogy addressed the independence and fairness of appellate court judges, not the restraint for Supreme Court Justices which Chief Justice Roberts envisions. As many have noted,<sup>24</sup> Chief Justice Roberts’s job is more complicated than Chief Justice Roberts’s conception of umpiring (and, so too, for that matter is umpiring<sup>25</sup>). In the next Part, I propose a new analog to the role of Supreme Court Justices: the Commissioner of Baseball.

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22. Zuzanna Kobrzynski, *Balls and Strikes*, SLATE, Sept. 13, 2005, <http://www.slate.com/id/2126289/>.
23. *But see* Howard Wasserman, Posting of 07:45 EDT, PrawfsBlawg, July 8, 2008, <http://prawfsblawg.blogspot.com/prawfsblawg/2008/07/umpires-and-jud.html> (arguing that umpires face difficult and novel circumstances where they cannot merely apply established rules, such as when an ambidextrous pitcher faces an ambidextrous batter, and each tries to repeatedly change sides).
24. *See, e.g.*, Siegel, *supra* note 2, at 701 (identifying “tensions between the understanding of the judicial role animating the umpire analogy and the actual practice of constitutional adjudication in race-conscious student assignment cases”); Jon O. Newman, *Judging’s a Lot More than Balls and Strikes*, HARTFORD COURANT, Sept. 8, 2009, at A11 (“[A]lthough both [Chief Justice Roberts and Justice Sotomayor] used words that convey the indispensable judicial characteristic of impartiality, they obscured an important part of a judge’s task.”); Michael McCann, Posting of 18:25 EDT, Sports Law Blog, Sept. 14, 2005, <http://sports-law.blogspot.com/2005/09/evaluating-judge-john-roberts-analogy.html> (analyzing the text of Justice Roberts’s remarks and concluding that they may “reflect[] Judge Roberts’ humility, but . . . do[] [not] reflect reality”).
25. *See, e.g.*, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1477 & n.29 (1975) [hereinafter *Common Law Origins*](describing the umpires facing the novel situation during the development of the infield fly rule); Wasserman, *supra* note 23. Judge O’Scannlain recently recognized the latitude given to umpires, and thus proposed that judges were analogous to football referees, who have less discretion. Diarmuid F. O’Scannlain, Judge, U.S. Court of Appeals for the Ninth Circuit, The Annual Herbert W. Vaughan Lecture on America’s Founding Principles: The Role of the Federal Judge Under the Constitution: Some Perspectives from the Ninth Circuit 5-7 (Oct. 21, 2009), *available at* <http://web.princeton.edu/sites/jmadison/calendar/documents/Vaughan%20Lecture.doc.pdf>.

### III. THE JUSTICE AS COMMISSIONER

The judge-umpire analogy frames the job of a Supreme Court Justice in the familiar terms of our national pastime and draws on a longstanding tradition of baseball comparisons in legal literature.<sup>26</sup> However, analogizing Supreme Court Justices to umpires is historically anachronistic and contemporarily inapplicable. Chief Justice Roberts had the right sport, but the wrong position: a Supreme Court Justice is analogous to the Commissioner of Baseball.

Quite aptly, William Howard Taft was passed over for the newly created office of Commissioner in 1920 only to become Chief Justice of the Supreme Court the following year.<sup>27</sup> George Mitchell was less successful: in 1994, he reportedly turned down an appointment to the Supreme Court,<sup>28</sup> but unsuccessfully tried out for Commissioner of Baseball,<sup>29</sup> for which he was at one time considered the front-runner.<sup>30</sup> In the race to become a Justice or Commissioner, the front-runner does not always win.<sup>31</sup> In this Part, I explore further similarities between a Supreme Court Justice and the Commissioner of Baseball using four criteria. Unlike umpires and trial court judges, Justices and Commissioners provide guidance to lower courts, deliberate,<sup>32</sup> take

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26. The most widely known and beloved of these works is *Common Law Origins*, *supra* note 25. Other examples include Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239 (1998) (describing the similarities between baseball and legal development); Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 42-46 (1994); and Charles Yablon, *On the Contribution of Baseball to Legal Theory*, 104 YALE L.J. 227, 228 (1994) (analyzing the “importance of baseball to American legal theory”).
  27. ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 155 (2001). Taft also “initiated the custom of the president throwing out the first ball on opening day” and is credited by some with inventing (perhaps inadvertently) the seventh inning stretch. *Id.* at 57. *But see* ANDY STRASBERG, BOB THOMPSON & TIM WILES, *BASEBALL’S GREATEST HITS: THE STORY OF TAKE ME OUT TO THE BALL GAME* 38 (2008) (documenting a reference to the seventh inning stretch in 1869). Instead of Taft, a trial court judge was chosen as the first Commissioner, Kenesaw Mountain Landis. Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L.J. 277, 277 (2005).
  28. Alex Altman, *Middle East Envoy George Mitchell*, TIME, Jan. 22, 2009.
  29. Steve Rushin, *Let’s Rethink This, Senator: George Mitchell, Do You Really Want To Be Baseball Commish, Not a Supreme Court Justice?*, SPORTS ILLUSTRATED, Apr. 25, 1994, at 72.
  30. Murray Chass, *Search Party Is Sought To Find a Commissioner*, N.Y. TIMES, Jan. 14, 1997, at B15.
  31. *Cf.* STEVEN TRAVERS, *THE 1969 MIRACLE METS: THE IMPROBABLE STORY OF THE WORLD’S GREATEST UNDERDOG TEAM* (2009).
  32. *See* Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 11, 2009, at WK1.

countermajoritarian action, and, most crucially, make and tweak the rules of the game within a broad framework of overall goals.<sup>33</sup>

### A. Interpretive Guidance

The Supreme Court hears only a small number of cases.<sup>34</sup> Most of its work consists of providing guidance to lower courts, rather than correcting all judicial errors on a case-by-case basis.<sup>35</sup> Similarly, the Commissioner of Baseball relays instructions to the umpires regarding how to interpret the rules of Major League Baseball, rather than reviewing their every call.

For example, in 1988, Commissioner A. Bartlett Giamatti<sup>36</sup> instructed umpires to interpret the balk rule<sup>37</sup> more stringently.<sup>38</sup> These instructions were promptly implemented and created considerable controversy as an increasing number of balks were called.<sup>39</sup> Giamatti provided guidance to subordinate judicial bodies (umpires) on interpretation, just as the Supreme Court provides guidance to lower courts on a host of issues, ranging from free speech to

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33. See Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 9 (2006).
  34. The number of cases granted certiorari has declined precipitously in recent times. Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES, Sept. 28, 2009, at A18 (discussing the “mystery of the court’s shrinking docket”).
  35. See Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006); see also AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 3-7 (2006) (discussing the social role of a judge).
  36. Giamatti was Commissioner of Baseball in 1989 for six months prior to his sudden and tragic death by a heart attack. His fight against the balk was largely during his role as President of the National League, for some of which time he was Commissioner-elect. Paul Gray, *A. Bartlett Giamatti: Egghead at the Plate*, TIME, Sept. 26, 1988, at 15. Nevertheless he worked closely with the Commissioner and other members of the Rules Committee while doing so, and so, for the sake of clarity, I use the title “commissioner” even when actions were taken during his time as Commissioner-elect and President of the National League.
  37. A balk occurs when “[i]n disengaging the rubber the pitcher . . . step[s] off with his . . . free foot first . . . or go[es] into a set or stretch position.” OFFICIAL R. BASEBALL 8.01(a)(3), available at [http://mlb.mlb.com/mlb/official\\_info/official\\_rules/pitcher\\_8.jsp](http://mlb.mlb.com/mlb/official_info/official_rules/pitcher_8.jsp).
  38. Giamatti did not do so completely unilaterally; he worked through the rules committee. See Murray Chass, *After Fading Away, Balk Calls Return with a Vengeance*, N.Y. TIMES, Aug. 14, 1988, § 8, at 3 (describing how Giamatti and the rules committee “decided to make pitchers come to a discernible stop”). Giamatti was widely seen as the driving force behind this policy. Gray, *supra* note 36, at 15.
  39. Chass, *supra* note 38, § 8, at 3 (“In recent weeks . . . a bevy of balks resurfaced at the most inconvenient times: when games were tied in the late innings and the teams at bat had runners at third base.”).

nondiscrimination. Unlike umpires, Justices and Commissioners are concerned largely with providing interpretive guidance to their subordinates.

Moreover, Giamatti's justification for his balk ruling was identical to the Court's reason for granting certiorari in many cases: the need to harmonize conflicting interpretations of the same rule. For Giamatti, the compelling factor for his decision was "[a] demonstrable difference between the [National and American] leagues and their interpretation of the balk rule."<sup>40</sup> For a Supreme Court Justice, this would have been a circuit split.<sup>41</sup> The American and National League were stand-ins for the Ninth and Fourth Circuits.

### *B. Deliberation*<sup>42</sup>

Both umpires and trial court judges make many split-second decisions in the course of a trial or game.<sup>43</sup> Umpires typically call over two hundred and fifty pitches per game.<sup>44</sup> A trial judge must consider a bevy of objections to evidence and questioning, as well as manage discovery and pretrial requests.<sup>45</sup> One can no more imagine a judge stopping a trial for weeks to consider objections to lines of questioning than one can imagine an umpire waiting weeks to make a strike call.<sup>46</sup> In contrast, both the Commissioner and Supreme

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40. Charles Siebert, *Baseball's Renaissance Man: Bart Giamatti*, N.Y. TIMES, Sept. 4, 1988, § 6 (Magazine), at 36.

41. In listing compelling reasons for granting certiorari, Supreme Court Rule 10 includes situations where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or a decision on an important federal question "that conflicts with a decision by a state court of last resort." SUP. CT. R. 10(a).

42. For more on the deliberative role of appellate judges as opposed to umpires, see Newman, *supra* note 24.

43. Umpires may sometimes conference before issuing a call, but usually do so quickly so that the game may continue. Umpires sometimes deliberate for longer periods when determining whether to call the game off, since the impact of such actions on the fans is unusually high. See Norman Rockwell, *Bottom of the Sixth* (painting), available at <http://www.rockwell.com/prints/viewimages.asp?ART=0000024>.

44. In 2001, the average MLB pitch count for a nine-inning game was 283. Murray Chass, *Mixed Messages in the Pitch-Count Controversy*, N.Y. TIMES, July 26, 2001, at D1.

45. In one respect, umpires are different, in that they are both the "eyewitness and the judge." Weber, *supra* note 32. In that sense, they more closely resemble the self-informing jury of the middle-ages. See Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 123 (2003).

46. In exceptional circumstances, an umpire's call has been appealed after the game, and the game has been reinstated. For example, in 1983, the Kansas City Royals played the New York Yankees. Kansas City third baseman George Brett hit a two run homer in the top of the ninth to put the Royals ahead 5-4, but the umpires declared him out for having had too

Court Justices have the luxury of examining issues over a protracted period of time before rendering a decision, allowing them to consider competing values and issues in a more careful and thorough manner.<sup>47</sup> This thoroughness allows each to give detailed explanations for their decisions, which allows others to use them for interpretive guidance. In contrast, umpires must make quick decisions with little time.

### C. Countermajoritarianism

Both the Supreme Court and the Commissioner of Baseball take countermajoritarian<sup>48</sup> action. For the Supreme Court, this means striking down the will of the legislature. For the Commissioner, this involves taking action contrary to the will of the owners.<sup>49</sup> In contrast, umpires and trial judges rarely take countermajoritarian actions; rather, they apply previously articulated rules to factual circumstances.<sup>50</sup>

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much pine tar on his bat. The Royals appealed to the American League president, who decided in their favor, and ordered the game resumed with two outs in the top of the ninth. The Royals held on to their lead and beat the Yankees. *The Pine Tar Game: George Brett's Bat Sparks Controversy*, MLB.COM, July 24, 1983, [http://mlb.mlb.com/mlb/baseballs\\_best/mlb\\_bb\\_gamepage.jsp?story\\_page=bb\\_83reg\\_072483\\_kcrnny](http://mlb.mlb.com/mlb/baseballs_best/mlb_bb_gamepage.jsp?story_page=bb_83reg_072483_kcrnny).

47. In extraordinary circumstances, such as death penalty stays or *Bush v. Gore*, Supreme Court Justices must decide items on short notice. Nevertheless, the vast majority of the time they have ample—arguably indefinite—time to decide a case.
48. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).
49. Action contrary to the express wishes of the Major League Baseball Player's Union could also, arguably, be seen as countermajoritarian, but the owners represent the teams themselves, which are the constituent components of the league and have the bulk of the rule-creating authority. The Commissioner initially was granted the express power to void any rules passed by the owners under the Best Interests Clause. However, following the death of Commissioner Landis, the owners amended the Major League Agreement to remove the power of the Commissioner to invalidate express rulemaking actions by the owners. See Ted Curtis, *In the Best Interests of the Game: The Authority of the Commissioner of Baseball*, 5 SETON HALL J. SPORT L. 5, 12 n.36 (1995).
50. Umpires often make controversial calls that run counter to a majority of fans, but these are not countermajoritarian in Bickel's sense, since the fans are not a rulemaking body. See, e.g., ERNEST LAWRENCE THAYER, *CASEY AT THE BAT: A BALLAD OF THE REPUBLIC SUNG IN THE YEAR 1888* (1978):

With a smile of Christian charity great Casey's visage shone;  
He stilled the rising tumult; he bade the game go on;  
He signaled to the pitcher, and once more the spheroid flew;  
But Casey still ignored it, and the umpire said, "Strike two."  
"Fraud!" cried the maddened thousands, and echo answered fraud;  
But one scornful look from Casey and the audience was awed.

The countermajoritarian capacity of Justices and Commissioners was exemplified by the process of racial integration. Both the Supreme Court and the Commissioner of Baseball were initially strong supporters of institutionalized racial segregation. Both ultimately reversed their decisions and encouraged integration in the face of significant opposition from majority constituencies. For both, the long journey toward racial integration started inauspiciously, by supporting separate-but-equal provisions. For the Court, this tragic misstep came in 1896, in *Plessy v. Ferguson*.<sup>51</sup> For baseball, segregation was adamantly supported by Commissioner Landis, who “consistently blocked any attempts to put blacks and whites together on a big league field” during the early twentieth century, and instead relegated black players to their own league.<sup>52</sup>

As the Court began its march toward overturning *Plessy* in *Brown v. Board of Education*,<sup>53</sup> baseball began to tear down the walls separating ballplayers by race, and the Commissioner played a critical role in desegregating the league. In 1945, Commissioner A.B. “Happy” Chandler publicly declared his staunch support for integrating baseball: “If they can fight and die on Okinawa, Guadalcanal, in the South Pacific, they can play baseball in America.”<sup>54</sup> Chandler’s declaration provided critical support to the integration of baseball, flying in the face of the owners’ actions and ensuing public declarations.<sup>55</sup> Similarly, the Supreme Court’s cases regarding desegregation were influenced by the successful integration of many American combat forces in the late 1940s and early 1950s.<sup>56</sup> Countermajoritarian action is a feature of both Justices and

51. 163 U.S. 537 (1896).

52. WILLIAM A. COOK, PETE ROSE: BASEBALL’S ALL-TIME HIT KING 193 (2004) (quoting Commissioner Chandler); see LEONARD KOPPETT, KOPPETT’S CONCISE HISTORY OF MAJOR LEAGUE BASEBALL 222 (2004) (“The source of all the backstage pressure [against integration] was Landis. He was not only a bigot but also a hypocrite . . .”); DAVID QUENTIN VOIGT, AMERICAN BASEBALL: FROM POSTWAR EXPANSION TO THE ELECTRONIC AGE 46-47 (1983).

53. 347 U.S. 483 (1954).

54. 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., 2000).

55. VOIGT, *supra* note 52, at 47; see also 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 (expanded ed. 1997) (arguing that Chandler was no more than a bit player in these historic events).

56. See PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 232-35 (2002).

Commissioners, as both pushed racial integration on often resisting institutions.

#### *D. Rulemaking*

Both Supreme Court Justices and Baseball Commissioners exercise rulemaking authority that trial judges and umpires lack.<sup>57</sup> Both have the “province and duty . . . to say what the law is.”<sup>58</sup> For Supreme Court Justices, this power is evident in their interpretations of the Due Process and Equal Protection Clauses. The Commissioner of Baseball’s analogous power flows from Article II, Section 3 of the Major League Constitution, which allows the Commissioner to take action to protect “the best interests of Baseball.”<sup>59</sup> The Best Interests Clause is the primary source of the Commissioner’s power to regulate baseball.<sup>60</sup> For both Justices and Commissioners, this power to “chang[e] the rules”<sup>61</sup> sets them apart from umpires and trial court judges.

This rulemaking power is evident in the long history of baseball and gambling. In 1921, Commissioner (and former Judge) Kenesaw Mountain Landis banned the eight “Black Sox” players for life for gambling on baseball.<sup>62</sup> Landis continued banning players for even the appearance of gambling-related impropriety throughout this term.<sup>63</sup> Over sixty years later, Commissioner Bart Giamatti again invoked the Best Interests Clause to ban Pete Rose for life for gambling.<sup>64</sup> These bans were controversial steps taken to preserve the integrity of the game, with no blackletter rules to provide guidance. Landis and Giamatti

57. See Oldfather, *supra* note 26, at 36 (“[A]n umpire will rarely be faced with a situation in which he does not know the standard that he must apply . . . . [C]ourts, in addition to legislatures, are empowered to create or reshape the rules.”).
58. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
59. MAJOR LEAGUE BASEBALL, MAJOR LEAGUE CONSTITUTION § 2(b) (2005); see also LARRY MOFFI, *THE CONSCIENCE OF THE GAME: BASEBALL’S COMMISSIONERS FROM LANDIS TO SELIG* 26-83 (2006) (describing the use of the Best Interests Clause by different commissioners); cf. *State v. Davidson*, 236 Wis. 2d 537, 579 n.16 (2000) (discussing the court’s ability to act in “the best interests of judicial administration”).
60. Curtis, *supra* note 49, at 7-8; see, e.g., *Atlanta Nat’l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1222 (N.D. Ga. 1977) (noting that “What conduct is ‘not in the best interests of baseball’ is, of course, a question which addresses itself to the Commissioner, not this court”).
61. Posner, *supra* note 33, at 9.
62. ABRAMS, *supra* note 27, at 156.
63. See, e.g., DANIEL E. GINSBURG, *THE FIX IS IN: A HISTORY OF BASEBALL GAMBLING AND GAME FIXING SCANDALS* 164 (1995) (discussing the suspension of Eugene Paulette for associating with gamblers).
64. Curtis, *supra* note 49, at 26-29.

were not simply “calling balls and strikes.” Rather, they exercised independent discretion under a broad mandate to preserve fundamental aspects of fairness in the system they were charged with protecting. Such broad discretion to protect the integrity of the game was further exemplified by the simple sign which hung on Commissioner Landis’s door for many years: “BASEBALL.”<sup>65</sup>

The Commissioner’s rulemaking power is also evident in the more technical aspects of the game, such as the strike zone. In 1988, Giamatti “lowered [the strike zone] so that more high strikes would be called.”<sup>66</sup> In so doing, Giamatti belied the seemingly inviolate representation of judicial objectivism exemplified by Chief Justice Roberts: he modified the definition of balls and strikes.<sup>67</sup>

The Commissioner’s rulemaking powers are analogous to the discretion the Supreme Court enjoys, particularly under the Due Process and Equal Protection clauses, which, like “best interests,” are inherently vague. For instance, in *Miranda v. Arizona*,<sup>68</sup> the Court prescribed the rules for police interrogations of criminal suspects under the Fifth Amendment. In so doing, the Court restricted the strike zone available to the prosecution, by disqualifying evidence that had previously been admissible under the “totality of circumstances” test. Similarly, in *Loving v. Virginia*,<sup>69</sup> the Court used analysis grounded in the Fifth and Fourteenth Amendments to strike down antimiscegenation laws, exercising broad discretion under Due Process and Equal Protection. The Court’s modern privacy jurisprudence provides another example of the potential for broad discretion that the Court—like the Commissioner—exercises.<sup>70</sup>

#### IV. CONCLUSION

The judge-umpire analogy has become an increasingly dominant paradigm to describe the role of the modern Supreme Court Justice. However, this analogy is flawed from both a historical and a contemporary perspective. The

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65. ROBERT S. FUCHS & WAYNE SOINI, JUDGE FUCHS AND THE BOSTON BRAVES, 1923-1935, at 16 (1998).

66. Siebert, *supra* note 40.

67. In fact, even umpires exercise more discretion over the strike zone than this analogy indicates. See Jack Shafter, *How the Court Imitates the World Series: John Roberts’s Winning Baseball Analogy*, SLATE, Sept. 13, 2005, <http://www.slate.com/id/2126241>.

68. 384 U.S. 436 (1966).

69. 388 U.S. 1 (1967).

70. See William M. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212.

appropriate analogy for Supreme Court Justices is the Commissioner of Major League Baseball. Neither Justices nor Commissioners are in the business of “merely calling balls and strikes”; each is charged with the fundamental duty of preserving the integrity of their game.<sup>71</sup> Chief Justice Roberts referenced the appropriate sport, but the wrong position: Justices are not Umpires, they are Commissioners.

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71. In recent times, the Commissioner of Baseball has weakened considerably, and the game has suffered as a result. See, e.g., MOFFI, *supra* note 59, at 149 (discussing the “absence of conscience” in baseball). Nevertheless, the Commissioner is still tasked with protecting the fundamental fairness and best interests of the game.