

The Boys of Winter: How Marvin Miller, Andy Messersmith and Dave McNally Brought Down Baseball's Historic Reserve System

By: Ben Heuer

Early one morning in December of 1965 Marvin Miller stepped into an elevator at San Francisco's Fairmont Hotel where he was attending the Kaiser Steel Long-Range Sharing Plan Committee meeting. Miller, a dapper gentleman with a pencil thin mustache, had made a name for himself in labor relations circles as a hearing officer at the Labor Board during World War II. The elevator doors slowly opened to reveal a familiar face, Dr. George W. Taylor who had been the Labor Board's national chairman in Washington. Dr. Taylor was one of the most prominent labor relations experts at the time, having served as an advisor to every President from Herbert Hoover to LBJ and was at the time the dean of the Wharton School in Pennsylvania. Dr. Taylor stepped into the elevator and immediately asked Miller: "Do you know Robin Roberts." Robin Roberts, an ace pitcher for the Philadelphia Phillies who had won twenty games in six seasons, was leading a committee of players in search of a new executive director of the Major League Baseball Players Association and contacted Dr. Taylor for his recommendation. Roberts expressed his desire for a candidate who would be more effective in dealing with contracts, management and especially pension plans. Dr. Taylor immediately thought of Marvin Miller. By the end of the elevator ride Miller had agreed to interview for the position and in two weeks he was in Cleveland sitting before the Major League Baseball players who comprised the search committee. It was the beginning of the end of baseball's historic "reserve system"; a system which for a century had kept ballplayer's salaries low by restricting the freedom of players to contract with any team other than the one they first signed with. In ten years time, the Major League Baseball Players Association, under the skillful guidance of Marvin Miller, would win the right for a ballplayer to be a free agent. This story begins, however, more than a century ago with the implementation of the reserve system in professional baseball.

The Beginnings of the Reserve System in Baseball

In the beginning of organized baseball in the 19th century players enjoyed the freest labor market in the history of the game. Every year players were free to sign contracts with whichever team they desired, usually the team that bid the highest for their services. This system that we now call free agency was known as "revolving" and grew out of the decentralized collection of baseball teams which, although amateur in nature, were quite competitive with teams luring players with the promise of higher salaries.¹

However, in the middle of the 19th century baseball clubs began to put restrictions on the revolving system. The first professional baseball league was formed in 1870 with the emergence of the National Association of Professional Baseball Players. The league kept the rule on revolving; however they required a player to wait 60 days after revolving to another team before he could play. Because players could sign in the off season and have the 60 days expire before the start of the season, this restriction was

¹ James B. Dworkin, *Owners versus Players* 41-42 (Auburn House Publishing Company 1981).

ineffectual in curbing the practice. The National Association of Professional Baseball Players failed largely because of the financial difficulties experienced by many teams, which some argued was due to the revolving system. In the ashes of this defunct league rose the National League of Professional Baseball Clubs, the league which still exists today. The owners quickly realized that to curb escalating salaries and the defection of star talent every year they needed to take action.²

By 1879 the owner's widespread dissatisfaction with the revolving system led them to convene a secret meeting of National League Officials. On September 30, 1879 the owners adopted the first reserve system whereby each team could reserve five players for the 1880 season. Club owners rationalized that this would hold salaries down by allowing each team to reserve their top five players; the players who were likely paid the most. The evidence indicates that this reserve system had the desired effect as owners saw average salaries decrease and their profits rise. The number of reserved players was subsequently increased to 11 in 1883, 14 in 1887 and then expanded to the entire team only a few years later. In these early days of the reserve system, there was no formal contract provision codifying this practice. Instead club owners circulated a list to all teams in the league, tacitly agreeing that they would not tamper with any reserved player.³

Players were upset by the secret agreements that created the reserve system and demanded to have a say in the implementation of that system into standardized contractual language. The player's and owners held a meeting in 1887 to deal with this issue. In 1885 the players had formed a secret union under the leadership of John Montgomery Ward; starting with the nine members of Ward's New York Giants and then expanding to a chapter in every National League city.⁴ Until the creation of the Major League Baseball Players Association this was the most successful labor organization in the history of the game.⁵ This first players' union, the National Brotherhood of Professional Baseball Players, formed with one of its primary objectives being the negotiation of the reserve system. Ward was quoted referring to the reserve rule as "... a fugitive slave law which denied the player a harbor or a livelihood and carried him back, bound and shackled to the club from which he attempted to escape." John Montgomery Ward was an impressive figure both on and off the field. In 1879 he led the league in victories and winning percentage, with a 44-18 record and in 1880 he pitched one of the first perfect games on record. But it was perhaps his off the field talents that made him the likely choice as the President of the Professional Baseball Player's Association. He spoke five languages, and to compensate for his early departure from Penn State to play professional baseball, he took night classes while playing with the New York Giants⁶, earning two bachelor's degrees from Columbia College, in law in 1885 and political science in 1886. He regularly contributed articles to national magazines and eloquently wrote about baseball. Ward, who later became a lawyer, was a persuasive man who cared deeply about the treatment of common ballplayers.⁷

² *Id.* at 43-44.

³ *Id.* at 44.

⁴ Roger I. Abrams, *Legal Bases: Baseball and the Law* 10 (Temple University Press 1998).

⁵ Robert C. Berry, William B Gould IV, Paul D. Staudohar, *Labor Relations In Professional Sports* 51 (Auburn House Publishing 1986).

⁶ *Id.* at 10

⁷ Lee Lowenfish & Tony Lupien, *The Imperfect Diamond* 28 -31 (Stein and Day Publishers 1980).

Despite their misgivings, the players eventually recognized the need for some type of reserve system. The result of these negotiations was a formal reserve clause in players' contracts which limited baseball clubs to a maximum of 14 players who could be reserved. The conciliatory nature of the meeting was likely due to the ambivalence that the players and their leader, John Montgomery Ward, felt towards the reserve system. Ward was perhaps swayed by some of the owner's rhetoric when he stated: "The reserve rule takes a manager by the throat and compels him to keep his hands off his neighbor's enterprise."⁸ As one of the concessions for accepting the reserve rule in players' contracts, Ward and the Brotherhood got the owners to agree not to cut salaries for the option year. Shortly after the agreement club owners put a freeze on salaries, leading Ward to believe that the owners would never enforce their own rules.⁹ Although Ward's motives may have been pure, his decision to recommend that the Brotherhood accede to the owner's demands of a reserve clause being explicitly placed into the player's contract was the beginning of the one-sided relationship between owners and players that would dominate the next century.¹⁰ Furthermore, the effect of Ward's early labor movement was to galvanize the owners into a tighter cartel leading to the implementation of a comprehensive reserve system covering all players in the league, a program of fines and blacklists to enforce league rules, exclusive territorial allocations, and standard rates of pay.¹¹

The Short Lived Rebellion

In the face of the abuses of National League owners, the reserve system being perhaps the most exploitive, the Brotherhood began meeting with financial backers in 1889 devising a plan to create a rival league; the Players League. The new league was to drop the hated reserve system as well as the salary classifications system and the practice of blacklisting.¹²

As a response, organized baseball sued Monte Ward in a New York state court, arguing the reserve clause in Ward's contract gave them the right to reserve his services for the 1890 season. The New York Giants sought an injunction barring Ward from playing for any other person or club except for them. The court held that the reserve clause did not specify the terms of the renewed contract, like provisions for salary, and thus was too indefinite to enforce. The court found the standard player contract in "want of fairness and of mutuality" because the player could be bound to a club for years while the club had an obligation to the player lasting only ten days.¹³ Ward's case and other's like it worried the owners because it demonstrated a reluctance of courts to enforce these one-sided contracts.

In the face of legal defeat, as well as the defection of 80 percent of their players to the new Player's League, the National League strongman Albert Spalding established a

⁸ *Id.* at 32.

⁹ *Id.*

¹⁰ Ward held so much clout in the league that he was able to reject his sale to Washington from New York, in a deal that would have secured him \$6,000 a year for his services. His rejection of the sale was partly due to his abhorrence of the idea that players could be sold as if they were a piece of livestock. *Id.* at 31.

¹¹ Abrams, *supra* note 4, at 18.

¹² *Id.*

¹³ *Id.* at 20.

league “war fund” and together with other owners attacked the rival league financially by scheduling games in direct competition with the Player’s League and distributing National League game passes throughout town. Spalding, with the use of propaganda, threats, personal intimidation, and financial offers, defeated the Player’s League after only one year of business. The naïve players and their backers were no match for the tactics of National League ownership. Monte Ward returned to the National League and, after playing for the Brooklyn team, finished his career with the New York Giants. Upon his retirement he went into the practice of law full time, representing baseball players in contract disputes.¹⁴

The Incomparable Second Baseman

At the turn of the century, in the face of the draconian rules implemented by owners to control salaries, ballplayer’s had only two options. They could either accept the terms of the contract offered by the owner of their club or they could quit baseball. However, in 1901, ballplayers had a new option; they could play for the newly formed American League.¹⁵ It was in this setting that the National League fought a “major but inconclusive battle” for the services of one of its star second basemen; Napoleon Lajoie.¹⁶ Lajoie, who played for the Philadelphia Phillies, learned that his teammate, the slugger and future Hall of Famer Ed Delahanty, was paid \$500 more than him in the previous season. Regarding himself as a star of the same caliber as Delahanty, Lajoie demanded the Phillies owner pay him a \$500 bonus for the previous season. The Phillies owner, Colonel John I. Rogers, a lawyer who drafted the league’s original reserve clause in the uniform players’ contract, refused to accommodate his star second baseman.¹⁷

Connie Mack, the young owner of the American League Philadelphia Athletics, used the opportunity to lure Lajoie to the American League with an offer a three year contract worth \$24,000. Rogers countered, offering Lajoie \$25,000 over two years to stay with the Phillies, but he refused to reward him the \$500 bonus for the 1901 season. The stubborn pride of Colonel Rogers spurred Lajoie to turn down the better offer and jump to the American League. 1901 proved a bitter pill for Colonel Rogers to swallow as he watched Lajoie win the triple crown with 14 home runs, 125 runs batted in, and a .422 batting average. Angered by Lajoie’s success for the cross-town rival Athletics, Colonel Rogers instituted a lawsuit in a Pennsylvania state court.¹⁸

The Pennsylvania trial court refused to grant an injunction barring Lajoie from playing with another club in the American League. The trial court ruled against the Phillies for two reasons. First, the court found that to warrant the issuance of an injunction “[t]he defendant’s services must be unique, extraordinary and of such a character as to render it impossible to replace him; so that his breach of contract would

¹⁴ *Id.* at 22.

¹⁵ Ban Johnson, a former sports writer who once covered the National League, created the American League when the National League dropped from twelve to eight franchises because of lagging attendance, establishing teams in the abandoned cities and raiding the rosters of the National League clubs to field their teams. *Id.* at 30.

¹⁶ Lowenfield, *supra* note 7, at 68.

¹⁷ Abrams, *supra* note 4, at 30.

¹⁸ Lowenfield, *supra* note 7, at 68.

result in irreparable loss to the plaintiff.”¹⁹ Furthermore, the court reasoned that the contract between Lajoie and the Philadelphia club lacked mutuality because the plaintiff had an option to discharge the defendant on ten days notice without a reciprocal right vested in Lajoie. The Supreme Court of Pennsylvania disagreed on both counts. As to the first count, the court found that the lower court understated the value of Lajoie’s services to the Phillies citing his great reputation amongst baseball fans. In rather whimsical language the court stated that Lajoie “[m]ay not be the sun in the baseball firmament, but he is certainly a bright, particular star.”²⁰ The court’s determination as to Lajoie’s unique talent led them to conclude that irreparable injury resulted from the breach of contract and that only a remedy in equity would be proper. Following judicial precedent the court refused to demand performance of the contract, however it did restrain Lajoie from playing for any other club.²¹ It is ironic that it was Lajoie’s unique talent, which could potentially garner him substantial financial success were he free to contract with the team of his choosing, that effectively bound him to serve out the terms of his repressive contract.

Rather than appeal the verdict, Ban Johnson, the leader of the American League, moved Lajoie to the Cleveland club. The Phillies searched for an Ohio court that would enforce the injunction issued by the Philadelphia Supreme Court, but were unable to find a judge who would claim jurisdiction; a curious refusal to acknowledge the “full faith and credit” clause of the constitution that might lead some cynical critics to wonder whether Ohio courts were packed with ardent Cleveland baseball fans.²² To keep his star player out of court, Ban Johnson forbade Lajoie from accompanying his teammates when they played in Philadelphia, giving him a paid vacation in Atlantic City instead. Despite their success in Pennsylvania’s highest court, the National League may have been the real loser in this battle, standing powerless as one of their best players succeeded in the fledgling American League.²³

The *Lajoie* case was a watershed in the development of baseball jurisprudence because it established the concept of professional baseball players being presumptively unique, a finding that allowed owners to gain equitable relief in the form of negative injunctions. *Lajoie* made clear that players would not be able to count on the judicial system to free them from the bonds of the one-sided contracts of adhesion they were required to sign to play professional baseball. Only a year after the *Lajoie* decision, in the face of sagging profits in the National League, the two rival leagues merged in what was the beginning of decades of hegemony for organized baseball. The *Lajoie* case was not the only litigation involving disaffection of players to the American League and some states refused to grant injunctions.²⁴ However this hodgepodge of state court decisions would prove ineffectual at chipping away at the dominance of organized baseball. Soon a new strategy would emerge under the relatively new antitrust laws promulgated in the Sherman and Clayton Acts around the turn of the century.

¹⁹ *Philadelphia Ball Club v. Lajoie*, 51 A. 973 (Pa. 1902).

²⁰ *Id.* at 974.

²¹ *Id.* at 975.

²² Abrams, *supra* note 4, at 40.

²³ Lowenfield, *supra* note 7, at 68-69.

²⁴ Abrams, *supra* note 4, at 40-41.

A “Purely State Affair”

Baseball’s antitrust exemption arose out of the last battle fought by organized baseball against an insurgent rival league. In 1913, with the backing of wealthy businessmen, the Federal League emerged, announcing its intentions to attract stars from the Major League. The League’s open intention to court the services of Major League baseball players was a significant threat to the reserve system monopsony, which had allowed owners to keep salaries down in a time of booming popularity for the game.²⁵

Major League owners used the familiar tactic of threatening to blacklist any players who jumped to the rival league, arguing that they were bound by the perpetual reserve system. While court’s repeatedly validated breach of contract claims against players who left the Major Leagues to play for the Federal League they were reluctant to issue injunctions when clubs relied on the reserve system’s option clause. The emergence of the Federal League shifted the balance of power ever so slightly away from the owners as players were able to use the threat of disaffection to extract higher salaries and bonuses from their clubs. Salaries of top players more than doubled in one year.

In the face of an antitrust suit initiated by the Federal League in a Chicago federal court, Major League owners offered to buy out Federal League owners located in cities where both leagues had established teams. Major League owners offered the Federal League Baltimore Terrapin’s owner Ned Hanlon peanuts in comparison because the major leagues did not have a team in Baltimore. Hanlon was particularly insulted when one major league owner mocked the city of Baltimore saying it was a “minor league city, and not a hell of a good one at that.”²⁶

The disgruntled Hanlon filed an antitrust suit in federal court in the District of Columbia against the American and National League owners as well as three Federal League Owners who received lucrative deals in settlement of the previous antitrust lawsuit. Hanlon alleged that the Leagues sought to destroy the Federal League and cited the humiliation suffered by the citizens of Baltimore. He alleged that the players who might have come to play for the Federal League were bound by a “system of peonage” under the reserve system and blacklist policy of Major League baseball.²⁷

In the lower court a jury awarded Hanlon \$80,000 trebled under the provisions of the antitrust statute. Organized baseball sent their chief attorney, George Wharton Pepper to convince the Court of Appeals that baseball must not be subject to antitrust laws. Pepper focused his argument on characterizing baseball as a local enterprise, analogizing it to professional speakers who cross interstate lines to give presentations.²⁸

The District of Columbia Court of Appeals reversed, finding Pepper’s arguments persuasive. The court wrote that the game of baseball does not constitute interstate commerce because it “is local in its beginning and in its end.”²⁹ Baseball, the court reasoned, is not trade or commerce and the “fact that the appellants produce baseball

²⁵ *Id.* at 53-54.

²⁶ *Id.* at 55-56.

²⁷ *Id.* at 56.

²⁸ Lowenfield, *supra* note 7, at 106.

²⁹ *National League of Professional Baseball Clubs v. Federal Baseball Club, Inc.*, 269 F. 681 (D.C. Cir. 1920).

games as a source of profit, large or small, cannot change the character of the games. They are still sport, not trade.”³⁰ The court mentioned the reserve system specifically in dicta, reciting the rationale used by club owners that without the reserve system the best players would be acquired by the wealthiest clubs and that future contests between clubs would be lopsided and uninteresting to the patrons of the game. Sanctioning the reserve system the court went on to say that the restrictions imposed by the reserve system “relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee (Federal League Baltimore Terrapins) on interstate commerce.”³¹

Hanlon appealed this decision to the Supreme Court, and on April 19, 1922 the Court heard oral arguments in the *Federal Baseball* case.³² Chief Justice William Howard Taft presided over what was to become the landmark decision in baseball jurisprudence for most of the twentieth century.³³

Justice Holmes, writing for the court, held that the business of baseball is one of “giving exhibitions . . . which are purely state affairs.”³⁴ Holmes reasoned that the exhibitions, which induced people to cross state lines and expend money to do so, were not interstate commerce because the “transport is a mere incident, not the essential thing.”³⁵ The Court found persuasive organized baseball’s argument that the exhibitions consisted of personal effort not related to production. The precedential effect of *Federal Baseball* is questionable because just the next term Justice Holmes, again writing for the court, ruled that a vaudeville show traveling with its “apparatus” over interstate lines might be sufficient to bring it under the purview of statutory coverage. While the accoutrements of a vaudeville show may be indistinguishable from the equipment carried by baseball clubs in interstate travel, perhaps the only thing that distinguished these two cases is that baseball was the national pastime.³⁶

Congress in Relief

In the end of the 1940’s and the beginning of the 1950’s several court cases loomed involving the legality of baseball’s monopoly powers. Three important cases being litigated at the time, two of which were brought by aggrieved minor leaguers, dealt with dissatisfaction borne out of the reserve system. Sensing that the courts may be willing to overturn the precedent of *Federal Baseball*, legislation was introduced to codify baseball’s exemption from the anti trust laws.³⁷

³⁰ *Id.* at 685.

³¹ *Id.* at 688.

³² Lowenfield, *supra* note 7, at 57

³³ Chief Justice Howard Taft, who played third base for Yale in college, was a true fan of the game. During his term as chief executive, he initiated the tradition of the president throwing out the first ball on Opening Day and is credited with being the originator of the seventh inning stretch when he stood up midway through a Pittsburgh Pirates game in 1910 to stretch his rather rotund body, inciting the crowd to stand up out of respect. It was also reported at the time that Taft turned down an offer to become the Commissioner of baseball. Despite these possible conflicts of interests, Taft did not recuse himself from the case. (Abrams, *supra* note 4 at 57.)

³⁴ *Fed. Baseball Club of Baltimore v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 209 (1922).

³⁵ *Id.*

³⁶ Abrams, *supra* note 4, at 59-60.

³⁷ Dworkin, *supra* note 1, at 59-60. *See also*, Lowenfield, *supra* note 7, at 174.

With the authority of the subpoena power, the House Judiciary Committee undertook hearings to determine whether baseball's antitrust exemption should stand. The committee, led by Brooklyn democratic Congressman Emanuel Celler, considered legislation that would either overturn the exemption or grant baseball limited immunity for individual provisions like the reserve clause. Either way, it was clear from the start of the hearing that the Committee would not upset the current balance of power which tipped largely in favor of ownership.³⁸

The testimony of the owners' reflected the same old arguments rationalizing the necessity of the reserve clause for the preservation of the game. The reserve clause, they argued, maintained the competitiveness of all clubs in the league because it prevented the wealthiest clubs from acquiring all of the top talent. Club owners argued that this competitive balance heightened interest in the game by providing for dramatic pennant races each and every year. While not specifically mentioned, it was well known that club owners also enjoyed the benefit of lower salaries because the reserve system allowed ownership to maintain a bargaining advantage in salary negotiations because players were contractually bound to refrain from shopping their services around the league. Ballplayers who testified before the committee acceded to the arguments laid out by the owners, agreeing that some form of a reservation system was needed for the good of the game. Dworkin notes that this testimony parallels John Montgomery Ward's admission to the same fact in the early days of the reserve system.³⁹ Ward's inability to stand firmly against the reserve system was a grave setback in the fight for players' labor rights. By joining in the chorus of the club owners espousing the necessity of the reserve system, the players gave little reason for Congress to conclude that the reserve system was an unfair restraint.

Those who testified against the reserve system pointed to the disparity between actual salaries and potential salaries were the players' labor market completely free. Opponents of the reserve system couched their arguments in moral terms, portraying the system as a form of slavery by which players were required to relinquish substantial freedoms in their employment. After taking testimony the committee was leaning towards implementing a limited antitrust exemption for baseball's reserve system while leaving the numerous other baseball rules open to coverage under antitrust statutes. In the end, Congress opted to take no action because of the duplicitous recommendation of league officials that Congress should wait until the reserve rule was tested under the rule of reason in the eight antitrust cases then pending. What Congress did not know at the close of the Celler hearings was that Major League Baseball's strategy would be to argue that the rule of reason does not apply to baseball because, they argued, it is intrastate commerce and thus exempt from antitrust laws.⁴⁰ The owners had consistently won in the courts and that winning streak would continue over the next twenty years, culminating in the *Flood* case; which would be the last challenge of baseball's antitrust exemption in federal court.

The Flood Case

³⁸ Lowenfield, *supra* note 7, at 174-75

³⁹ Dworkin, *supra* note 1, at 60.

⁴⁰ *Id.* at 61-62.

Baseball's reserve system was tested in the Supreme Court a third and final time in the now famous 1972 case *Flood v. Kuhn*.⁴¹ Appellant in the case, Curt Flood, was an exceptional ballplayer for the St. Louis Cardinals, batting over .300 six times in his career. Sports Illustrated declared Flood the best center fielder in baseball in 1968, and his future appeared bright.⁴² In 1968 Flood asked St. Louis owner August "Gussie" Busch for a \$30,000 raise. Enraged by this request, Busch privately plotted his retaliation, and finally in October of 1969 dealt Flood to the Philadelphia Phillies in a multiplayer trade.⁴³ Flood refused to go along with the trade and wrote a letter to Commissioner Bowie Kuhn on December 24, 1969. Echoing the sentiments of John Montgomery Ward a century earlier Flood wrote to Kuhn: "After 12 years in the major leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes."⁴⁴ Commissioner Kuhn believed the *Flood* litigation was a way for the players union to combat the reserve system on two fronts; in court and at the negotiating table. In Kuhn's estimation the *Flood* litigation was a huge mistake by the Players Association because prospects of success were poor and because he believed it soured the potential for negotiation in the future.⁴⁵ In reality, it was Flood's decision, not the union's, to reject the trade and sue for free agency because he saw it as his only avenue for justice.⁴⁶

There was a racial subtext when Curt Flood, who was African American, talked about the inequities of the reserve system, drawing an analogy between ballplayers and a piece of property. The case was litigated at a time when racial injustice was the most important social issue, and his opponents and opponents of the player's union used racial stereotypes and code words to diminish his position. While sports writers and fans may have unfairly derided Flood in his flight, the opinions he cared most about were those of the federal judges who would soon hear his case.⁴⁷ What Flood may not have fully appreciated was that even the hallowed chambers of the highest court of the land were not immune from the mystique of America's pastime.

When it came time to pick the author of the Court's opinion in *Flood v. Kuhn*, Chief Justice Warren Burger tapped his old friend and devoted baseball fan Harry Blackmun.⁴⁸ The reasoning employed by the majority opinion has been roundly criticized by legal scholars. Woodward and Armstrong's 1979 book, *The Brethren*, revealed the embarrassment many of the court felt towards Blackmun's overly sentimental opinion.⁴⁹ Another legal commentator described the majority opinion as an "almost comical adherence to the strict rule against overruling statutory precedents, particularly considering that the Sherman Act has developed essentially through a common law process."⁵⁰

⁴¹ *Flood v. Kuhn*, 407 U.S. 258, 259 (1972)

⁴² Charles P. Korr, *The End of Baseball As We Knew It* 84-85 (University of Illinois Press 2002).

⁴³ Abrams, *supra* note 4, at 65.

⁴⁴ Bowie Kuhn, *Hardball* 83, (Random House 1987).

⁴⁵ *Id.* at 84.

⁴⁶ Korr, *supra* note 42, at 86.

⁴⁷ *Id.* at 96

⁴⁸ Abrams, *supra* note 4, at 66.

⁴⁹ Lowenfield, *supra* note 7, at 213.

⁵⁰ William N. Eskridge Jr., 76 *Geo. L.J.* 1361, 1381 (1988)

The majority opinion in *Flood* begins with a five paragraph recitation of the mythical history of baseball in which Blackmun lists the names of those he felt “have sparked the diamond and its environs and that have provided tinder for recaptured thrills . . .”⁵¹ Blackmun concludes his eloquent opening with a reference to the poem “Casey at the Bat” “and all the other happenings, habits, and superstitions about and around the game of baseball that made it the ‘national pastime’ or, depending upon the point of view, ‘the great American tragedy.’”⁵²

Blackmun reasoned that while baseball’s antitrust exemptions is an “exception and an anomaly” which is an “aberration confined to baseball” it is entitled to a narrow form of *stare decisis* because it “rests on a recognition and an acceptance of baseball’s unique characteristics and needs.”⁵³ Blackmun notes that other professional sports like football and basketball are not covered by the exemption but gave no insight into the unique constellation of attributes which justify baseball’s special place in antitrust jurisprudence.⁵⁴ To justify their conclusions, the *Flood* majority invokes a canon of statutory interpretation known as “positive inaction” to give deference to the precedent set by *Federal Baseball*. The court employed this questionable canon of interpretation to support the proposition that because Congress had, up until that point, failed to enact remedial legislation despite numerous opportunities to do so, Congress had not intended to subject baseball’s reserve system to the antitrust statutes.⁵⁵

Although the logic behind the majority opinion in *Flood* is opaque, what was readily apparent at the time was that the Supreme Court would never apply the antitrust laws to baseball’s reserve system.⁵⁶ However, Justice Marshall’s dissent mentioned an alternative method of dealing with the reserve clause; collective bargaining. The owners argued that the reserve clause was not subject to the antitrust laws because the 1966 Collective Bargaining Agreement subsumed the issue into the province of labor law.⁵⁷ Marshall noted that the issues revolving around the relationship between the Collective Bargaining Relationship and the reserve clause had not been fully explored, stating: “The labor law issues have been in the corners of the case -- the courts below, for example, did not reach them -- moving in and out of the shadows like an uninvited guest at a party whom one can’t decide either to embrace or expel.”⁵⁸ The labor law issues were on the verge of stepping out of the shadows, and in a moment of foreshadowing, the Marshall dissent unconsciously exposed the corner into which the owners were painting themselves. Kurt Flood could take some solace in the fact that his loss in the highest court of the land served as a catalyst for subsequent discussions about the reserve system that would eventually lead to the players’ vindication before an impartial arbitrator.⁵⁹

⁵¹ *Flood* at 262, Abrams, *supra* note 4, at 66.

⁵² *Id.* at 263-64.

⁵³ *Id.* at 282.

⁵⁴ *Id.* at 283.

⁵⁵ *Id.* at 283. See also, Morgen A. Sullivan., A Derelict in the Stream of Law: Overruling Baseball’s Antitrust Exemption, 48 Duke L.J. 1265, 1267 (1999) (arguing that the doctrine of positive inaction was “questionable at its inception and subsequent decisions by the Court have further eroded its foundation.”)

⁵⁶ Abrams, *supra* note 4, at 67.

⁵⁷ *Flood* at 294 (Marshall Dissenting).

⁵⁸ *Id.* at 295

⁵⁹ Korr, *supra* note 42, at 94.

The Collective Bargaining Agreement

Professional baseball players were unable to institute an effective labor union until the establishment of the Major League Baseball Players' Association (MLBPA) in 1954. While the 16 player representatives who voted to create the association insisted that it was not now, nor ever would be a "union", many owners at the time were concerned. This sentiment proved well founded as labor relations in baseball were to undergo dramatic changes in the next two decades at the helm of Marvin Miller, the first executive director of the MLBPA who made that organization one of the most powerful labor unions in the country.⁶⁰

Miller, who was described as the "commissioner of the players" during his tenure with the MLBPA, was born in New York City in 1917. He earned his B.S. from New York University in 1938 in both education and economics, and took graduate courses at the New School for Social Research. It was his interest in economics that led him to a job as an economist and disputes hearing officer at the Wage Stabilization Division of the War Labor Board during World War II.⁶¹ He started his career in the labor movement with a job at the International Association of Machinists and then three years later moved on to the United Steelworker's Union. While at the United Steelworker's Union Miller engaged in several innovative labor-management strategies that demonstrated, early on, his exceptional aptitude in labor and bargaining matters.⁶² In 1965, when the MLBPA decided to create a full time position of "executive director", Miller emphasized his experience with pension issues in his application.⁶³

The screening committee established to choose the first executive director initially chose Judge Robert Cannon, a circuit court judge from Wisconsin. Cannon had served as the first part-time legal counsel for the MLBPA and took less than a hard-line approach towards the owners. Cannon displayed substantial respect for the fairness and integrity of club owners and from his perspective there were no issues serious enough to create a divide between players and owners.⁶⁴ Cannon believed that "baseball is and must forever be an integral part of developing the youth of America . . . [Players must] also set a good example off the field."⁶⁵ He saw his role in the MLBPA as that of an intermediary between players and owners and felt that his primary concern was to protect the best interests of baseball and secondarily those of the players. Concerned about issues involving his own pension, and perhaps harboring an ambition to one day be the Commissioner of baseball, Judge Cannon turned the offer down. This proved fortuitous because Cannon would likely have been ineffectual at challenging the reserve system, which he once described to Congress as a "necessary evil."⁶⁶

After Cannon declined the offer, the committee reviewed their list once more and began to focus on Marvin Miller, who had been recommended by George Taylor, a respected professor at the Wharton School of the University of Pennsylvania.⁶⁷ Miller

⁶⁰ Dworkin, *supra* note 1, at 27-29.

⁶¹ *Id.* at 29.

⁶² *Id.* at 30.

⁶³ Korr, *supra* note 42, at 28.

⁶⁴ *Id.* at 24.

⁶⁵ *Id.* at 23.

⁶⁶ *Id.* at 28-32.

⁶⁷ *Id.* at 35.

stipulated as one of his conditions for taking the job that the players union take an independent stance at bargaining with the owners.⁶⁸ Miller understood that leading the MLBPA in its current form would be a difficult task, considering most players knew nothing about the purposes and advantages of union membership and were even hostile to the idea. This hostility was deep-seeded and the result of the propaganda espoused by club owners who made ballplayers believe abolition of the reserve system would result in catastrophic harm to the game. As Miller described in his memoir, the sentiment was that “players were privileged to be paid to play a kid’s game; and (the biggest fairly tale of all) baseball was not a business and, in any case, was unprofitable for the owners.”⁶⁹ Upon surveying the labor situation in baseball one of the things that stood out to Miller was a provision in the extremely one-sided Uniform Player’s Contract. Miller had to do a “double take” when he read provision 10(a) which he felt ran contrary to the belief that players no longer had control over their careers once they signed with the team. The plain words of the section seemed to give a club an option to renew a contract unilaterally for one year after the expiration of the players’ contract but entitled the club to nothing more. When Miller started off in 1966 he knew little about the history of the reserve system and the interlocking rules implementing it, although he was well aware that the Supreme Court, Congress, and the Justice Department had never vindicated the interests of ballplayers.⁷⁰ Clearly another strategy would be needed, and Miller recognized, early in his tenure, there might be a latent vulnerability in the Uniform Players Contract.

After the American League’s Umpires successfully enlisted the help of the National Labor Relations Board in organizing a collective bargaining agreement with the league, Miller and the MLBPA recognized that the Labor Board would provide similar protection to the players. Armed with this new authority Miller negotiated the first collective bargaining agreement between the players and owners in 1968.⁷¹ During the negotiations to this first collective bargaining agreement in professional sports⁷², Miller successfully negotiated an increase in the minimum salary to \$10,000 and a formal grievance procedure in which the commissioner, who was hired by the owners, acted as final decision maker in all disputes under the Agreement.⁷³

Two years later in 1970, Miller obtained the right for players to have grievances heard before a third-party neutral arbitrator. It was this provision for binding arbitration that made the Messersmith and McNally arbitrations (Messersmith arbitration) possible and may stand the test of time as the most influential provision won by the MLBPA in the collective bargaining process.⁷⁴ Early in his negotiations Miller made the reserve system an issue and proposed a study committee to evaluate it further. At the behest of the owners, the presidents of the National and American League’s and John Gaherein, the director of the owners’ Player Relations Committee, were recalcitrant to aide the committee in any way. The unwillingness of the owners to even study the reserve system

⁶⁸ *Berry, supra* note 5, at 53.

⁶⁹ Marvin Miller, *A Whole Different Ballgame* 39 (Ivan R. Dee, Publisher 1991).

⁷⁰ *Id.* at 41-42

⁷¹ Abrams, *supra* at 77, 82.

⁷² Miller, *Supra* at 97.

⁷³ Jennings, Kenneth, M. *Swings and Misses: Moribund Labor Relations in Professional Baseball*, p. 2, Praeger Publishers, Westport, Ct. (1997).

⁷⁴ *Id.*

lead Miller to believe that negotiations in their current form would not produce any meaningful progress on the issue.⁷⁵

The MLBPA refrained from attempting to change the reserve system through collective bargaining until the conclusion of the *Flood* litigation. The 1973 collective bargaining agreement reflected this cease-fire and in Article XV of that agreement the parties agreed that:

. . . this agreement does not deal with the reserve system. The Parties have differing views as to the legality and as to the merits of such a system as presently constituted . . . During the term of this Agreement neither of the Parties will resort to any form of concerted action with respect to the issue of the reserve system, and there shall be no obligation to negotiate with respect to the reserve system.⁷⁶

Although this language appears to remove the reserve clause from the purview of the grievance process, Article III. of that same agreement incorporated the Uniform Player's Contract into the document. Because the Uniform Players Contract contained the reserve clause this seemed to create an ambiguity in the agreement.⁷⁷ An ambiguity that Miller and the Players Association would soon exploit. Miller thought that the language of Article XV would effectively prevent a future arbitrator from ruling that the parties had settled the issues involving the reserve clause in the collective bargaining agreement. In *A Whole Different Ballgame* Miller explains that he “wanted it as clear as mountain water that we had not come to an agreement on the clause – we had come to a contract settlement *in spite of it*.”⁷⁸

Messersmith and McNally Arbitrations

The Parties

Towards the end of the 1975 season the Players Association dug in their heels in anticipation of a fight over the new 1976 basic agreement. Miller claimed that the owners were attempting to “set the players back 20 years” in their negotiations with the MLBPA. With the old basic agreement set to expire December 31, 1975, Miller anticipated a protracted battle into the winter over some of the owner's proposals which included: a reduction in major league rosters from 25 to 23 players, elimination of the provision allowing salaries to be tied to the federal cost of living index, and the elimination of the newly minted 5 and 10 – year rule which permitted a player who had been with the same club for ten years to reject a trade. Miller called these proposals “absolutely absurd” and bristled at the owner's attempts to force the players into an unacceptable agreement.⁷⁹ While the owners were busy posturing and positioning for the upcoming collective bargaining agreement, Marvin Miller was surreptitiously preparing for his assault on the reserve system. In his 1987 memoir, Commissioner Bowie Kuhn

⁷⁵ *Id.* at 98.

⁷⁶ Dworkin, *supra* note 1, at 70. Citing (*Basic Agreement Between The American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association*, effective January 1, 1973, Article XV.)

⁷⁷ *Id.* Citing (*Basic Agreement Between The American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association*, effective January 1, 1973, Article III.

⁷⁸ Miller, *supra* note 69, at 239.

⁷⁹ Jerome Hotlzman, “Baseball Splitting Union”, Chicago Sun Times, September 23, 1975.

recounts the events surrounding the Messersmith arbitration in a chapter he entitles “The Fox in the Henhouse.” In the book, Kuhn captured well the resentment felt by organized baseball towards Miller, years after the landmark decision. As Kuhn saw it, Miller’s defeat in the *Flood* case “had been a galling experience for that proud man. Playing the lion had been a failure; now he was playing the fox.”⁸⁰

If Miller was the fox, then the owners were the blissfully ignorant farmers who wantonly left ajar the door to the proverbial henhouse. On October 7, 1975, Andy Messersmith filed a grievance under the Collective Bargaining Agreement.⁸¹ Miller never made it a secret that his contention, and that of the Players’ Association, was that Paragraph 10(a) in the Uniform Player’s Contract gave owners the ability to renew an unsigned player for “one year, and one year only”.⁸² While Commissioner Kuhn and baseball owners may claim to have been surprised by Miller’s audacity at challenging the century old reserve system, they most certainly could have seen it coming.

Andy Messersmith made his major league debut with the California Angels in 1968, showing promise as young pitcher with a 4-2 record and 2.21 ERA in 28 appearances.⁸³ After completing his first four years with a winning record, he slipped to 8-11 in 1972 and was traded to the Los Angeles Dodgers in November of that year as part of a seven player deal.⁸⁴ During his years with the Angels he served as the alternate player rep exposing him to the power of the new arbitration process which awarded his teammate Alex Johnson with disability pay for debilitating “acute mental distress”. While this decision was unpopular with management and the press, it strengthened the player’s beliefs that the union would protect the interests of its members.⁸⁵

In 1974 Messersmith had reached what would be the pinnacle of his career, as he posted a league best twenty wins and a 2.59 ERA. Messersmith along with teammates Steve Garvey, Ron Cey, and Mike Marshall led the Dodgers to the World Series in 1974 only to come just short of a championship at the hands of Reggie Jackson and his Oakland Athletics.⁸⁶ Messersmith came in second in Cy Young voting that year, finishing behind his teammate Mike Marshall.⁸⁷ After his phenomenal performance in 1974 Messersmith hoped to leverage his success in his upcoming contract negotiations. Ironically, Andy Messersmith’s paramount concern was staying with the Los Angeles Dodgers and he requested a no-trade clause, or the right to approve a trade, in his contract for the following year. The Dodgers owner, Walter O’Malley, refused to make such an exception for Messersmith arguing that the team needed freedom to deal with its personnel and indicated that he would never allow such a provision in a players’

⁸⁰ Kuhn, *supra* note 44, at 154.

⁸¹ Abrams, *supra* note 7, at 122.

⁸² Miller, *supra* note 69, at 238; “Touching All Bases”, Chicago Tribune, October 17, 1975.

⁸³ Andy Messersmith Statistics: baseball-reference.com, available at <http://www.baseball-reference.com/m/messean01.shtml>

⁸⁴ Korr, *supra* note 42, at 147.

⁸⁵ *Id.* at 148.

⁸⁶ Los Angeles Dodgers Baseball History, available at http://www.tickets-mlb-baseball.com/los_angeles_dodgers/history.htm

⁸⁷ Andy Messersmith Statistics: baseball-reference.com, available at <http://www.baseball-reference.com/m/messean01.shtml>

contract.⁸⁸ Messersmith refused to sign the 1975 contract and the Dodgers renewed the contract from the previous year giving Messersmith a diminutive salary increase.⁸⁹

While Mike Marshall, the Dodger's player representative and self described "outrageous point man" with a penchant for saying "outlandish things" during negotiations, may have encouraged Messersmith to play out his option year and challenge the reserve clause, the decision was ultimately Messersmith's and he made that decision for his own personal reasons.⁹⁰ Messersmith played out his option year ruminating on Miller's statements to players regarding his interpretation of paragraph 10(a) of the Uniform Players Contract. Towards the end of the season, Messersmith again asked for a no-trade clause in his contract to which Walter O'Malley dismissively replied "Can't do it. The League wouldn't approve the contract." "Absolute Bull! Miller responded upon Messersmith's recounting of O'Malley's callous response. O'Malley's stubborn refusal to candidly deal with one of his star players was inching the owners perilously closer to arbitration."⁹¹

In October of 1975 Andy Messersmith was just coming off another successful season in which he ranked first in the league in starts, complete games, shutouts, and innings pitched, third in strike outs and second in earned run average.⁹² In his memoir, Marvin Miller confides that Messersmith began talking with him about filing a grievance in August of 1975 when it appeared likely that O'Malley would not concede to the no-trade clause. While O'Malley accused Messersmith of being a pawn of the Players' Association, the truth was that Messersmith's priority was to obtain the no-trade clause. In a phone call with Miller before the filing of the grievance, Messersmith apologized to Miller in advance, telling him that the Players Association's test case would fail if O'Malley met his demands. Miller assured Messersmith that he should do whatever he felt was in his best interest.⁹³

In fact, Miller thought it was probable that O'Malley would sign Messersmith, especially after he produced another phenomenal year on the mound wearing Dodger blue. Miller was also dubious that management would want to arbitrate the limits of reserve clause as it pertained to the Collective Bargaining Agreement, despite their outward bravado. With this in mind Miller scoured the records and found the only other player who was unsigned after his option year. That player was former Orioles pitcher Dave McNally.⁹⁴

McNally had been a prolific pitcher in his own right, pitching 13 seasons with the Baltimore Orioles, including four straight twenty- win seasons, with nine wins in the World Series. McNally was traded by the Orioles to the Montreal Expos in 1974, and after beginning the 1975 season a disappointing 3-6 he decided to hang up his cleats for good.⁹⁵ McNally may have been the more likely candidate to test the reserve clause had Messersmith not had such a protracted public fight over his contract. McNally was a

⁸⁸ Korr, *supra* note 42, at 148.

⁸⁹ Miller, *supra* note 69, at 241.

⁹⁰ Korr, *supra* note 42.

⁹¹ Miller, *supra* note 69, at 242.

⁹² Korr, *supra* note 42, at 149.

⁹³ Miller, *supra* note 69, at 243.

⁹⁴ Miller, *supra* note 69, at 242.

⁹⁵ Miller, *supra* note 69, at 243; Dave McNally Statistics, available at <http://www.baseball-reference.com/m/mcnalda01.shtml>

good union man, having been the Orioles player representative and most importantly he had no intention of returning to baseball and was thus immune to retaliation from the owners.⁹⁶ McNally's former general manager Harry Dalton referred to him as "the staunchest holdout . . . someone who was willing to lose time and money rather than take less than he thought he deserved." One former teammate said McNally was "upset with things over the years and felt that someone had to change it . . . He might have been laid back, but when he'd had it up to eyeballs, he just exploded."⁹⁷ Luckily for Miller, McNally was still contractually an active player which gave him the right to challenge the reserve clause by asserting that paragraph 10(a) allowed him to be a free agent after playing out his option year.⁹⁸

Dave McNally was working as a Ford dealer in his hometown of Billings Montana when Miller contacted him to ensure that there would indeed be a test case in 1975 if Messersmith decided to sign his contract. McNally informed Miller "If you need me . . . I'm willing to help", and with that his name was added to the grievance. As Miller put it in his memoir, "McNally had been a starter for fourteen years, but the last act of his career was to serve in arbitration as a reliever."⁹⁹

Upon the filing of Messersmith's and McNally's grievances reaction amongst the owners was decidedly hyperbolic. National League President Chub Feeney said that the bidding war that would result from free agency might be as disastrous as to cause a cancellation of the World Series. Dodger's manager Walter Alston proclaimed "If Messersmith is declared a free agent, then baseball is dead."¹⁰⁰

Amidst the murmurings of the impending baseball apocalypse, the owners wasted no time in taking steps to stem the tide towards arbitration. The Expos offered McNally a large signing bonus to simply show up to spring training and retire; a package totaling more than he had ever made in a single season in the Majors. The Expos' general manager took the threat so seriously that he placed a phone call to McNally, offering to buy him a drink, when he just happened to be passing through the Billings Montana airport. Had McNally accepted the generous payoff O'Malley would have offered Messersmith the no-trade clause and Miller and the Players Association have been back to square one. McNally would later explain that he refused to take his golden parachute out of baseball because of his feelings that he was mistreated in Montreal and because he was concerned about younger players who were "being held in reserve instead of being let loose to go to places they could further their careers." In "The End of Baseball as We Knew It", Korr offers a poignant defense of McNally against those who criticized the players who tried to change the reserve system. "Even when judged against the most rigid standard of self interest, no one can question McNally's motives. He turned down a lot of money to pursue arbitration to win benefits for other players knowing there was no way he would benefit financially himself."¹⁰¹

The Owners' Strategy

⁹⁶ *Id.*

⁹⁷ Korr, *supra* note 42, at 150.

⁹⁸ *Id.*

⁹⁹ Miller, *supra* note 69, at 243.

¹⁰⁰ *Id.* at 244.

¹⁰¹ Korr, *supra* note 42, at 152, Miller, *supra* note 69, at 245.

Unable to buy their way out of arbitration the owners turned to the federal courts; a historical safe haven for the baseball establishment. The owners, through their Player Relations Committee (PRC), had planned on filing the lawsuit in Cincinnati, where their lawyers felt the law was most favorable. However, the Reds unexpectedly refused, and the suit was subsequently filed in Kansas City before Judge John W. Oliver.¹⁰² In their brief, the lawyers for Major League Baseball argued that labor arbitration was an improper forum to resolve the issue of free agency because the consequences were dire and abolishing the reserve clause would do irreparable damage to the game of baseball. They argued these considerations dealing with the integrity of the game made the only proper forum the Office of the Commissioner. Baseball's lawyer also asked for an injunction of the arbitration proceedings, arguing that because the Basic Agreement did not specifically deal with the reserve system or the option clause because of Article XV the arbitrator lacked jurisdiction. At the hearing all sides agreed to go ahead with the arbitration with the understanding that the jurisdictional question made by the arbitrator could be appealed by either party.¹⁰³

Commissioner Bowie Kuhn had another option that would have allowed him to prevent Messersmith and McNally from having their grievances heard before a neutral arbitrator. Article 10, item A.1. (b) of the Basic Agreement, the "integrity-public confidence" clause, narrowed the term grievance by excluding complaints that involved "action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball." Kuhn was certain the game's integrity was indeed at stake with the impending abolition of the time honored reserve system. John Gaherin, however, was able to persuade him that this course of action would be unwise. Gaherin believed it would sour the improving relations between the PRC and the Players Association and that the subsequent rift would result in a strike over free agency. A defeated and perhaps disillusioned Kuhn would later write in his memoir: "In hindsight, my greatest regret about my sixteen years as commissioner is that I did not take the grievance and head off Seitz [the arbitrator]."¹⁰⁴ It is dubious whether this counterfactual makes sense given the widespread implacability amongst club owners to rework the reserve system with the consultation of the Players Association; but had Kuhn decided to exercise his discretion under the "integrity-public confidence clause" the modern history of baseball could have looked remarkably different.

With momentum hurling club owners closer towards arbitration, the PRC met in John Gaherin's office on November 12, 1975 to discuss the continued employment of baseball's neutral arbitrator Peter Seitz. Under baseball's grievance procedure in the Collective Bargaining Agreement, arbitration panels consist of three people; one representative from management, one from the union, and an unbiased "permanent contract arbitrator". (The panel in the Messersmith arbitration consisted of Marvin Miller of the MLBPA, John Gaherin of the PRC and Peter Seitz).¹⁰⁵ Both parties had the ability to fire the neutral arbitrator at any time; so strategically this was an important consideration for the PRC and the Players Association. The PRC and the MLBPA

¹⁰² Kuhn, *supra* note 44, at 155.

¹⁰³ Korr, *supra* note 42, at 153; Dworkin, *supra* note 1, at 73; Miller, *supra* note 69, at 244

¹⁰⁴ Kuhn, *supra* note 44, at 158.

¹⁰⁵ Abrams, *supra* note 4, at 121.

scrutinized Seitz's record which included the famous Catfish Hunter case in which Seitz ruled against Charles Finley for breaching the terms of Hunter's contract, making Hunter a free agent, and an opinion in his capacity as an arbitrator for the National Basketball Association in which he cited a 1969 California Court of Appeals ruling which allowed NBA player Rick Barry, of the San Francisco Warriors, to sign with a team in the rival American Basketball Association after playing out his one year option.¹⁰⁶ Some of the members of the PRC believed that Seitz's personal convictions were antithetical to the justifications underlying the reserve system and they believed he would be unsympathetic to baseball's conservative owners.

A lengthy debate ensued in John Gaherin's office. PRC members were torn about whether to fire the "grandfatherly" Seitz, who was a well respected arbitrator. Seitz was a pragmatic arbitrator with a great depth of knowledge on the issues and historical significance of the reserve system.¹⁰⁷ The PRC was concerned that firing Seitz would sour relations with the Players Association and could damage the reputation of Major League Baseball. The lawyers for the PRC counseled that, on the question of jurisdiction and on the merits, their case was strong and they believed that Seitz would rule in their favor on both counts. Commissioner Kuhn, who usually attended PRC meetings in an information gathering capacity, presciently observed that Seitz might not find the PRC's arguments persuasive. Kuhn told the committee "There's a great deal at stake here. Don't worry about public sentiment . . . Remember that an arbitrator has enough leeway to virtually ignore your strong legal arguments." The PRC remained unconvinced and voted 6-1 to retain Seitz.¹⁰⁸

As the PRC broke for lunch Kuhn contemplated the ramifications of free agency and resolved himself to try once more to persuade the seven member committee of their perilous folly. Kuhn, no longer concerned with subtleties, told the PRC that their decision to retain Seitz was a "fundamental mistake". He argued that Seitz was "a prisoner of his own philosophy and would rationalize his way to the destruction of the reserve clause." Kuhn's arguments before the committee highlighted the historical anxieties of ownership towards any change in the reserve system. Kuhn argued that should Seitz rule against the owners, resulting in an unprecedented shift in power over the reserve system, the Players Association would be short sighted negotiations over restructuring the system in a way that would take into account the interests of the fans and the clubs. He believed that in the absence of the reserve system it would be difficult to continue to subsidize the minor leagues and in this "helter-skelter" of all players becoming free agents it "was not hard to imagine that we could even lose a major league." After this impassioned appeal the committee voted again and arrived at the same 6-1 result. In Kuhn's words: "The fox [Miller] was past the fence and heading for the henhouse."¹⁰⁹

Marvin Miller's assessment of Seitz's prior opinions was more optimistic. Miller was particularly encouraged by Seitz's reference to the Barry decision because the wording of the renewal clause in the NBA's Uniform Player's Contract was virtually identical to baseball's contract. Miller was surprised that the owners had hired Seitz in

¹⁰⁶ Miller, *supra* note 69, at 246.

¹⁰⁷ Korr, *supra* note 42, at 154.

¹⁰⁸ Kuhn, *supra* note 44, at 156.

¹⁰⁹ *Id.* at 157.

1974 given the fact that the rationale behind this previous opinion was likely in conflict with baseball's reserve system. In Miller's estimation, the PRC likely retained Seitz, despite his past decisions, because Seitz had more often than not sided with the owners while serving as baseball's permanent contract arbitrator.¹¹⁰

The Arbitration Hearing

Before the Messersmith and McNally grievances were heard over three days (November 21 and 25 and December 1) in New York City, Seitz went to great lengths to broker a compromise between the two parties. He felt strongly that both sides would be better off if they were to collaborate on a resolution.¹¹¹ A negotiated settlement was perhaps not realistic given the owners' perception that the legality of the reserve clause was well established by the federal courts.¹¹²

At the arbitration hearing Dick Moss, the legal counsel for the Players Association, argued in favor of interpreting the Basic Agreement in the narrowest way possible. Moss argued simply that the word "one" in article 10(a) meant a single year rather than a rolling number of one-year renewals stretching into perpetuity; an interpretation Miller had made known since becoming the director of the Player's Association. Moss argued that it was not the arbitrator's job to protect the owners from a collective bargaining agreement they entered into freely, without ascertaining the unintended consequences of such action.¹¹³

The PRC on the other hand argued for the more expansive interpretation of section 10(a), an interpretation that left intact the traditional reserve system. In addition to this argument the owners also made traditional policy arguments as to the necessity of the reserve system. Using the same rationale as that employed by the *Lajoie* court at the turn of the century, the Dodgers argued that Messersmith was an "irreplaceable commodity" that they could not afford to lose to free agency.¹¹⁴ In his memoir Marvin Miller remarked that the National League counsel Lou Hoynes was a good lawyer and was quick on his feet in court but had two fatal flaws. First, Hoynes was inexperienced in labor relations. Second, Hoynes believed that courts would always give in to the demands of the owners; a belief that was reinforced by baseball's impressive win-loss record in court.¹¹⁵

Hoynes sought to bring Bowie Kuhn in to make an opening statement as a sort of "impartial" pronouncement from the Office of the Commissioner as to the interests of the game. Miller objected on the grounds that if Kuhn were to make any remarks before the panel he should do so as a witness, subject to cross examination. When Kuhn eventually testified for the owners, Miller found his testimony to be "irrelevant" as he reiterated the prophecies he had made to the PRC just weeks earlier regarding the impending collapse of one of the Major Leagues. Seitz reminded Kuhn that as an arbitrator he was vested only with the power to interpret the contract, not to find solutions to problems in collective bargaining. Seitz repeatedly nudged Kuhn towards negotiating the issue

¹¹⁰ Miller, *supra* note 69, at 246.

¹¹¹ Korr, *supra* note 42, at 156.

¹¹² *Id.* at 155.

¹¹³ Korr, *supra* note 42, at 156.

¹¹⁴ *Id.* at 149.

¹¹⁵ Miller, *supra* note 69, at 248.

outside of the arbitration, reminding him that the Collective Bargaining Agreement was set to expire on December 31; a perfect moment to hash out a new understanding.¹¹⁶ Testimony from Kuhn and league presidents Chub Feeny and Lee MacPhail focused not on the interpretation of section 10(a), but instead on the history and necessity of the reserve system and the shortsighted view of the players who they believed were bent on undermining the 100-year old foundations of the national game.¹¹⁷

After three days of testimony the hearing concluded with Miller confident that the Players Association would be victorious. Seitz, who could not reveal his ruling ahead of time, gave both sides a rather unequivocal indication of which way he was leaning. Seitz indicated that one side would be significantly hurt by the decision telling Gaherin, “John, you’re going to get your head cut off”. With defeat almost certain, Gaherin attempted to convince the owners to give him the power to negotiate a compromise to the Messersmith-McNally arbitration that would save at least part of article 10(a). The club owners’ hubris blinded them, as it had from the beginning, preventing a last minute negotiation that could have saved at least a part of the traditional reserve system. Their lawyers reinforced the notion that baseball had a unique status in the courts, one that would protect them from anything a renegade labor arbitrator might do. In his meeting with the owners Gaherin was rebuffed and admonished by one owner for “destroying this business”. With no support from the owners Gaherin told Seitz to “turn the crank” and in a matter of days the century old reserve system would be a relic of baseball’s mythic past.¹¹⁸

The Decision

On December 23 1975 Peter Seitz gave the Players Association an early Christmas present when he handed down the majority opinion for the panel.¹¹⁹ After a brief summary of the arguments of both sides, Seitz immediately dealt with the jurisdictional question. The owners maintained their position that Article XV of the 1973 Collective Bargaining Agreement denied the arbitration panel the ability to hear arguments regarding the reserve clause.¹²⁰ Article XV read: “Except as adjusted or modified hereby, This Agreement does not deal with the reserve system.” It was the leagues’ opinion that this provision removed the authority of the panel to arbitrate this matter and they argued the Players Association asked for a remedy in derogation of the rights of the clubs provided in the Major League Rules, which they characterized “as the ‘core’ of the reserve system. The owners argued that the core of the reserve system included Major League rule 4-A(a) (the reserve list), Rule 3(g), the no tampering rule and rule 10(a) of the Uniform Players contract. Counsel for the American League argued that on the question of jurisdiction “if 10(a) is a part of this grievance in such a way that it is also wrapped up with Major League Rule 4-A(a)¹²¹ and Major League Rule 3(g)¹²² then

¹¹⁶ *Id.*

¹¹⁷ Red Smith, “Where One Year is Forever” New York Times (Dec. 5, 1975)

¹¹⁸ Korr, *supra* note 42, at 157.

¹¹⁹ Abrams, *supra* note 4, at 122.

¹²⁰ Professional Baseball Clubs, 66 Lab. Arb. & Disp. Settl. 101, 103 (1975) (Seitz, Arb.).

¹²¹ Major League Rule 4-A(a) FILING. On or before November 20 in each year, each Major League Club shall transmit to the Commissioner and to its League President a list of not exceeding (40) active and eligible players, whom the club desires to reserve for the ensuing season. On or before November 30 the League President shall transmit all of such lists to the Secretary-Treasurer of the Executive Council, who

it is the core of the reserve system involved and it is exactly that which is excluded from here, you gentlemen have no authority over it.”¹²³

Seitz pointed out the apparent paradox created by the leagues’ rationale noting that it is hard to understand how:

the Basic Agreement could state that it does not ‘deal’ with the Reserve System, when, at the same time, its own provisions and the provisions of the Players Contract and the Major League Rules which are absorbed into the Agreement patently do ‘deal’ with such rules.¹²⁴

Seitz reconciled this patent contradiction by adopting the Player Association’s interpretation. To interpret Article XV, Seitz looked at the genesis of the provision, which first appeared in Article XIV of the 1970 Basic Agreement; which provided: “Regardless of any provision herein to the contrary, this Agreement does not deal with the Reserve System.” The inclusion of this provision was a direct response to the *Flood* case, which was filed in the United States District Court for the Southern District of New York that same year. Seitz found it evident from the text and from testimony presented at the hearing that this language did not refer to a possible question as to what the reserve system meant, but rather was meant to address the possible impact of the *Flood* case. Seitz agreed with the notion that Article XIV was in essence a cease fire on the resolution of disputes dealing with the meaning, extent and modification of the reserve system.

The Players Association argued that having acquiesced to compliance with the reserve system during the *Flood* litigation, it needed Article XIV to shield the Association from liability against a claim by a player that it acted as a “co-conspirator in agreements claimed to be in violation of the anti-trust laws.”¹²⁵ Seitz found that the bargain struck between the two parties in 1970 did not result in the expansion of the negative covenants to the interpretation or application of the reserve system. Using principles of statutory interpretation, Seitz argued that Article XIV of the 1970 Basic Agreement explicitly excluded concerted action and negotiations in respect of the reserve system but it was silent as to the filing of grievances. Elaborating further Seitz wrote:

The broad provisions of Article X of the 1970 Agreement defining grievances and setting forth grievance and arbitration procedure excludes certain kinds of disputes from its scope; but it says nothing of grievances complaining of a violation of the reserve system. *Inclusio unius, exclusio alterius*.¹²⁶

shall thereupon promulgate same, and thereafter no player on any list shall be eligible to play for or negotiate with any other club until his contract has been assigned or he has been released. See *Id.* at 111.

¹²² Major League Rule 3(g) TAMPERING. To preserve discipline and competition and to prevent the enticement of players, there shall be no negotiations or dealings respecting employment, either present or prospective between any player and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved unless the club or league with which he is connected shall have in writing, expressly authorized such negotiations or dealings prior to their commencement.

¹²³ Professional Baseball Clubs at 105

¹²⁴ *Id.* at 106-07

¹²⁵ *Id.*

¹²⁶ *Id.* at 109.

After the Supreme Court ruled in *Flood* that the antitrust laws did not apply to baseball and its reserve system, the Players Association, still worried about litigation, sought to carry the language of Article XIV into the 1973 Basic Agreement. Article XV, the subject of the jurisdictional question, contained language that is “materially identical” to Article XIV of the previous Agreement. As a result of this history, Seitz ruled: “I find nothing in the Basic Agreement or in any other document evidencing the agreements of the parties, to exclude a dispute as to the interpretation or application of section 10(a) of the Uniform Players Contract . . . dealing with the Reserve System from the reach of the broad grievance and arbitration procedure in Article X.”¹²⁷

With the jurisdictional question dispensed with, Seitz then moved on to the merits of the grievances filed by Messersmith and McNally. The decision was to turn on the panel’s interpretation of section 10(a) of the Uniform Players Contract. The pertinent section of 10(a) reads: “the Club shall have the right by written notice to the Player to renew this contract for the period of one year on the same terms . . .”¹²⁸ The Players Association maintained its long held belief that this provision meant the Dodgers and the Expos had the right to renew the contract of Messersmith and McNally, respectively, for one year and one year only. The Los Angeles Dodgers, on the other hand claimed that when they placed Messersmith on their reserve list in November of 1975 it had an exclusive right to his services from that point forward. While the Players Association did not argue the point of whether Messersmith had been placed on the reserve list, they did disagree with the affect of such a placement. The Association argued that when Messersmith’s renewal year expired in September of 1975 he was no longer under contract with the Dodgers and so his placement on their reserve list had no legal effect.¹²⁹

To determine whether there was indeed a contractual relationship Seitz analogized the renewal clause in the Uniform Players Contract to a lease agreement. Contract law does allow parties to contract for successive renewals of the terms of their bargain provided there is explicit language as to that intention. Renewals of real estate leases are normally not allowed by implication because courts will be reluctant to provide for a renewal of a tenancy *ad infinitum*. In the case of contracts for personal services, Seitz contended, courts are less willing to uphold successive renewals than they would be when presented with such terms in a lease. Seitz found the league’s argument untenable that section 10(a) could provide a club with the ability to renew the entire contract on all of its terms, including the renewal clause, into perpetuity. The absence of express language in section 10(a) expressing the intent of the parties to allow for perpetual renewal prohibited such unilateral action in the contractual relationship established by the Basic Agreement of 1973 and by incorporation the Uniform Players Contract.¹³⁰

For additional support, Seitz again referenced the *Barry*¹³¹ case from the California Court of Appeals; the same case that he cited a few years earlier in his capacity as arbitrator for the NBA and NBAPA. The court in *Barry* had found that the renewal provision, a provision that did not differ materially from section 10(a), should be

¹²⁷ *Id.* at 110.

¹²⁸ *Id.*

¹²⁹ *Id.* at 111

¹³⁰ *Id.* at 113.

¹³¹ *Lemat Corporation v Barry*, 275 Cal. App. 2d 671 (Cal. Ct. App. 1969).

narrowly construed to allow for an extension of the terms of the contract for only one additional year without an option for successive renewals.

In the alternative the League argued that it mattered not whether there was a contractual relationship because Major League Rules 4-A(a) and 3(g) allowed a team to reserve a player regardless of the existence of a contract. Seitz rejected this notion and found that the rules that comprise the reserve system contemplate the existence of a contractual relationship. After so concluding the necessary conclusion followed that

absent a contractual connection between Messersmith and the Los Angeles Club after September 28, 1975, the Club's action in reserving his services for the ensuing year by placing him on its reserve list was unavailing and ineffectual in prohibiting him from dealing with other clubs in the league and to prohibit such clubs from dealing with him.¹³²

Acknowledging testimony from the Commissioner and the Presidents of the Leagues that "the integrity of the sport may be placed in hazard", Seitz used the last words of his decision to encourage a negotiated settlement between the two parties. He expressed his disappointment that the parties had not worked out their differences on the historic reserve system before the issuance of this arbitration decision but he expressed the hope that in the upcoming collective bargaining negotiations the parties could "reach an agreement on measures that will give assurance of a reserve system that will meet the needs of the clubs and protect them from the damage they fear this decision will cause, and, at the same time, meet the needs of the players."¹³³

Upon the issuance of the opinion, John Gaherin handed Seitz a letter dismissing him from his position as baseball's arbitrator.¹³⁴ The owners issued a statement saying "they no longer had confidence in the arbitrator's ability to understand the basic structure of organized baseball."¹³⁵ The forecasts from Commissioner Kuhn and the owners were predictably dire. They claimed the ruling would bring about the end of baseball as bidding wars would ensue, wreaking financial havoc on the game. Phil Koury, legal counsel for the Kansas City Royals said "[t]his decision has reduced everyone to a state of shock . . . The Arbitrator ignored all of the precedents in making his decision. The ramifications are so great it is difficult to say what will happen."¹³⁶ However sports writers at the time were skeptical of the owner's fatalistic rhetoric as it was likely clubs and players would alter their bargaining relationship and begin to draft long term contracts to keep star players from exercising their free agent rights. This was also an opportunity to create better transparency of the financial situation of the leagues. As Marvin Miller had pointed out; clubs had never disclosed what they were making in the past.¹³⁷

Miller recognized the significance of the ruling, but was cautious in his appraisal of the future negotiations in collective bargaining. In a statement released by the Players Association, Miller said:

¹³² *Id.* at 117 (Seitz Freed Dave McNally from the Montreal Expos under the same reasoning.)

¹³³ *Id.* at 118.

¹³⁴ Red Smith, *Christmas Spirit*, New York Times (Dec. 24, 1975); Korr, *supra* note 42, at 157.

¹³⁵ *2 Players Free To Job Shop*, Detroit News (Dec. 24, 1975).

¹³⁶ Joe McGuff, *Ruling Jeopardizes Baseball Reserve System*, Kansas City Star, Dec. 23, 1975.

¹³⁷ Glenn Dickey, *Baseball's Jeremiahs*, S.F. Chronicle (Dec. 29, 1975)

We are gratified that the chairman agreed with our long-standing view that the clubs may renew a player's contract for one year and one year only; that at the end of the renewal year the contract is terminated; and that without a valid contractual relationship, a club can no longer reserve a player.¹³⁸

Mr. Miller recognized that the renewal clause in section 10(a) was "only a small part of baseball's reserve system" and reiterated his desire to "continue to negotiate in good faith on all matters, including revisions of the reserve system . . ." in collective bargaining.¹³⁹

Not wanting to wait until the negotiations over the new collective bargaining to hammer out the contours of a new, and presumably less advantageous, reserve system, the owners took their case back to the District Court in Kansas City; an avenue both parties left open by agreement during their first hearing before Judge Oliver.¹⁴⁰ In the run up to litigation John Gaherin again urged the owners to compromise with the Players Association, but the PRC lawyers were confident they could win because baseball had always prevailed in federal courts. However the lawyers and advisors who counseled in favor of litigation misunderstood the tenor of the times in the Eight Circuit. Korr conjectures that the New York and Washington lawyers "might have thought that the judges in Kansas City were not sophisticated and would be amenable to arguments that harkened back to the pastoral heartland of America and the national pastime image that baseball ownership liked to project when it wanted to claim special privileges."¹⁴¹ This proved a miscalculation as the Eight Circuit had been the source of important decisions upholding the power of arbitrators. Furthermore, the Players Association outmaneuvered the club owners once again by hiring Donald Fehr¹⁴², a local labor lawyer who had been a clerk for a federal judge in Kansas City and possessed a strong grasp on the Eight Circuit and its judges.¹⁴³

From the beginning of the proceedings it was apparent that Judge Oliver would not be swayed by references to baseball's legendary past. Oliver indicated that "[t]his is simply another case on this Court's docket, which must be processed and decided in accordance with the applicable law of the United States."¹⁴⁴ The owners urged the court to consider the catastrophic effects an adverse ruling would have on the game of baseball. Referencing the days before the reserve system began in the 19th century the owners explained it would result in ballplayers "revolving from team to team."¹⁴⁵ During the hearing, Judge Oliver pointed to a section of the owners brief which suggested that the only way to avert the destruction of baseball would be a favorable ruling from the court. Judge Oliver did not appreciate this escalated rhetoric and pointed out the contradiction between their claim that they needed to protect baseball from the labor movement while at the same time threatening to use tactics used often by management in that same

¹³⁸ Press Release, Major League Baseball Players Association, December 23, 1975

¹³⁹ *Id.*

¹⁴⁰ Dworkin, *supra* note 1, at 79

¹⁴¹ Korr, *supra* note 42, at 159-60

¹⁴² Donald Fehr went on to replace Dick Moss as the MLPBA attorney and later went on to become its Executive Director in 1986. *See Id.* at 160

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 161.

¹⁴⁵ *Messersmith, McNally Ruled Free Agents*, Chicago Daily News (Feb. 4, 1976)

battle.¹⁴⁶ Furthermore, Judge Oliver said the “Congress of the United States has not invested this court to act as some sort of guardian of the national pastime.”¹⁴⁷

Oliver relied on the “Steelworkers Trilogy”, the Supreme Court precedent which established the judiciary’s limited role in labor arbitration, to uphold the Seitz decision. This trilogy of opinions, written by Justice Douglas in 1960, created a “presumption of arbitability; meaning courts will pass off any dispute that is even “arguably” intended by management and labor to be resolved in arbitration. Furthermore, courts will give deference to arbitration decisions as long as they “draw their essence” from the collective bargaining agreement.¹⁴⁸ Upon review of the record the court was satisfied that “the arbitrator arrived at a decision drawn from the contract documents and from the history of the agreements leading up to the 1971 Collective Bargaining Agreement . . .” and “that the arbitrator did not exceed his arbitral authority and that his award is valid . . .”¹⁴⁹ As one sports writer of the time put it: “Marvin Miller and the Major League Players Assn., backed by Federal Judge John W. Oliver’s favorable ruling in Kansas City, continued their winning streak over baseball’s reeling management and the controversial reserve system . . .”¹⁵⁰

Upon release of the opinion Miller was pleased but did not take the opportunity to revel in his success. He had, up until that point, repeatedly urged the owners to negotiate over changes to the reserve system rather than go through costly litigation. He was however particularly pleased with Judge Oliver’s remarks about Peter Seitz, whose unceremonious dismissal had been a personal and professional indignity to the distinguished arbitrator. Oliver remarked that Seitz “had discharged his duties with the highest sense of fidelity, intelligence and responsibility”.¹⁵¹

The owners planned an appeal in the Eight Circuit, still hoping that a court would eventually rule in their favor; however their resolve was weakening as sources close to the PRC indicated a loss in the Eight Circuit would likely mean an end to litigation and the beginning of meaningful negotiations on the matter in collective bargaining.¹⁵² Management was beginning to realize that they would be unsuccessful in maintaining the reserve system in its previous incarnation. Joe L. Brown, General Manager of the Pittsburg Pirates said it would be necessary for the PRC and the MLBPA “to sit down and arrive at a mutually satisfactory agreement which would offer the clubs some form of contract control.” Hank Peters, the General Manager for the Orioles said; “[r]egardless of legal decisions, I think the reserve system will have to be determined at the bargaining table.”¹⁵³

The owners did appeal Oliver’s decision but lost in a two to one ruling in the Eight Circuit. While some may have hoped this final defeat would mean a speedy resolution to the issue in collective bargaining, the owners had a different plan. The

¹⁴⁶ *Id.*

¹⁴⁷ *Reserve Clause, Cont’d*, San Francisco Chronicle (Jan. 27, 1976).

¹⁴⁸ *Kansas City Royals Baseball Corp. v. Major League Baseball Players Assn.*, 409 F. Supp. 233, 265 (D. Mo. 1976)

¹⁴⁹ *Id.*

¹⁵⁰ *Red Foley, “Federal Judge Fires Strike 2 at Reserve Clause*, Chicago Daily News (Feb. 5, 1976).

¹⁵¹ *Id.*

¹⁵² Murray Chass , *Baseball Owners Will Keep Fighting Messersmith Decision*, New York Times (Feb. 10, 1976)

¹⁵³ *Red Foley, Federal Judge Fires Strike 2 at Reserve Clause*, Chicago Daily News (February 5, 1976).

owners, seeking to maintain strength at the bargaining table, had been implying that they would not open spring training camps without a new agreement. This strategy was an untenable one, considering that, regardless of the status of the collective bargaining agreement, the clubs would be forced to pay their players even if the season were to be delayed. This would have put the owners in the ironic situation of having to breach contracts with all of their players; risking arbitration that would presumably result in those players being declared free agents as Catfish Hunter had just two years earlier.¹⁵⁴ No matter how long the club owners refused to deal with reality, they would eventually be forced to deal in good faith with the Players Association.

Miller was eager to negotiate over modifications to the reserve system for two reasons. First, Miller recognized that with the expiration of the old Basic Agreement, he was compelled to come to the bargaining table. Second, he did not believe that free-agency after one year was in the best interests of the players because the large supply would hold salaries down.¹⁵⁵ John Gaherin had conveyed the owner's initial proposal for modification of the reserve system while the appeal was still undecided. The terms would be that, for a player to be eligible for free agency, he would have to be in the majors for nine years with his tenth year being an option year. That player would then become a free agent *unless* the club offered him a contract of \$30,000 or more. Miller found this offer to be "preposterous" and he was quite certain that the two parties would remain far apart as long as the owners continued to act as if the Messersmith decision did not exist. Without an agreement, Miller expected management to go on the offensive to test the unity of the players in the fight for free agency.¹⁵⁶

With the owners keeping the camps closed until the signing of a new Basic Agreement, Miller counseled all players who wanted to become free agents not to sign, resulting in more than 350 players without a contract before the start of the season. While this may have heightened the anxiety and resolve of the owners who felt betrayed by Miller's promises of only a few free agents a year, this was also of a concern for Miller who understood that an influx of this number of free agents on the market would benefit the owners by keeping salaries low. In spite of the stalemate, several hundred players began migrating to the warmer climates of Arizona and Florida in hopes that an agreement would promptly be achieved.¹⁵⁷ Miller took this opportunity to arrange meetings with Gaherin in St. Petersburg so many of the players could attend the negotiations. At this time Miller was also waging a media battle as frustrated sportswriters, many of whom had rented houses in Florida for spring training, tried to get players to comment on the lockout often referring to it in their articles as a "strike". Miller would hold frequent press conferences after daylong negotiations in which he had to remind the press that the players were willing and ready to play and negotiate simultaneously and that it was the owners who were locking the players out.¹⁵⁸

Inside the negotiations many players did show up and were a great asset to Miller and the Players Association. At one point Johnny Bench stood up and admonished Chub

¹⁵⁴ Murray Chass, *Baseball Owners Will Keep Fighting Messersmith Decision*, New York Times (Feb. 10, 1976)

¹⁵⁵ Miller, *supra* note 69 at 255.

¹⁵⁶ Miller, *supra* note 69, at 256.

¹⁵⁷ *Id.* at 259.

¹⁵⁸ *Id.* at 260-62

Feeney and Barry Rona, saying, “[h]ow can you say a player must play ten years to be a free agent? Only four percent of all major leaguers ever play that long!”¹⁵⁹ Seeing that the owners were uniting the players behind Mr. Miller, Walter O’Malley, owner of the Dodgers, demanded the lockout be lifted and Kuhn wisely followed this advice. Spring training for the 1976 season had begun and Miller and Gaherin flew to New York to continue negotiating the new Basic Agreement.¹⁶⁰

Gaherin was faced with a tough task. The owners were of differing views as to what the new reserve system should look like. Some were of the unrealistic view that the owners should demand the preservation of the old reserve system, while newer owners Ted Turner of the Braves and George Steinbrenner of the Yankees viewed free agency as a means to quickly catapult their teams to success. The owners chose their strategy based on tradition and tangible concerns about retention of talent. According to Korr, “[c]ontrol and the ability to plan for a few years in the future were enormously important to most owners.”¹⁶¹ Baseball, unlike the other major sports, relies on its minor leagues to develop young talent. The economic interests in retaining these young players was a paramount concern and this led a majority of owners to rally behind the plan for a six year restriction on player movement.¹⁶²

Miller on the other hand, was charged with the obligation of securing a form of free agency that would be acceptable to all players; no small feat considering Mike Marshall, the 1974 Cy Young winner of the Los Angeles Dodgers, vocally demanded no restrictions on players at all. The majority of players favored some restriction on player movement because they believed the salaries paid for the top free agents would determine the share that would be spread amongst the other players. The average player understood that players like Catfish Hunter and Andy Messersmith were exceptional and clubs would be willing to compete for the ability to employ them. If there were dozens of free agents competing with one another on the free market it was uncertain these average players could capture any value from free agency. Free agency would be a bold new experiment and there were differing views as to what the free market would bear. Furthermore, players were anxious to end the stalemate and feared a lengthy work stoppage.¹⁶³

The closest Miller came to losing his bargaining advantage was when Charles Finley, the outspoken and outlandish owner of the Oakland A’s, declared “Make ‘em all free agents”. Finley understood the economic concepts of supply and demand and knew that if every player were to be declared a free agent every year the owners’ fears about escalating salaries would be resolved. However, Finley garnered little respect from his fellow owners and as Ewing Kauffman, owner of the Kansas City Royals, pointed out “If Finley pointed out the window at noon and said the sun was shining, many owners would have said it was dark.” In 2000, Kuhn reflected on Finley’s argument saying “Maybe Charlie was right . . . I don’t say that too often.” Miller was genuinely concerned about Finley’s proposal because it would have put him in the unenviable position of arguing against the total freedom they had won in arbitration. Miller was never forced to make

¹⁵⁹ *Id.* at 261.

¹⁶⁰ *Id.* at 264

¹⁶¹ Korr, *supra* note 42, at 183.

¹⁶² *Id.* at 183

¹⁶³ *Id.* at 182-83.

such an argument as the club owners allowed their hostility towards Finley and anxieties about losing control over their organizations to ignore Finley's proposal.¹⁶⁴

Miller struggled to determine the right mix of supply and demand, with no previous study on the movement of players in free agency to aide him. He started out proposing four years, while personally believing that five years might be optimal. In the end he agreed to a six year¹⁶⁵ requirement as long as the club owners agreed that after five years a player could demand a trade, designate up to six clubs to which he would not accept a trade, and have the right to become a free agent if the club failed to trade him by March 15. The new Basic Agreement provided that any Player who signed the Uniform Players Contract before 1976 could be reserved for one year after their contracts expired, and players who signed after that date would be subject to reservation for only the six years.¹⁶⁶ The owners agreed and the compromise on the new Basic Agreement was reached on July, 12 1976.¹⁶⁷

Post Game Wrap Up

Baseball

Did the destruction of baseball's century old reserve system bring America's national pastime crumbling down into the dustbin of history? Of course not; it did, however, change the economics of the game considerably. The history of baseball was a history of economic dominance by the owners. With the exception of Babe Ruth, who was paid a considerable sum of \$80,000 for each of a two year contract in 1930, players made very little money. The average salary right before the Messersmith arbitration in 1975 was \$44, 675. By 1977 that figure had almost doubled as the average player took home \$76,066. The 1980's saw a meteoric rise in salaries and in 1992 the average salary finally topped \$1 million.¹⁶⁸

This rate of increase tapered off significantly from 1987-88 when the owners colluded; agreeing not to sign free agents during that period. The Players Association filed a grievance on the grounds that collusion was illegal under the terms of the collective bargaining agreement, forcing the owners to pay the affected players approximately \$280 million in damages.¹⁶⁹ The rise in salaries also declined from 1993 through 1996 due to the decline in national television revenues and other affects of the 1994-95 players' strike. Despite these short periods of stagnant growth, average salaries have risen consistently since the beginning of free agency and this is largely due to the rise in salaries for the top players in the game. In 1994, 12 percent of the players were being paid 54 percent of total payroll expenditures in Major League Baseball. In the 1990s, owners attempted to keep payrolls low by replacing higher cost "fringe" players with younger players from their farm systems, which increased dramatically the number of rookies entering the league in this period. In response to this wage disparity the Players Association bargained for increases in salary minimums in collective bargaining.

¹⁶⁴ *Id.* at 183-84.

¹⁶⁵ The average length of a major league baseball career in 1976 was six years. (Dworkin, *supra* note 1, at 83.)

¹⁶⁶ Dworkin, *supra* note 1, at 83.

¹⁶⁷ Miller, *supra* note 69, at 267

¹⁶⁸ Paul Staudohar , *Diamond Mines: Baseball & Labor* 142-47 (Syracuse University Press 2000).

¹⁶⁹ *Id.* at 145

The Players Association has also proposed a revenue sharing formula by which players would be guaranteed a percentage of gross revenues; however this proposal has yet to be adopted in an agreement.¹⁷⁰ The Players Association was eventually successful in raising the minimum salary to \$150,000 in 1997 and \$200,000 in 1999.

And what of the owners' arguments that and end to the reserve clause would mean a destruction of baseball's competitive balance? The owners argued that the wealthy teams would buy up all of the best players. By 1991, it was apparent that free agency had brought about a better competitive balance. In the fifteen years following the Messersmith decision twelve different teams won the World Series and only three teams failed to win at least one division title. The explanation to why the richest teams were unable to buy championship teams is that they were remarkably ineffective at paying a player according to his output. For the years 1984 through 1989 average team salary explained less than ten 10 percent of variance in team win percentage. Zimbalist argues that this might be the result of the variable effect of long term contracts on player performance. Zimbalist also posits that the increased importance of a players' emotional character has become a new consideration as money has changed the game and the media have scrutinized player performance to a new degree.

Furthermore, baseball's growing profitability in the 1980's and early 1990's actually led to an equalization in revenues. The increase was due mostly to large media contracts and licensing; revenues which are shared equally amongst all teams. These forces may have negated any distortion in competitive balance in the first fifteen years after the Messersmith decision. This trend began reversing in the middle of the 1990's as local revenues from cable contracts grew rapidly.¹⁷¹ In the face of this shift in economics Major League Baseball implemented a luxury tax to help preserve competitive balance. In 2004 the Yankees spent \$188 million on its payroll and doled out an additional \$85 million in revenue sharing and luxury taxes. This level of taxation did in fact deter the Yankees from signing Carlos Beltran that year; evidencing that the current scheme does have some effect. While the Players Union is unlikely to ever agree to a hard salary cap, whether the current level of taxation and revenue sharing will allocate baseball's resources in a desirable way may yet to be seen. The owners and Players Association will have an opportunity to take a look at baseball's competitive balance again when the Basic Agreement expires in 2011.¹⁷²

Peter Seitz

After suffering the greatest indignity of his career, being fired immediately after his issuance of the Messersmith decision, Peter Seitz continued to arbitrate labor disputes. In November of 1977, acting as an impartial arbitrator for the NBA, Seitz upheld the reduction of NBA rosters from twelve to eleven players; a change the NBA Players Association claimed violated their collective bargaining agreement.¹⁷³ In 1981, Seitz was asked to settle a list of disputes between New York City and its unionized employees. Handing both sides a partial victory, Seitz ruled that New York City could institute a

¹⁷⁰ *Id.* at 147-48.

¹⁷¹ Andres Zimbalist, *Baseball and Billions* 95-104, (HarperCollins Publishers 1992).

¹⁷² Murray Chass, *Fretting Over a Payroll Gap Doesn't Pay*, *The New York Times* March 4, 2005, Sports.

¹⁷³ Byron Rosen, *NBA Rosters Cut to 11 Players*, *The Washington Post* November 5, 1977, Saturday, Final Edition.

policy on tardiness and eliminate reduced hours during summer months; a decision that was estimated to save the city \$4.5 million a year. In that same arbitration the union won the right for their members to automatically deduct a portion of their salaries to fund a war chest to be used in federal elections; a politically sensitive issue vehemently opposed by then New York City Mayor Koch.¹⁷⁴ As a testament to Seitz's evenhanded and reasoned approach to labor arbitrations, Koch commented on the decision: "I still don't believe it's a good thing . . . But on balance it's a responsible decision . . ." ¹⁷⁵

In the final years of Peter Seitz's life, the Messersmith decision was never far from his mind. A prolific letter writer, Seitz continued to communicate with Marvin Miller Dick, Moss and Bowie Kuhn regarding his most famous decision. Seitz's letters, which showcased his biting wit and depth of knowledge of the classics, revealed the lingering pain and anger he felt towards Bowie Kuhn and Major League Baseball. When news leaked that the owners would not renew Kuhn's contract, Seitz felt it an opportune moment to express his feelings on the matter. The following is an excerpt from Seitz's letter to Bowie Kuhn:

I believe that each of us, the roles assigned for us to play, acted conscientiously in the achievement of what we conceived to be our designated missions. In my case, I was cast out by the Major Leagues with the same grace and empathy as John Milton's Jehovah when he cast out Satan from Heaven in Paradise Lost . . . I was dismissed unceremoniously with the conventional pink slip without a word of kindness except from John Gaherin who, being a gentleman, could not act otherwise. The dismissal was ignominious and shameless in character and took no account of my professional career and general acceptance as an arbitrator. Nevertheless, at the time, the brutality and rudeness of the action hurt deeply and it is only now, years later, when you yourself were asked to step down, that I considered it appropriate to voice these feelings and reactions . . .

. . . Baseball has some fine conventions which deserve preservation. Normally, a hapless pitcher, being removed from the mound in the course of an inning will get a few kind words from the Manager for his efforts, perhaps a reassuring pat on the back and even an opportunity to doff his cap in deference to the applause of the more sensitive and appreciative customers. This is part of what makes baseball a sport rather than a cock-fight. I am afraid that too many of the franchise owners, your former clients, are unaware of this . . . ¹⁷⁶

On October 17, 1983, less than a year after he penned these words to Bowie Kuhn, Seitz died after a spinal operation at Lenox Hill Hospital in New York City. ¹⁷⁷

¹⁷⁴ Damon Stetson, *City Wins Point on Productivity During the Summer*, The New York Times October 20, 1981, Tuesday, Late City Final Edition,

¹⁷⁵ Richard C. Levine and Carlyle C. Douglas, *The Region in Summary; Summer Blues: A Full Day's Work*, The New York Times October 25, 1981, Sunday, Late City Final Edition,

¹⁷⁶ Letter From Peter Seitz to Bowie Kuhn (November 8, 1982).

¹⁷⁷ Metro; Deaths Elsewhere, The Washington Post October 20, 1983, Thursday, Final Edition,

Marvin Miller, who had become good friends with Seitz in the years following the Messersmith decision, learned of his passing while on vacation shortly after his retirement from the Players Association. Miller had brought a few letters Seitz had recently written him, intending to respond to them while away. Upon hearing the news of his death, Miller read the letters to his wife and family friends as a personal memorial service to his late friend.¹⁷⁸

Dave McNally

Dave McNally never intended to play baseball again, and the arbitration decision changed nothing for him personally. He retired with a career 184-119 record and a 3.24 E.R.A. His record 17 straight victories, which matched the mark set by Johnny Allen in the 1930's, remained an American league record until 1999 when Roger Clemens won 20 straight games with the New York Yankees. After the arbitration McNally resumed his life in Billings Montana running his auto dealership and enjoying his family. In 2000 McNally was contacted by the Billings Gazette to comment on Alex Rodriguez's record 10-year \$252 million contract with the Texas Rangers. Of the contract McNally dryly commented "My first thought when I saw that was: Did Texas offer him \$250 million and he wanted two more? How did they get to \$252 million?"¹⁷⁹

McNally died December 1, 2002 of lung cancer at the age of 60. Upon his death the owner of the Baltimore Orioles said, "The look of wonderment in his smiling face as Brooks Robinson leaps into his arms after the last out of the 1966 World Series will live forever in the memory of Oriole fans. That he was the first pitcher inducted to the Orioles Hall of Fame is testament to his place in Orioles history."¹⁸⁰

Andy Messersmith

The initial response to Messersmith by club owners was markedly cold. Teams did not clamor to sign him as they had done for Catfish Hunter the pervious year. The Cincinnati Reds expressed interest but team President Bob Howsam said to sign Messersmith with the salary consideration would be poor business. He said, "no club in our industry can truly afford this and survive." Marvin Miller found this reasoning spurious because Howsam, nor any other club owner, had any idea as to how much Messersmith might be worth on the open market.¹⁸¹

In March of 1976, Messersmith came close to a deal with the New York Yankees, but relations soured when the Yankees tried to change the terms of the contract and then trashed Messersmith in the press saying he reneged on their deal; a strategy which infuriated the proud 30-year old pitcher. The dispute was brought before Commissioner Kuhn to determine whether the Yankees did indeed have rights to Messersmith. Up until this point Messersmith had received only a few offers and he and Miller began to wonder whether the owners were in collusion to keep Messersmith's salary down.¹⁸² Kuhn never made a ruling as the Yankees withdrew their claim on Messersmith saying they did not

¹⁷⁸ Miller, *supra* note 69, at 330.

¹⁷⁹ Richard Goldstein, *Dave McNally, 60, Early Free Agent, Dies*, The New York Times Obituaries, Dec. 3, 2002.

¹⁸⁰ *Pitcher Dave McNally, Ushered in Free Agency*, Newsday Obituaries (New York) December 3, 2002.

¹⁸¹ Miller, *supra* note 69, at 252.

¹⁸² Mike Lupica, *How Messersmith Sees It*, New York Daily News, April 3, 1976.

want to pursue a player who did not want to play for them.¹⁸³ In the end Ted Turner, the new owner of the Atlanta Braves, lured Messersmith with a three year contract worth a total of \$1 million. Ironically the deal Messersmith signed with Atlanta contained a clause granting the Braves a right of first refusal, a clause which eliminated Messersmith's right to free agency. Miller promptly called the president of the National League to remind him that players could not sign away rights earned in collective bargaining. The clause was stricken from the contract but the incident reminded Miller of why progress had been so slow in the past in the absence of a strong union looking out for the interests of the players.¹⁸⁴

After two disappointing seasons with the Braves in which he was plagued by nagging injuries, Messersmith was traded to the Yankees where he separated his shoulder in the Yankee camp putting him on the disabled list the entire year. The Yankees chose not to exercise their option for the fourth year in his contract and gave Messersmith his outright release. In another ironic turn of events, Messersmith wound up signing with the Dodgers in 1979 for about the same money he had refused on principle in 1975. Upon his return to the Dodgers Messersmith was somber when reflecting the turbulent years that followed his victory in arbitration. "Sure, I was one of the first free agents and people do consider that because I've made the money I've had some measure of success", Messersmith commented. "But I really haven't pitched that well since free agency."¹⁸⁵ Messersmith was resentful of being made a target by the owners, expressing his belief that "the owners have gone a little overboard with the way they spend their money, and it's unfortunate that the fans view the players as the greedy ones." Still Messersmith did not regret his decision to go to arbitration, saying of free agency: "[I]t gives a player an opportunity to do what he wants to do with his own career, and I think that's excellent."¹⁸⁶

Unfortunately, the comeback was short-lived as Messersmith retired in 1979 after playing in only 11 games for the Dodgers, posting a 2-4 record. Leaving baseball was perhaps the best thing for Messersmith, who noticed that his good rapport with baseball fans evaporated once he became a free agent. In an interview with Frank Blackman of the San Francisco Examiner in 1986 Messersmith confided: "ninety-eight percent of my mail was hate mail. I got hit over the head coming out of a ballpark. The players, my peers, were ripping me in the press."

Messersmith could not stay away from baseball for long though and he has found the happiness that evaded him during his major league career since assuming the role of head coach for Cabrillo College Baseball in Aptos, California. Reflecting on his new life in baseball Messersmith said "When you work as a professional athlete, you're very selfish, especially as a pitcher . . . You don't worry about anybody else . . . With this, you have to share everything. You're working with 20 kids. It's a team thing as opposed to an individual thing." Messersmith tries to help his players appreciate and enjoy the game by telling them to abide by only two rules: "The first is it's got to be fun. No. 2, you don't hit

¹⁸³ Murray Chass, *Yankees Pressed Illegal Agreement With Messersmith*, The New York Times, April 25, 1976.

¹⁸⁴ Miller, *supra* note 69, at 253.

¹⁸⁵ Larry Whiteside, *Messersmith Completes Cycle*, Boston Globe, March 30, 1979.

¹⁸⁶ *Id.*

the coach."¹⁸⁷ Messersmith remains the head coach of the Cabrillo College Seahawks to this day.

Marvin Miller

Marvin Miller would never see peace between the owners and the players during the waning years of his directorship of the Players Association. The years following the historic Messersmith arbitration were marred by tensions over compensation for teams who lost players to free agency. The owners took out a \$50 million insurance policy with Loyds of London and accumulated a \$15 million strike fund in anticipation of the battle. The 1976 Agreement was set to expire at the end of 1979, but meaningful negotiations did not begin until February of 1980. The owners, determined to weaken free agency, sought to add a major league player to the compensation package for a team that lost a free agent.¹⁸⁸ A strike was averted when Miller suggested at joint study committee to look into the compensation issue with the understanding that at the end of the calendar year the owners would be free to impose their plan and the players would be free to strike. On June 12, 1981, with the owners plan in place, the players went on a strike that would last fifty days. The players decided to postpone the strike until a few weeks had been played, when the players would have some money in their pockets, hoping to minimize the costs to the players while maximizing the effects on club owners.¹⁸⁹ This strategy proved effective as club owners took substantial losses totaling over \$72 million while the players lost \$34 million in salaries. The new plan which emerged was similar to one proposed by Miller before spring training and maintained the amateur draft pick feature in addition to compensation from a pool of Major League players.¹⁹⁰ As Korr put it, in the fifteen years Marvin Miller headed the Players Association the players had “transformed themselves from supplicants in a company union to a united force with its own agenda . . . The 1981 strike put an exclamation point to Miller’s tenure at the union. It proved that the union was there to stay and had the resolve and power to protect its gains.”¹⁹¹ Marvin Miller retired in 1982, leaving Donald Fehr, the young Kansas City Attorney who worked on the federal appeal of the Seitz decision, to eventually take the helm of the Players Association.

In recent years Marvin Miller has remained in the news as many baseball analysts have lamented over his exclusion from the Hall of Fame. “Imagine a runner rounding third and heading for home, only to have a last minute rule change move the location of the plate. That’s roughly what happened to Marvin Miller’s chances of getting his long overdue recognition in baseball’s Hall of Fame”, commented Chris Isidore of CNNMoney, when baseball changed the mechanism by which executives are voted into the Hall of Fame.¹⁹² Until February of 2007, executives were considered for induction by a committee of all living Hall of Famers. In February of 2007 Miller came up just

¹⁸⁷ Frank Blackman, *Finally Feeling Like a Million Free Agent Pioneer Messersmith Doesn’t Miss Majors*, Chicago Tribune, November 3, 1986.

¹⁸⁸ The 1976 Agreement provided compensation for the loss of a free agent with an amateur draft choice. These amateur players were of little significance because college baseball was considerably less developed than football and basketball.

¹⁸⁹ Korr, *supra* note 42, at 197.

¹⁹⁰ Zimbalist, *supra* note 171, 22-23

¹⁹¹ Korr, *supra* note 42, at 230.

¹⁹² Chris Isidore, *Miller’s time? Don’t Count On It*, CNN Money, November 30, 2007.

short of election with 63 percent of the vote, a level of support that would likely increase as more and more players who benefited from Miller's work at the union became voting members. After this vote the Hall of Fame changed its voting mechanism to a 12 member panel made up mostly of current and former team owners and executives because three rounds of voting on executives had produced no elections.¹⁹³ This change means that Miller, who at the age of 90 still inspires fear and anger amongst baseball's club owners thirty years after the Messersmith and McNally Arbitration, will not be inducted into the Hall of Fame in his lifetime.¹⁹⁴

In the first vote with the new system, which occurred in December of 2007, Miller's former nemesis Bowie Kuhn and Dodger owner Walter O'Malley were elected to the Hall with Miller receiving only three votes. After the vote Miller responded: "I think it was rigged, but not to keep me out. It was rigged to bring some of these in . . . It's demeaning, the whole thing, and I don't mean just to me. It's demeaning to the Hall and demeaning to the people in it," he said. Indeed this latest election might reflect least the sentiment of the great players who make up the Hall of Fame. In the February 2007 vote, the last round conducted under the old voting system, Kuhn received only 17 percent of the vote compared to Miller's 63 percent.¹⁹⁵

Despite his exclusion from the Hall of Fame, Miller's place in baseball history is of little doubt. Reactions from former baseball greats to Miller's exclusion says it all. Hank Aaron said: "Marvin Miller should be in the Hall of Fame if the players have to break down the doors to get him in." Tom Seaver exclaimed: "Marvin Miller's exclusion from the Hall of Fame is a national disgrace." Joe Morgan said: "They should vote him in and then apologize for making him wait so long." In the estimation of legendary broadcaster Red Barber, "Marvin Miller, along with Babe Ruth and Jackie Robinson, is one of the two or three most important men in baseball history."¹⁹⁶ Miller helped to bring about the economic system that has brought baseball to its current level of popularity and profitability. The prospect of free agency helped to attract a generation of talent to baseball who may have chosen another sport without it. It also motivated teams to make more concerted efforts in player development and to expand international scouting operations to avoid paying for costly free agents. Few can argue with the positive affects on the game of the resulting influx of talent from Latin America and Japan in terms of quality of play and the expansion of Major League Baseball's appeal as an international brand.¹⁹⁷ Sportswriter Tim Marchman writes that Miller's "assault on baseball's feudal structure led to a vastly improved and much more competitive game, which led to more fans being willing to spend money on it, which led to owners making greater profits and baseball becoming an even more integral part of the culture."¹⁹⁸

Conclusion

¹⁹³ *Id.*

¹⁹⁴ Stephen Brunt, *Miller's Exclusion a Sin*, The Globe and Mail, December 6, 2007.

¹⁹⁵ *Kuhn, O'Malley and 3 Others Elected to Baseball of Fame; Marvin Miller Snubbed*, The Bismarck Tribune, December 4, 2007.

¹⁹⁶ Allan Barra, *Hall of Shame*, The Villiage Voice, November 27, 2007.

¹⁹⁷ Isidore, *supra* note 182.

¹⁹⁸ Tim Marchman, *If Anyone Should Be In the Hall, It's Marvin Miller*, The New York Sun. Times, February 28, 2007.

Baseball's historic reserve system stood for over one hundred years because of the game's unique position in America's collective consciousness. The federal courts, congress, and even the ballplayers themselves believed in the necessity of baseball's reserve system. Club owners were able to conflate the preservation of baseball's long term competitive balance with restrictions on players movement, while in reality the only thing they were preserving were their own profits. The hiring of Marvin Miller, a skilled and adept labor negotiator, by the Major League Baseball Players Association was a watershed for labor relations in professional sports. The years that followed the Messersmith decision demonstrated that the most visible effect of free agency is that it has forced owners to share their ever expanding profits with the players whose talent fill the stadiums and excite the viewers of locally and nationally broadcast games. As large market teams earn more money from their local television contracts and income distribution continues to widen in major league baseball owners may be forced to reconsider it current revenue sharing and luxury tax regimes. Despite these concerns baseball's viability is in little doubt. Fans have witnessed the changing face of the game through rising salaries, strikes, and steroids but in spite of it all Major League Baseball is bringing in record profits. In 2007 revenues were expected to be \$6 billion, nearly eclipsing the amount brought in by the NFL.¹⁹⁹ It may be that the emotional connection many fans feel towards the game of their youth, that club owners exploited to preserve the reserve system for over a hundred years, is the reason professional baseball has resiliently remained America's pastime.

¹⁹⁹ *Record Profits For Major League Baseball* available at:
http://www.1440wallstreet.com/index.php/site/comments/record_profits_for_major_league_baseball/