BASEBALL PLAYERS, OWNERS, UNIONS, AND TRUSTS: THE ROOTS AND RISE OF THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

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BASEBALL PLAYERS, OWNERS, UNIONS, AND TRUSTS
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Ross E. Davies†

On April 24, 2012, Marvin Miller delivered a speech at New York University in which he reflected at length on the history of the Major League Baseball Players Association (MLBPA) and his role in the development of the labor union he led from 1966 to 1983. This article is an introduction in two parts to that speech and the panel discussion that followed it. Part I is a chronology of highlights of labor-management relations in major league baseball. Part II draws an inference or two about the MLBPA from events on that timeline. It is not the entire story of organized labor in major-league baseball, or even of Miller and the union he led. But it is enough, I hope, to put his recollections and the subsequent discussion in mature perspective.

PART I:
TIMELINE OF BASEBALL’S LABOR-MANAGEMENT HISTORY

The history of labor-management relations in major-league baseball is very long, often complicated or obscure (in part because the documentary record is incomplete), and occasionally exciting. There is enough of it to fill volumes. It has. And some of them are very good, including Charles Korr’s The End of Baseball as We Knew It (2002), Lee Lowenfish’s The Imperfect Diamond (1980, 2010), Marvin Miller’s A Whole Different Ball Game (1991, 2004), and Brad Snyder’s A Well-Paid Slave (2006). But the very length and complexity of that history, and the depth of the storytelling about particular parts of it, can leave the observer unable to get a sense of the larger picture — of the essential characteristics of the relationship between laboring players and managing owners, and of the large movements and major changes in those relationships over nearly 150 seasons of work that is called play. This article-in-the-form-of-a-timeline is an attempt to provide that absent sweeping portrait of a long relationship. Each entry is necessarily a little sweeping brush stroke of its own — a small and selective collection of fact and commentary and sources relating to an episode and its context. The intended result is (1) generally a study that can be viewed from 20,000 feet or at close range, and can be a useful resource to scholars of baseball, labor, and law at either altitude, and (2) particularly a portrayal of the workplace into which Marvin Miller stepped in 1966 and which he left behind in 2012.

Two important themes will be glaringly obvious from a quick read of the timeline below. They, and the most obvious question they point toward, are worth considering summarily upfront.

First, in 1885, major-league baseball players (that is, people trying to make a buck in baseball as athletes, hereafter “players”) began trying to coordinate their dealings with major-league baseball team owners (that is, people trying to make a buck in baseball as entrepreneurs, hereafter “owners”). Generally speaking, the players were not very successful in their dealings with the owners for the next 80 years or so. Then in 1966 the players hired Miller to help them coordinate their dealings with the owners. The players have been pretty successful in their dealings with the owners ever since, working through the MLBPA and executive directors Miller (1966-83), Donald Fehr (1984-2009), and Michael Weiner (2009-present). Correlation does not necessarily indicate causation, but the standard view among experienced observers of professional baseball is that the players’ failure-then-Miller-then-success in labor-management relations sequence is indeed causal. Miller himself was always modestly dismissive on the subject, but he did not deny it either.

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Second, the following chronology contains plenty of evidence showing that from early on both the players and the owners recognized (a) the potential power of an organized body of players — the power to influence, if not dictate, the conditions of the players’ working lives and the return on the owners’ investments; (b) the most effective means of exercising that power — by allocating their labor, and sometimes withholding or at least threatening to withhold it; and (c) the most important factors limiting that power — the availability of substitute labor and the unavailability of alternate employment.

And the question: Why then did it take so very long for the players to effectively organize?1 To say that they were waiting for Marvin Miller all those years but did not know it is to simultaneously give Miller too much credit and make light of his contributions. He was an important figure in his own time, but he was not some sort of magical labor elf. He came to his job at the MLBPA as an expert and experienced labor leader, and did work in that capacity that contributed to the success of the MLBPA. The question here is about the forces that were in play before his time — from the players’ perspective, the forces that made it hard to build a union; and from the owners’ perspective, the forces that made it hard to anticipate and thus perhaps forestall the union that was to come. There probably is no such thing as a complete answer to that question, but this chronology may help:

**September 1879:** The National League owners secretly agree to honor each other’s reservation of a limited number of players — five per team. That is, the owners promise to refrain from competing for the services of each other’s star players.2

**February 1883:** The National League, American Association, and Northwestern League enter the first “National Agreement” among the major leagues, under which the owners agree, among other things, to expand the reservation system to cover eleven players per team — at a time when eleven was the size of a standard team roster.3 According to John Montgomery Ward, the first baseball labor leader (who was also both a star player and a successful lawyer),

> By reservation is meant the privilege each club has of claiming for each succeeding year the services of its players, and this “right” is founded, primarily, on an agreement between the clubs themselves of each association. Its effect is that a contract for one season is made perpetual, at the option of the club, and a player, once signed by a club, belongs to the club forever. There is no escape for him, except by the consent of the club which owns him; and if, for any reason, he does not want to engage with the same club, for another year, he is forced out of base-ball [sic] entirely.4

“Forced out... entirely” is, in this context, a euphemism for blacklisting.5

**October 1884:** Labor-management relations in the major leagues draws the color line. The release of catcher Moses Walker by the Toledo Blue Stockings of the American Association marks the end (until

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1 There is an obvious follow-up question for which this article provides little insight but the transcript that follows it does: What happened in the late 1960s and early 1970s that enabled the players to establish a durable and effective union?  
1947) of employment in the major leagues for players of recognized African descent, a practice that had been extremely rare even before then. Although a few prominent whites in the major leagues (including Ward in the late 19th century and New York Giants manager John McGraw in the early 20th) make some small noises about breaking the color line, there is no doubt that players and owners (both individually and in their respective organized forms) share responsibility for the drawing of the line and for the decades of race discrimination that followed. Indeed, every success, and every failure, by major-league players, owners, and teams from this time until at least 1946 should be read with an asterisk.

October 1885: The Brotherhood of Professional Base Ball Players — the first baseball labor union — is formed in secret by Ward and eight of his teammates on the New York Giants, who then organize chapters at other major-league teams. The Brotherhood goes public in August 1886.

November 1887: The Brotherhood and the National League negotiate a new player contract, in which “concessions were made on both sides, and the result is a more equitable form of agreement between the club and the players.” The contract includes the reserve clause, which perpetuates each owner’s control over the movement of individual players on that owner’s team (and thus also players’ compensation).

June 1889: The Sporting News reports that “the players . . . known as the Brotherhood are about to inaugurate a strike which will be the biggest thing ever heard of in the base ball world” in response to a new salary cap system imposed by the owners.

November 1889: The strike does not happen. Instead, Brotherhood members, led by Ward, announce the formation of their own league — the Players’ National League of Base-Ball Clubs — which will operate competitively during the 1890 season. Players who move to the Players’ League enjoy nearly complete success defending lawsuits filed against them by National League owners who claim that the reserve clause in their contracts bars the players from working for any professional baseball team other than the National League team with which they have contracted.

November 1890: Under financial strain and suffering from a combination of mismanagement and defections to the National League by both owners and players, the Players’ League folds. The Brotherhood

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7 Bill James, The New Bill James Historical Baseball Abstract 166 (2001) (“Segregation in baseball dates back to 1867; Cap Anson’s famous refusal to play against black players, which came twenty years later, is more properly described as a time when efforts to break the color line were turned back, rather than the time when the color line was established.”).
8 White’s Official Base Ball Guide, supra note 6 at 81-87; Robert Peterson, Only the Ball Was White: A History of Legendary Black Players and All-Black Professional Teams ch. 2 (1970).
11 Ward, Base-Ball, supra note 10 at 32; Leonard Koppett, Koppett’s Concise History of Major League Baseball 57-58 (updated and expanded ed. 2004).
13 Palmer et al., Athletic Sports, supra note 11 at 125-129, 146-50 (reproducing and explaining the players’ November 4, 1889 announcement); Gelzheiser, Labor And Capital, supra note 11 at ch. 8.
June 1900: After “incubating for several years,” a second union is formed — the Players’ Protective Association:

Team meetings were held from time to time [during the 1900 season] to consider a plan of organization submitted by President [Samuel] Gompers, of the [American] Federation of Labor. When everything had been shaped up for organization a meeting of delegates from every team in the National League was held at the Sturtevant House, in New York, June 10th. At this meeting the League Players’ Protective Association was permanently organized with Charles Zimmer, president; William Clarke, treasurer, and Hugh Jennings, Secretary. Ex-player Harry L. Taylor, of Buffalo, was elected attorney for the Association. Later the American League and Eastern League players were organized into separate branch organizations.16

In a new environment of league competition for players, territory, and attendance (primarily within and between the established National League and the new American League), the Players’ Protective Association has some leverage, and thus also some success in negotiations with the leagues during its first two years of existence.17

July 1903: After the American and National Leagues negotiate a “peace treaty” in January 1903,18 the Players’ Protective Association loses much of its bargaining power and many of its gains in working conditions. The union soon folds: “A meeting in New York to reorganize the Players’ Protective Association is slimly attended and results in a fizzle.”19

April 1911: Pitcher Addie Joss of the Cleveland Naps (now Indians) dies of tubercular meningitis. His teammates announce their intention to attend his funeral in Toledo, although they are scheduled to play the Detroit Tigers that day. American League president Ban Johnson insists that the game be played. The Naps players announce they will strike. The game is postponed. Johnson announces that “[t]here is no strike, dissatisfaction or misunderstanding over that game,” which “will be played later in the season.”20

September 1912: After a season in which the members of the Detroit Tigers strike in support of teammate Ty Cobb (and are fined for doing so) and players from both major leagues meet in secret to plan a new labor union, the Fraternity of Professional Baseball Players of America — the third baseball labor union — is formed under the leadership of lawyer and former major-league player David Fultz, with Christy Mathewson, Edward Sweeney, Michael Doolan, and Ty Cobb on its board.21

January 1914: Like the Players’ Protective Association a decade earlier, the Fraternity of Professional Baseball Players enjoys early success at the bargaining table due at least in part to interleague compet-

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16 The Players’ Protective Association, in REACH’S OFFICIAL BASE BALL GUIDE FOR 1901, at 13 (1901).


20 Addie Joss Buried at Toledo, Big Crowd Pays Its Last Respects, Game Put Off So Players May Attend, SPORTING NEWS, Apr. 20, 1911, at 1; see also MICHAEL COFFEY, 27 MEN OUT: BASEBALL’S PERFECT GAMES 34-35 (2010).

21 Francis C. Richter, The “Base Ball Players’ Fraternity”, in REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE FOR 1913, at 79 (1913); see also id. at 11-12; Scott Longert, The Players’ Fraternity: They fought the good fight, 30 BASEBALL RESEARCH J. 40 (2001); Brian McKenna, Dave Fultz, in THE BASEBALL BIOGRAPHY PROJECT, http://sabr.org/bioproj/person/1857946b.
tion for players (in this case between the established American and National major leagues and the new Federal League, which had been founded in 1913). After the Fraternity sends a list of 17 proposals to the major-league owners in November 1913 — accompanied by a promise that members of the union will refuse to sign their employment contracts for the 1914 season (that is, strike) until the players’ concerns are addressed — the union and the leagues negotiate the “Cincinnati Agreement.” It embodies several of the proposals but leaves the reserve system and league governance practically intact.

**July 1914:** Minor league first baseman Clarence Kraft is transferred from a AA team to an A team in violation of the Cincinnati Agreement. (The Players’ Protective Association represented minor-league players as well as major-league players.) Fultz warns American League president Johnson (who sits on the National Commission that governs some of the minor leagues) that all members of the union will strike if the Cincinnati Agreement is not followed in the Kraft case. Johnson arranges for Kraft to be dealt with according to the Agreement, and the strike does not happen.

**February 1915:** “[T]he Base Ball Players’ Fraternity, which has come to be a power in the game to be reckoned with,” sends a list of nine more proposals to the owners in late 1914. But the owners, perhaps anticipating the failure of the Federal League, indefinitely postpone consideration of the new proposals at their annual winter meeting, which is itself delayed to February from its normal January date by proceedings before Judge Kenesaw Mountain Landis relating to an antitrust lawsuit filed by the Federal League against the major leagues in the U.S. District Court for the Northern District of Illinois.

**November 1916:** The Base Ball Players’ Fraternity presents four more proposals to the owners. But with the demise of the Federal League after the 1915 season, market pressure on owners to accommodate players has eased, the Fraternity of Professional Baseball Players has lost much of its leverage in negotiations, and labor-management tensions have risen (including strike rumors in the spring). Three of the four proposals relate to the minor leagues, and they are promptly rejected by the minor league owners. *Sporting Life* reports that the Fraternity is prepared to call a nationwide major-league/minor-league strike if the four proposals are not accepted.

**January 1917:** Samuel Gompers, president of the American Federation of Labor, announces his support for the Base Ball Players’ Fraternity:

> I heartily approve of the action of the Players’ Fraternity in threatening to strike. I have consulted with [president of the Fraternity] Mr. Fultz many times about the new organization and I am familiar with its troubles. The fraternity will have our support in any action it may take to improve existing conditions.

Owners and league officials respond that they will use replacement workers and break the union. Amer-

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23 Evil Days for Base Ball: The Kraft Case Will Have Its Aftermath, SPORTING LIFE, Aug. 1, 1914, at 3; THE REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE FOR 1915, at 416 (1915); THE REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE FOR 1916, at 18 (1916); see also Longert, The Players’ Fraternity, supra note _, at 43.


27 THE REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE FOR 1917, at 114, 117 (1917).


ican League president Ban Johnson tells the *New York Times*:

I cannot believe the players will go through with this strike that has been threatened. If they do, it will mean the elimination of Fultz and the elimination of the fraternity. Organized ball cannot and will not tolerate any such action by the players. If the players want to strike, let them go ahead. There will be baseball just the same this Summer.10

Fultz announces plans to affiliate with the AFL in order to “bulwark us up,” and sets a strike date of February 20.11

**February 1917:** The Fraternity’s affiliation with the American Federation of Labor falls through, apparently because the White Rats — the vaudeville performers union within the AFL that has jurisdiction over all “entertainers” represented by the AFL — has asserted that “baseball is an amusement, and that the players are entertainers. As such they would be classified the same as vaudeville performers, and if they join the American Federation of Labor they would be compelled to come in under the White Rats’ charter.”12 Fultz is surprised by this development and by Gompers’s backpedalling on his expressions of personal and AFL support for the Fraternity and its strike.13 Small wonder that in later years the players will commit to an independent union, rather than affiliate with a large labor conglomerate. At the same time, the major leagues formally cut off all ties to the Fraternity and abrogate the Cincinnati Agreement of 1914.14 Support for the strike collapses as more and more players sign contracts for the 1917 season.15 This is as close as the players will get to establishing a strong and durable labor union until they elect Marvin Miller executive director of the MLBPA in 1966.

**April 1917:** Marvin Miller is born in the Bronx.16 He will “grow up in Brooklyn, not far from Ebbets Field[,] . . . one of the countless kids who felt intimately connected to the fortunes of the Dodgers.”17

**Summer 1918:** The Fraternity “pass[es] away out of existence” after the United States enters World War I. The $2,234 in member dues the union still holds is donated to the YMCA and the Clarke Griffith Bat and Ball Fund.18

**May 1922:** In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs* (a lawsuit triggered by conflict over the demolition of the Federal League in 1915) the U.S. Supreme Court rules that major-league baseball is neither interstate nor commerce and thus not subject to federal legislation enacted by Congress based on its authority to regulate interstate commerce under Article I, section 8, of

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10 *Id.*
13 *Id.*
14 THE REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE FOR 1917, at 279-82 (1917).
15 *Id.* at 346; see also *Doings in the National League*, *Sporting Life*, Feb. 17, 1917, at 3; THE REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE FOR 1918, at 22 (1918); see also ROBERT PEYTON WIGGINS, *THE FEDERAL LEAGUE OF BASE BALL CLUBS: THE HISTORY OF AN OUTLAW MAJOR LEAGUE, 1914-1915*, at 300-02 (2009).
the U.S. Constitution. In particular, baseball is not subject to federal antitrust law — the Sherman Act of 1890 and the Clayton Act of 1914 — prohibiting, among other things, monopolies and other anti-competitive creatures of interstate commerce. Although *Federal Baseball* is not about labor-management relations in general or the reserve clause in particular, knowledgeable citizens of the baseball and legal communities are well aware of the case’s implications for owner control of players.

**August 1922:** The National Baseball Players Association of the United States is established by lawyer and former minor-league player (and future Member of Congress) Raymond J. Cannon. Rumors of a potential strike in 1923, and of affiliation with the American Federation of Labor, begin circulating shortly thereafter.

**Summer 1923:** Under a barrage of threats and promises from the owners, the Players Association dissolves without achieving anything for the players. One of the owners’ unkept promises — a fund for needy former players — does take shape the next year under player leadership as the Association of Professional Ball Players of America, a purely charitable organization that is still in existence today. At this point the players can look back over the first half-century or so of major league baseball and see that they have organized a union roughly once every dozen years (1885, 1900, 1912, 1922), and disbanded or abandoned each of them within five years or less.

**1938:** Miller graduates from New York University with a bachelor’s degree in economics. He never attends law school, although later in life many people he deals with will assume he did.

**April 1946:** The American Baseball Guild is set up by lawyer Robert Murphy. It is the fifth substantial effort to establish a union of major-league players.

**June 1946:** There are early signs of substantial player dissatisfaction, and of interest in acting via the Guild. Most strikingly, members of the Pittsburgh Pirates vote 20-16 in favor of holding out for better pay, pensions, and working conditions. The Pirates players had previously agreed among themselves, however, that a two-thirds supermajority would be required to authorize a strike. So, there is not strike. Like its predecessor in the early 1920s, the Guild succumbs within a few months of its formation to a combination of strong pressure from the owners, weak support from the players, and ineffective union leadership. This time, however, the owners — sensitized, perhaps, by the close vote in Pittsburgh or more generally by the changing post-World War II society and the growing strength of the broader labor union movement — keep some of their promises, including the establishment and co-funding of a pension

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39 See *Federal Baseball*, 259 U.S. 200, 209 (1922); see also 26 Stat. 209 (1890); Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 38 *Baseball Research J.* 86, 90-92 (Fall 2009).


43 *Johnson Won’t Talk on Union’s Demand*, N.Y. TIMES, Apr. 3, 1923, at 20.


45 Goldstein, Marvin Miller, Union Leader, supra note _, at A1.

46 supra note _

47 supra note _
plan for players.48

April 1947: Jackie Robinson plays in his first game for the Brooklyn Dodgers on April 15.49 Equal treatment in the major leagues without regard to race was not instantaneous, but it was a start.50

March 1950: After working at the National War Labor Board during World War II, and then for the U.S. Department of Labor, the International Association of Machinists, and the United Auto Workers, Marvin Miller joins the United Steelworkers of America as a research economist. By the time he leaves the Steelworkers to join the MLBPA in 1966 he is the union’s chief economist and one of its top negotiators.51 During this time he works closely with Arthur Goldberg, general counsel of the Steelworkers and later Associate Justice of the U.S. Supreme Court and still later counsel to Curt Flood in the Flood v. Kuhn baseball antitrust and labor case.

July 1951: The Subcommittee on Study of Monopoly Power of the Committee on the Judiciary of the U.S. House of Representatives begins hearings on organized baseball. The hearings are prompted by the referral to the subcommittee of three bills designed to explicitly exempt organized baseball from the federal antitrust laws. The bills are prompted by the fear among some members of Congress that one or more of the several federal courts considering challenges to the reserve system under the Sherman Act (including the Toolson case discussed below) might find that baseball is engaged in interstate commerce, that it is thus subject to the federal antitrust laws, and that the owners who impose the reserve clause on their players are thus in violation of those laws.52 Nothing comes of the hearings. From the 1950s to the 1990s, numerous federal legislators will introduce bills designed to preserve, modify, or destroy the baseball antitrust in whole or in part, and a variety of Congressional committees will hold hearings on some of those bills.53 Nothing will come of any of them either, until the consideration and passage of the Curt Flood Act of 1998.

51 Miller, A Whole Different Ball Game, supra note _, at 22; see also id. at 19-32.
August 1953: After the owners rebuff a set of requests by players that includes appointment of a “players commissioner” to represent the players in league meetings, the players hire lawyer J. Norman Lewis to represent them in dealings with the major leagues. In September, while negotiations with the owners over pensions and other matters are ongoing, Lewis says, “There is absolutely no contemplation of a union. The players don’t want it and I don’t advise it. There is a loose association of players now that is going to be closer knit for the exchange of ideas and mutual help, but definitely no unionization.”

November 1953: In Toolson v. New York Yankees, Inc., George Toolson argues that the reserve clause is an illegal restraint of trade under the federal antitrust laws, and thus the U.S. Supreme Court is again confronted with the question presented in the Federal Baseball case in 1922: Is major-league baseball interstate commerce subject to the Sherman and Clayton Acts? This time the Justices are deliberating in a post-1937 New Deal world in which baseball is unavoidably, indisputably engaged in interstate commerce. They opt to create a special exemption from the antitrust laws for major-league baseball by holding that those laws do not apply to baseball “on the authority of Federal Baseball . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.” Alas, Federal Baseball says nothing about congressional intent with respect to baseball. Moreover, there is no evidence in the legislative history of either the Sherman Act or the Clayton Act that anyone in Congress had any intention either for or against including baseball within the scope of those laws. Toolson is, in a sense, a magic-legal-realist moment. The Court bases its Toolson holding on a holding in Federal Baseball that does not exist in Federal Baseball, which makes the nonexistent Federal Baseball holding a figment of the Toolson Court’s imagination and the Toolson holding a product of the Court’s imagination, although not itself imaginary: it is a holding that the baseball antitrust exemption does exist (it has, after all just been applied to a real set of facts to decide a real legal dispute), and does so to the extent that something else exists that does not in fact exist. What is the precedential value of a holding that makes manifest the imagination of a collection of Supreme Court Justices? Very high, as Justice Harry Blackmun and several of his colleagues will show in 1972, in Flood v. Kuhn. However, the down-to-earth results of Toolson at the moment are that (1) the legal status of the reserve clause and all that goes with it in terms of owner control of players, their compensation, and their working conditions remain the same, and (2) it is difficult to imagine circumstances in which the Supreme Court will not imagine a reason to preserve major-league baseball’s exemption from the federal antitrust laws. If players are going to escape the strictures of the reserve clause, they will have to do it without the help of the courts. The Court does invite Congress to step in, adding that “if there are evils in this field [of baseball and the reserve clause] which now warrant application to it of the antitrust laws it should be by legislation.”

July 1954: After operating more-or-less informally in their dealings with major-league owners on workplace issues since the demise of the American Baseball Guild in 1946, the players form the Major League Baseball Players’ Association. They retain lawyer J. Norman Lewis, who continues to “deny[ ] that the player action could be construed as the forming of a union.” Although the union now bears the name it
will carry up to the present day, it is (and will remain until Miller arrives in 1966) essentially "a ‘House Union’ guided by a member of the Commissioner’s office and the most influential owner of that time" — operating on funds provided and controlled by the owners and permitted to raise issues and participate in negotiations only to the extent allowed by the owners. 62 This is reflected in the deference shown to the owners by the MLBPA’s top staff during the late 1950s and early 1960s, part-time director Frank Scott and part-time legal advisor Robert Cannon. 63

December 1956: The MLBPA announces plans to meet directly with all of the owners as a group (rather than with a committee) to present their proposals relating to compensation and benefits. In effect, the players are calling for direct negotiations with the owners of terms of employment. Cleveland Indians pitcher Bob Feller is elected president, and says, “You cannot carry collective bargaining into baseball.”64

April 1966: By electing Marvin Miller to serve as the full-time executive director of the MLBPA, the players hire a professional union leader to represent them for the first time in the history of the major leagues. Shortly thereafter, the owners respond by withdrawing funding for the MLBPA on the (correct) grounds that it is unlawful under federal labor law for management to fund a union, although they had been doing so for several years. The MLBPA responds in turn by launching a licensing program to keep itself afloat until union dues start flowing in. The licensing program soon becomes a major source of cash for the players and the union, and the owners follow suit by setting a licensing arm for the major leagues.65

February 1968: The MLBPA and Major League Baseball negotiate the first collective bargaining agreement in any professional sport. “Progress,” Miller would recall, “had been made on all our basic demands, except changes in the reserve rules and shortening the season to its original 154-game schedule.”66 There would be substantial progress on the first of the two by 1976. On the second, never.

February 1969: The MLBPA calls on players to refuse to sign contracts for the 1969 season until the owners agree to an extension of the pension plan. Most players comply and a new deal is completed in less than a week.67

May 1970: The players and owners sign their second collective bargaining agreement. The owners — concerned, perhaps, to demonstrate a commitment to procedural workplace justice and fair treatment for their player-employees in light of Curt Flood’s recently filed lawsuit challenging the baseball antitrust exemption68 — agree to grievance arbitration for the first time.69

April 1972: The players strike en masse for the first time in the history of the major leagues. The strike, which is over the structure and funding of the players’ pension plan, begins on April 1 and ends on April 13 on terms proposed by the players before the strike. Eighty-six games are cancelled.70

June 1972: The Supreme Court upholds baseball’s exemption from federal antitrust laws in Flood v. Kuhn, the last installment of the baseball antitrust trilogy of Federal Baseball, Toolson, and Flood.71 In Flood, St.

62 Korr, The End of Baseball As We Knew It, supra note __, at 2 (quoting Frank Scott, the MLBPA’s part-time director during the late 1950s and early 1960s).
63 Id. at ch. 1.
64 Players Ask Joint Meeting, N.Y. TIMES, Dec. 11, 1956, at 64.
65 Miller, A Whole Different Ball Game, supra note __, at 142-47.
66 Id. at 163-64.
67 Id. at 166-67.
69 Miller, A Whole Different Ball Game, supra note __, at 214; see also Sullivan, Early Innings, supra note __, at 261 et seq. (reproducing and explaining the 1970 Basic Agreement).
70 Miller, A Whole Different Ball Game, supra note __, at ch. 11.
71 The best source of the complete story of Flood and his antitrust, anti-reserve-clause case is Brad Snyder’s A Well-Paid Slave: Curt
Louis Cardinals star outfield Curt Flood challenges the reserve clause much as George Toolson had 20 years before — as part of an illegal restraint of trade under the Sherman and Clayton Acts. Justice Harry Blackmun’s opinion for the Court restates and relies on Toolson’s rationales (Congress should fix our error if error it be72 and it isn’t an error anyway because the Congresses that enacted the Sherman Act and the Clayton Act wanted a major league baseball exemption73), and places a bit of extra emphasis on the fact that major league baseball has relied on its antitrust exemption for a very long time, and thus (albeit without any evidence on the question) retroactive application of the Sherman Act at such a late date could wreak havoc on baseball.74 A bit of background to this last rationale for the perpetuation of Toolson reveals a disappointing inconsistency between Blackmun’s opinion for the Court and his private views about the facts of the case — an inconsistency that reveals just how empty Flood’s hope for release from the reserve clause really is. Although Blackmun writes an opinion for the Court that justifies preservation of the baseball antitrust exemption partly on reliance-and-retroactivity grounds, he privately tells at least one of his colleagues (Justice Potter Stewart) at the same time that

The case, supposedly, is critical for the baseball world. I am not so sure about that, for I think that however it is decided, the sport will adjust and continue.75

And in a 1995 interview with Yale Law School Professor Harold Koh for the Justice Harry A. Blackmun Oral History Project, Blackmun recalls an equally cynical contemporaneous awareness of the futility of punting the baseball exemption to Congress:

Of course, it was perfectly apparent that Congress wasn’t going to act if it could help it. There were too many constituents back home who like baseball, and I think Congress just didn’t want to do it.76

The bottom line is that the Flood Court’s non-application of the federal antitrust laws to major league baseball deserves the bemusement, the hilarity, the contempt with which it is widely regarded by judges, practitioners, and scholars who encounter it.77 More importantly for the players and owners, it reinforces the lesson of Toolson: The Supreme Court is a safe haven for and steadfast defender of the baseball antitrust exemption and the reserve clause, no matter what.

March 1973: With spring training approaching and early exhibition games being cancelled,78 a new major-
league collective bargaining agreement is reached at the last minute. It leaves the reserve clause intact but provides for salary arbitration. It is in the years after salary administration becomes structured and salary figures become available to players under the 1973 agreement that the steady increase in player salaries also becomes and remains dramatic:

<table>
<thead>
<tr>
<th>Year</th>
<th>Avg. MLB Player Sal.</th>
<th>Percent Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964</td>
<td>$14,863</td>
<td>-3.5</td>
</tr>
<tr>
<td>1965</td>
<td>14,341</td>
<td>+7.6</td>
</tr>
<tr>
<td>1966</td>
<td>17,664</td>
<td>+23.2</td>
</tr>
<tr>
<td>1967</td>
<td>19,000</td>
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<tr>
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December 1975: Arbitrator Peter Seitz interprets the owners’ unilateral renew-for-one-year clause in the standard major-league player contract to permit only a single one-year renewal, rather than an unending series of one-year renewals. Federal trial and appellate courts uphold the Seitz decision against challenges by the owners, who choose not to appeal to the Supreme Court, perhaps fearing to put the antitrust exemption at risk again so soon after the *Flood v. Kuhn* decision. The result is free agency for pitchers Dave McNally and Andy Messersmith, and the prospect of the same status in the very near future for all major-league players.

July 1976: After a short lockout during spring training in March, the MLBPA and the major leagues negotiate through much of the first half of the 1976 season before signing their fourth collective bargaining agreement — the first with a radically re-structured reserve system (really a free agency management system), necessitated by the decimation of the reserve clause in the McNally-Messersmith arbitration.

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April 1980: The players vote almost unanimously (one nay) to hold out for the last week of spring training, play the beginning of the season and then go out on strike on May 23 (the Memorial Day weekend) if a new collective bargaining agreement is not completed by then. Professor Charles Korr describes the denouement as the strike deadline approached:

The proposed strike ended with an almost comic-opera abruptness. When league officials and those of some clubs inquired why players were not heading to the airport to board planes to go to the sites of their next games, they were informed there was no reason to go since the games would not be played. The season was coming to an abrupt halt. The reality of players not getting set to play the next games brought home the fact that the strike was not an abstraction. There was an all-night and early-morning bargaining session on May 22 between principals for both sides . . . negotiations to end a strike before it started.

The strike did not happen, and the MLBPA got the terms it sought in the bargaining agreement, while the owners got a joint study committee to explore changes in a system that was delivering a much larger share than ever before of the proceeds of the major-league baseball business.

June 1981: The major-league players strike for the third time in ten years, but this is the first stoppage to start mid-season. (It is the fifth work stoppage during that time — the owners locked the players out in 1976, and a few exhibition games were cancelled in 1973 as negotiations stretched close to spring training.) The strike will end on July 31, after 713 cancelled games approximately $100 million in net lost revenue for players and owners. The major area of contention between players and owners is, as it has been in recent years, free agency and related compensation issues. It is a sign of the depth of the change in labor-management relations that the standard term in the news media for issues relating to owner control of players is no longer "the reserve system," but is now "free agency."

December 1982: Miller retires as executive director of the MLBPA. He will briefly un-retire in late 1983 when his replacement departs the MLBPA after a short and unhappy tenure.

December 1983: Donald Fehr, longtime in-house legal counsel to the MLBPA, is elected interim executive director. The position is regularized in 1985 and Fehr will hold it until he retires in 2009.

August 1985: After a two-day strike, mainly over revised salary arbitration rules, the MLBPA and the major leagues complete a new collective bargaining agreement.

1987-90: Arbitrators repeatedly rule that from 1985 to 1987 owners colluded to lower players’ compensation in violation of their collective bargaining agreement with the MLBPA. The cases eventually settle.
for $280 million.92

March 1990: After a 32-day lockout by the owners, a new collective bargaining agreement is completed shortly before the regular season begins. Once again, the main disputes relate to salary arbitration.93

August 1994: The big strike begins, and does not end until April 1995, after the union wins an unfair labor practice case against the major leagues before the National Labor Relations Board and then-Judge Sonia Sotomayor enjoins the leagues from unilaterally implementing their preferred terms of employment. The players and owners eventually agree to terms on a new collective bargaining agreement in November 1996.94

October 1998: Congress and the President enact the Curt Flood Act, the purpose of which is to state that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.95

According to then-MLBPA executive director Donald Fehr, “There is now no doubt that players will be able to consider antitrust litigation as an option in any future dispute . . . . Members of Congress came to understand that baseball fans would ultimately be the real beneficiaries of this act.”96

August 2002: Hours before a strike deadline, the MLBPA and the major leagues agree to a new collective bargaining agreement.97

October 2006: Another collective bargaining agreement is completed, though this time without the cliff-hanging prospect of a strike.98

December 2009: Donald Fehr retires and is replaced as executive director of the MLBPA by longtime in-house legal counsel to the MLBPA Michael Weiner.99

November 2011: Yet another collective bargaining agreement is completed — the eleventh between the MLBPA and the major leagues — again without a strike looming.100

November 2012: Marvin Miller dies at the age of 95.101

PART II:
FENDING FOR THEMSELVES

Permit me to close by offering three thoughts about the above sprint through the relations of labor and management in major league baseball, all on the theme of fending for themselves.

92 PATRICK K. THORNTON, LEGAL DECISIONS THAT SHAPED MODERN BASEBALL 214 (2012); see also id. at ch. 11.
1. The Owners Had the Power to Act on Their Own

As my friend, former counsel, and labor activist turned management-side labor lawyer Bill Twomey used to say, over the long haul management usually gets the union it deserves. In other words, management that gives its employees nothing to complain about gets a union that gives management nothing to complain about (which really means no union at all). Twomey was talking about the wisdom of paying workers demonstrably fair wages and providing them with demonstrably fair workplace justice. He was emphatically not talking about giving away the store.

Over the long haul of the past half-century or so, major league baseball has moved from (then) a world in which owners could freely express scorn for their union-free player-employees’ suggestion that they ought to get 25 percent of the proceeds from the games they played to (now) a world in which those unionized player-employees are getting roughly 50 percent of the take. And these days reasonable minds differ over whether the players should be getting a more lionine share. There is no way of knowing how much richer, or poorer, the owners of major league teams would be today if in the 1950s (or earlier) they had fully funded a puny pension fund for players (or even committed to a 25-75 overall income split), or if in the 1960s (or earlier) they had initiated a graduated free-agency system that gave seasoned players a meaningful role in deciding who they would work for (or even abandoned the reserve clause altogether) — those are counterfactuals too far from reality then or now.

2. The Big Strikers Have the Power to Act on Their Own

This big strike of 1994-95 marked the end of what might be called the “Era of Radically Adjusted Expectations in Labor-Management Relations in Major-League Baseball” because it was the last strike or lockout (at least up through 2012) in the major-leagues. If the trend holds for six more years, then the period of labor-management peace since 1995 will exceed the entire period of strike- and lockout-strewn labor-management conflict from 1972 to 1995. And if the trend holds much longer than that, future commentators will be able to look back on the period from 1972 to 1995 as a comparatively short period of dramatic labor-management unrest during which about 150 years’ worth of pent-up imbalances and disputes and associated work stoppages were crammed into a 25-year period of conflict and resolution.

Of course, the three main — and mutually exclusive — conditions for long-term labor peace are (a) that all parties negotiate deals that they view as acceptable and do not regret deeply afterward, or (b) that one party is repeatedly duped, or (c) that bargaining power between the parties is so lopsided that one is practically unbeatable and another is practically helpless. Only time will tell. Both labor and management in baseball have access to a long historical record of their dealings with each, and there are plenty of people on both sides of the table with a strong sense of that history. But if keeping all the players, or all the owners, on the same page is difficult — as the former demonstrated long ago and the latter has demonstrated more recently — how much harder will it be to steer a steady course with both?

3. The Government Had (and Has) the Power Too

Finally, there are the strange cases of Congress, the President, and the Supreme Court.

The chronology above shows a legislature filled with interest in spending time in committee rooms with celebrity baseball players. And little interest in granting baseball players the same legal protections enjoyed by practically all other workers in the private sector — at least not until the Curt Flood Act of 1998. The same chronology shows Supreme Court Justices who publish — in Flood v. Kuhn — an enthusiastic paean to the game of baseball and the great athletes who have played, while at the same time going to perplexing lengths to perpetuate legal disabilities for those players in order to provide competitive advantages in the workplace to team owners whom the author of the paean does not even believe really need them. And then there is barkless
dog of the chronology. Presidents and the executive branch are almost perfectly absent from this chronology (and also largely absent from the history of labor relations in baseball), despite the fact that whole books have been written about presidential enthusiasm for the game.\footnote{William B. Mead and Paul Dickson, *Baseball: The Presidents’ Game* (1997).} That cannot be because Presidents believe they are powerless to act upon baseball. Consider the Justice Department, which reached out to protect radio and television broadcasters from anticompetitive behavior by the owners at the same time that it was keeping its hands off the *Toolson* case.\footnote{See Lowenfish, *The Imperfect Diamond*, supra note \_, at 173-74.}

It is a strange thing. All three branches of the federal government have a long history of powerful figures with a deep and often charming enthusiasm for baseball as a game. And an almost equally long history of an intriguing lack of interest in the welfare of baseball players as human beings. In essence, the federal government, having asserted and often exercised the power to protect its citizens from monopolists (via the Sherman and Clayton Acts and subsequent related legislation and regulation), has in the past often opted to provide less protection to baseball players than to other working people in the United States (other than the undocumented). Understandably, those who have benefitted from this state of the law — the owners — have made the most of it. That is the way things work in regimes of regulated competition: the participants are expected to play by the rules, and play to succeed. Baseball the game is no exception (see, e.g., infield fly rule), and neither is baseball the business.

All of which suggests a different perspective on the roles of Presidents and Justices and Senators as tossers of first pitches to start major league baseball games. Is there still — as surely there was long ago — a whiff of the plantation to the little ceremony in which a smiling worker in the field accepts a symbol of the service to which he is bound from the powerful governmental hand that ensures that the owners of that worker retain their extraordinary powers over him, courtesy of the strong arm of the law? Or does the success of the MLBPA in recent years rebut Curt Flood’s description of the major league player as a “well-paid slave”?\footnote{See Snyder, *A Well-Paid Slave*, supra note \_, at 104 (quoting Flood’s remarks during a January 3, 1970 interview with Howard Cosell for ABC’s *Wide World of Sports*); see also id. at 104-05 (discussing other athletes’ and commentators’ use of similar language); *Player Representation on the Commission*, *Sporting Life*, Feb. 5, 1916, at 11 (early discussion of “players being poor slaves” by then-president of the National League, and former member of the U.S. House of Representatives, John Tener).} Is it now the case that while the owners may still be to some extent masters as a matter of law, the players are now just as masterful as a matter of fact?