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**SPORTS IN THE COURTS: HOW SPORTS  
REFERENCES STRENGTHEN WRITTEN  
ADVOCACY AND JUDICIAL OPINIONS (PART I)**

**Douglas E. Abrams**

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# Sports in the Courts: How Sports References Strengthen Written Advocacy and Judicial Opinions (Part I)

By Douglas E. Abrams

Early in the morning of July 23, 2000, four police officers responded to a call about a melee at a home in Brigham City, Utah. Through a screen door and windows, the arriving officers witnessed a violent fight and a victim spitting blood into the kitchen sink. The officers opened the door, announced their presence, entered the kitchen, quelled the altercation, and made arrests.

In 2006, in *Brigham City v. Stuart*, the Supreme Court unanimously held that the Fourth Amendment permitted the officers to enter the home without a warrant because they had an objectively reasonable basis for believing that an occupant was seriously injured, or imminently threatened with serious injury.<sup>1</sup> Writing for the Court, Chief Justice John G. Roberts, Jr. reinforced the holding with a sports analogy: “The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.”<sup>2</sup>

*Brigham City’s* analogy was unprompted because no reference to sports appeared anywhere in the briefs of either party or any *amicus*.

Chief Justice Roberts – the captain of his high school football team years earlier and thus conversant in athletics<sup>3</sup> – employed a rhetorical technique increasingly used by the

Justices and lower federal and state judges since the early 1970s. In cases with no claims or defenses concerning sports, written opinions frequently help explain substantive or procedural points with references to the rules or terminology of sports familiar to many Americans.

This two-part article explores the growth of this familiar rhetorical technique in the courts. Part I here discusses the proliferation of sports references in Supreme Court opinions, and begins discussing that proliferation in the lower federal and state courts. In the next issue of *Precedent*, Part II finishes discussing sports references in lower courts, and concludes by describing how these references invigorate formal writing by advocates and judges.

Writers crafting an argument express themselves best when they “front load,” that is, when they orient readers by stating the conclusion at the outset, before proceeding to analysis and resolution. My conclusion here, which I will articulate more fully in Part II, is that careful use of sports references normally strengthens written advocacy and judicial opinions by enhancing the reader’s understanding, but that the particularly high stakes at issue in some cases may make a sports reference seem inconsistent with the dignity and prestige that sustain the judicial role.

Such “high-stakes” cases incompatible with sports references are few. The example set by the Supreme Court itself, where high-stakes cases are the norm, should continue to encourage

careful use of sports references.

The word “sports” may conjure images of fun-and-games, assertedly incompatible with courtroom formality in the administration of justice. Careful use of sports references in written advocacy and judicial opinions, however, recognizes that amateur and professional sports is “one of the most powerful social forces in our country,”<sup>4</sup> indeed “a microcosm of American society”<sup>5</sup> with “special significance in our culture,”<sup>6</sup> and thus with a special capacity to forge a bond of understanding between writer and reader. Advocates write for an audience distinct from the audience that judges seek to reach, but the bond remains constant for advocates and judges alike.

“Legal briefs are necessarily filled with abstract concepts that are difficult to explain,” advises Justice Antonin Scalia. “Nothing clarifies their meaning as well as examples” because examples “cause the serious legal points you’re making to be more vivid, more lively, and hence more memorable.”<sup>7</sup> For advocates and judges alike, examples drawn from sports are favorites because they are particularly effective vehicles to (as Justice Scalia advises) “Make it interesting.”<sup>8</sup>

## SPORTS REFERENCES IN HISTORICAL PERSPECTIVE

Before the early 1970s, sports references in Supreme Court and lower federal and state court opinions were not unknown, but remained quite rare. A court might discuss

legal “ground rules,” might liken intricate argumentation or analysis to the contortions characteristic of “gymnastics,” or might declare specified conduct or arguments “out of bounds.”<sup>9</sup> Few decisions, however, ventured beyond these core sports terms that were already ingrained in the American lexicon.<sup>10</sup>

The flowering of sports references in federal and state judicial opinions began in earnest shortly after the Supreme Court handed down *Flood v. Kuhn* in 1972.<sup>11</sup> When the St. Louis Cardinals traded Curt Flood to the Philadelphia Phillies after the 1969 season without his consent, he wrote to Baseball Commissioner Bowie Kuhn, objecting that he was not “a piece of property to be bought and sold irrespective of my wishes.”<sup>12</sup> When the letter fell on deaf ears, the three-time all-star and seven-time Gold Glove winner filed an antitrust suit challenging the reserve clause in Major League baseball’s standard contract. The reserve system bound a player to his first club for his entire career unless the team traded him – that is, assigned his contract – and bound the player permanently to the new club until a future unilateral trade.

*Flood* acknowledged that professional baseball is a business engaged in interstate commerce, but held that Major League baseball’s reserve system enjoyed an exemption from the federal antitrust laws unless Congress overruled prior Supreme Court decisions that had conferred the exemption. Justice Harry A. Blackmun’s majority opinion opened with a reverential history of the “colorful days” of baseball, climaxed by a list of 88 former Major League stars who “have sparked the diamond and its environs and . . . provided

tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season.”<sup>13</sup> Before the Court presented the facts and turned to legal analysis, the page-long list closed with this solemn disclaimer: “These are names only from earlier years. By mentioning some, one risks unintended omission of others equally celebrated.”<sup>14</sup>

Justice Blackmun’s odyssey into baseball lore was an unabashed fan’s pure dictum in a high-visibility decision awaited not only by baseball fans, but also by fans of other sports that enjoyed no judicially-conferred antitrust exemption. *Flood’s* visibility grew when arbitrator Peter Seitz struck down baseball’s reserve system in the case of pitchers Andy Messersmith and Dave McNally in 1975, four years before the Bob Woodward-Scott Armstrong best-seller, *The Brethren*, provided an intimate account of the justices’ deliberations leading to what the two authors called *Flood’s* “ode to baseball.”<sup>15</sup>

So prominent an ode in so prominent a decision by the nation’s highest court helped signal an expanded role for sports references in official judicial writing, not only in cases that (such as *Flood* itself) raised claims directly related to sports, but also in other cases (such as *Brigham City v. Stuart*) in which a sports reference might help a court explain salient points of law or fact. Lower court judges typically examine Supreme Court opinions in the advance sheets, and *Flood* lent an aura of respectability to sports references that the justices themselves and the lower courts have embraced in their official writing ever since.<sup>16</sup>

*Flood* reached the United

States Reports at a particularly opportune moment for cultivating this respectability. Since the early 1970s, judges have had greater reason than ever before to presume their readers’ familiarity with a wide range of sports and their respective vocabularies. Today’s judges, lawyers and litigants grew into adulthood amid an unprecedented saturation of professional and amateur sports in broadcasting, the print media, and more recently on the Internet. Newspapers, conventional radio, and network television now coexist with, and frequently face eclipse by, all-sports radio stations, cable and satellite television channels, interactive blogs, and other outlets that provide instantaneous around-the-clock access to sports, teams and star players. “[T]hrough their pervasive presence in the media,” says the U.S. Court of Appeals for the Sixth Circuit, “sports . . . celebrities have come to symbolize certain ideas and values in our society and have become valuable means of expression in our culture.”<sup>17</sup>

In 1976, just four years after *Flood*, writer James A. Michener correctly observed that “[s]ports have become a major force in American life.”<sup>18</sup> For most Americans, immersion in (as the U.S. Court of Appeals for the Third Circuit put it) the nation’s “sports-dominated culture” begins at a tender age.<sup>19</sup> Almost half the nation’s children – approximately 30 to 35 million – participate each year in at least one public or private organized sports program.<sup>20</sup> Nearly all children have first-hand experience playing organized sports before they turn 18, and no other activity outside the home or school reaches so many boys and girls from coast to coast.<sup>21</sup>

Play continues beyond childhood

and adolescence with so-called “carryover,” or “lifetime,” sports conducive to active participation throughout adulthood.<sup>22</sup> With influential public and private voices advocating the demonstrated health benefits of vigorous lifelong physical activity, sports today attracts not only adult spectators drawn to mass public entertainment, but also adult participants drawn to gymnasiums and playing fields nationwide.<sup>23</sup>

Sports references ingrained in our national culture find a comfortable place in written advocacy and opinion-writing because courts, like athletic competitions, apply an adversary model that produces winners and losers in contests monitored by neutral decision-makers who apply established rules and procedures. Judges frequently invoke sports to illuminate core values inherent in the adversary system on the playing field or in the court room, such as the “level playing field,” an ideal of fair play central to athletic competition and to the quest for equal justice under law.<sup>24</sup>

Images of the level playing field in written judicial opinions produce corollary images similarly grounded in adherence to the rules of the game. Like officials who evenhandedly apply the rule book to the particular circumstances of a ballpark or other sports venue, judges frequently remind readers that they apply procedural and substantive “ground rules.”<sup>25</sup> Similar to baseball players, litigants “may play ‘hard ball,’ but ‘foul ball’ is . . . totally unacceptable.”<sup>26</sup> In civil and criminal proceedings alike, the lawyers’ lack of civility can degenerate unacceptably into “mud wrestling.”<sup>27</sup> When sharp practice attempts an “end run” around a rule or obligation,<sup>28</sup> the

offending party or offending lawyer should be “thrown for a loss,”<sup>29</sup> the setback that sometimes happens in football to a ball carrier who seeks to evade tacklers by cutting a wide path around his own end. The parties’ arguments and conduct must remain “in bounds”<sup>30</sup> because stepping “out of bounds” invites sanction in court, as it does on the playing field in many sports.<sup>31</sup>

Courts since *Flood* have moved well beyond these core values. In the Supreme Court and the lower federal and state courts alike, the array of sports references that lace written judicial opinions today is nearly as broad as the kaleidoscope of sports that captivate so many Americans.

## SPORTS REFERENCES IN SUPREME COURT OPINIONS

Chief Justice Roberts’ analogy to boxing and ice hockey in *Brigham City* demonstrates the growing comfort with sports references that has been evident in Supreme Court opinion-writing since the early 1970s.<sup>32</sup> In *Engquist v. Oregon Dep’t of Agriculture* in 2008, golf helped the Court reject the employment discrimination claim on the ground that, as Chief Justice Roberts wrote for the majority, “treating seemingly similarly situated individuals differently in the employment context is par for the course,” that is, the performance expected.<sup>33</sup> In *Metropolitan Life Insurance Co. v. Glenn* a week later, Justice Stephen G. Breyer’s majority opinion specified that a product “falls below par” when it fails to meet expectations.<sup>34</sup>

In 2007, *Morse v. Frederick* upheld a high school principal’s suspension

of a student who unfurled a banner (“BONG HiTs 4 Jesus”) at a school-sponsored and school-supervised event on a public street near the campus.<sup>35</sup> The Court found that the principal had reasonably concluded that the banner advocated illicit drug use. Football accented Justice John Paul Stevens’ dissenting argument that the Court’s First Amendment speech precedents also required proof that the student’s conduct interfered with the school’s educational mission. “[I]nstead of demanding that the school make such a showing,” wrote Justice Stevens for himself and Justices Souter and Ginsburg, “the Court punts,” and thus avoids confronting a difficulty, much as a football team avoids disadvantageous field position by kicking the ball down field and yielding possession to the opposition.<sup>36</sup>

In *Federal Election Commission v. Wisconsin Right to Life, Inc.* (WRL) in 2007, the Court held that, as applied, a congressional ban on use of corporate funds to finance “electioneering communications” during pre-federal election periods violated WRL’s free speech rights.<sup>37</sup> The decision turned on whether WRL’s advertising constituted campaign advocacy within the ban, or issue advocacy outside the ban. Chief Justice Roberts found the question close, but concluded that WRL was entitled to the advantage that base runners enjoy on a close play in baseball: “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”<sup>38</sup>

In *Randall v. Sorrell* in 2006, the Court held that two Vermont statutory provisions – one limiting amounts that candidates for state office could spend on their own campaigns, and the other limiting campaign

contributions by other entities – violated the First Amendment’s free speech guarantee.<sup>39</sup> In the lower courts, a central issue was whether the state legislature sought to help insulate incumbents from effective opposition at the polls. Applying a basketball term for an easy offensive score that overpowers the opposition, dissenting Justice Stevens cited district court findings in an unrelated case that no Albuquerque, New Mexico mayor had been re-elected in the 25 years since that city set campaign spending limits. The uninterrupted pattern of defeat, he wrote, “cuts against the view that there is a slam-dunk correlation between expenditure limits and incumbent advantage.”<sup>40</sup>

In 1994, *NLRB v. Health Care and Retirement Corp.* held that under the National Labor Relations Act, the company’s nurses were not “employees” with the right to organize and engage in collective bargaining, but rather were “supervisors” who directed the work of aides.<sup>41</sup> Dissenting Justice Ruth Bader Ginsburg concluded that the nurses spent little time directing aides but, like baseball or softball players who bat in a teammate’s place, would “pinch-hit for aides” when necessary to assure proper patient care.<sup>42</sup>

In 1992, the Justices sparred about boxing in *R.A.V. v. City of St. Paul*, which struck down a city hate-crime ordinance that prohibited display of a symbol that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>43</sup> The majority found impermissible viewpoint discrimination because speakers favoring tolerance in the five specified matters would be treated differently than their opponents. The city “has no such authority,” wrote Justice Scalia,

“to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules” – the basic rules of boxing published in 1867 by John Graham Chambers under the sponsorship of John Sholto Douglas, the Marquis of Queensbury.<sup>44</sup> Concurring Justice Stevens found no viewpoint discrimination because, “[t]o extend the Court’s pugilistic metaphor, the St. Paul ordinance simply bans punches ‘below the belt’ – by either party,” that is, blows outside the rules because they confer unfair advantage by striking at particular vulnerability.<sup>45</sup>

In *Peretz v. United States*, decided in 1991, the Court held that the Federal Magistrates Act authorizes the district court to permit magistrate judges to conduct *voir dire* in felony cases with the litigants’ consent.<sup>46</sup> The majority distinguished a prior decision of the Court, which had withheld this authority where the parties had not consented.<sup>47</sup> Writing for himself and Justices White and Blackmun, dissenting Justice Thurgood Marshall argued that the prior decision depended on construction of the Act and not on absence of consent, and he accused the majority of “an amazing display of interpretive gymnastics” to peg the outcome on a defendant’s consent.<sup>48</sup> The justices have drawn analogies to “gymnastics,” a sport marked by agile bodily contortions, in more than a dozen decisions since *Peretz*.<sup>49</sup>

*Jones v. Thomas*, decided in 1989, arose from a Missouri prosecution for felony-murder and attempted robbery.<sup>50</sup> After it became apparent that the trial court had imposed two consecutive sentences where state law permitted only one, a state court vacated the shorter sentence, which the defendant had already served,

and credited time already served against the longer sentence. The Court held that the procedure “fully vindicated” the defendant’s Fifth Amendment double jeopardy rights because the defendant did not suffer greater punishment than the legislature intended.<sup>51</sup> Justice Scalia’s dissent likened the majority’s rationale to excusing a batter’s failure in baseball: “A technical rule with equitable exceptions is no rule at all. Three strikes is out. The state broke the rules here, and must abide by the result.”<sup>52</sup>

In *Owen v. City of Independence*, decided in 1980, the Court held that when municipalities such as the Missouri city are sued under 42 U.S.C. § 1983 for violating federally protected rights, they may not claim qualified good faith immunity from liability.<sup>53</sup> To bolster his argument that strict liability would unreasonably subject local governments to damages for conduct that was reasonable when performed, dissenting Justice Lewis F. Powell, Jr., joined by Chief Justice Burger and Justices Stewart and Rehnquist, evoked images of the circuitous route characteristic of some downhill skiing events. Strict liability, Justice Powell wrote, “converts municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable.”<sup>54</sup>

In 1978, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, football helped explain the Court’s holding that the Administrative Procedure Act’s notice-and-comment formula “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.”<sup>55</sup> Writing for the majority, Justice William H. Rehnquist

noted that the court of appeals had imposed greater procedures only after reviewing the record of the Vermont Yankee rulemaking proceeding itself, a vantage that he said permitted “Monday morning quarterbacking,” the second-guessing that happens when a writer or fan questions athletic strategy or decision-making from the relative comfort of hindsight.<sup>56</sup>

In 1973, in *United States v. Little Lake Misere Land Co.*, the Court held that Louisiana state legislation did not affect later acquisitions of land made by the United States under the federal Migratory Bird Conservation Act.<sup>57</sup> Chief Justice Warren E. Burger’s majority opinion recited that the lawsuit proceeded to conclusion in the federal courts, but only after the company first filed in the Louisiana courts, and thus, like a track runner who leaves the block before the starting gun sounds, committed a “false start.”<sup>58</sup>

## SPORTS REFERENCES IN LOWER COURT OPINIONS

*Little Lake Misere Land Co.* began an uninterrupted post-*Flood* embrace of sports references in Supreme Court opinions, setting an example that has led lower federal and state courts also to invoke references drawn from a wide range of sports that help shape American culture. Some of these lower-court sports references are ones that have also appeared in Supreme Court decisions.<sup>59</sup> With their significantly larger caseloads, however, lower courts also have occasion to use sports references that have not yet appeared in the United States Reports.

### Football

A 2009 Harris Interactive survey found that professional football remains America’s favorite sport; 31 percent of Americans who follow one or more sports ranked professional football at the top.<sup>60</sup> In *Cabell Huntington Hospital, Inc. v. Shalala*, the U.S. Court of Appeals for the Fourth Circuit plumbed this widespread popularity when it held that the U.S. Secretary of Health and Human Services had improperly calculated disproportionate-share payments under the Medicare statute.<sup>61</sup> The key section distinguished between patients who were “eligible” for Medicaid benefits and patients who were “entitled” to them, terms that the Secretary contended were interchangeable. The court of appeals rejected the contention. “In a football game,” the panel explained, “wide receivers are *eligible* to receive the ball from the quarterback, but none of them is *entitled* to receive it.”<sup>62</sup>

Other lower court opinions describe litigation strategy (like a football coach’s strategy) as the “game plan,”<sup>63</sup> which may be found in a “playbook.”<sup>64</sup> Parties may engage in preliminary “scrimmaging,” a term referring to exhibition or practice games, usually in amateur leagues, that do not count in league standings in football and other sports.<sup>65</sup> When opposing parties stake out their respective positions, they (like the offensive and defensive units of opposing football teams) assume positions at the “line of scrimmage.”<sup>66</sup> Similar to a running back or pass receiver when the quarterback turns to him, a party or its representative who takes the initiative “carries the ball,”<sup>67</sup> even while others “stand on the sidelines.”<sup>68</sup>

The U.S. Court of Appeals for the

Third Circuit has said that “trial judges are somewhat like quarterbacks in that they have a broad range of options for their game plan.”<sup>69</sup> Appellate courts grant particular deference to trial court fact-finding because “absent an evidential vacuum or clear error, the final judgment . . . must come from the judicial gridiron, and not from armchair quarterbacks’ reading of the game in Sunday’s paper.”<sup>70</sup> When the trial court rules on whether to admit assertedly cumulative evidence, the court must decide whether the proffer would aid the jury, or whether “in the parlance of the gridiron, [it] will just be piling on,” akin to a late tackle on an opposing ball carrier who has already been brought down.<sup>71</sup>

Like a quarterback who seeks a seemingly miraculous victory by throwing a long desperation pass to a teammate heavily covered near or beyond the goal line in the waning seconds, a party who faces impending defeat in court may throw a “Hail Mary pass” by pressing a contention or argument whose success appears remote but not impossible.<sup>72</sup> Uncertainty late in the legal proceeding may lead to “sudden death overtime,” the period played when teams remain tied at the end of regulation time in football and other sports; “death” is “sudden” because the first team to score and break the tie wins.<sup>73</sup> When the court enters final judgment in a party’s favor, “[a] win, whether by four touchdowns or a last second field goal, is a win.”<sup>74</sup>

### Baseball

*a. The rules and conduct of the game*

“The one constant through all the years,” said James Earl Jones (“Terence Mann”) in the 1989 movie classic, *Field of Dreams*, “has been baseball. America has rolled by like an

army of steamrollers. It's been erased like a blackboard, rebuilt, and erased again. But baseball has marked the time. This . . . game: it's a part of our past . . . It reminds us of all that once was good, and that could be again."<sup>75</sup>

From this profound national heritage, judges “often draw on baseball analogies.”<sup>76</sup> In *Linton v. Missouri Veterinary Medical Board*, for example, the Supreme Court of Missouri rejected the equal protection challenge of an applicant who was denied a license after she failed the licensing examination three times in Missouri and once in Illinois, though her Illinois grade on an examination identical to Missouri's exceeded Missouri's passing grade.<sup>77</sup> The Missouri licensing statute provided applicants only three tries to pass.

Judge Michael A. Wolff, dissenting in *Linton*, concluded that the defendant board had no rational basis for denying the applicant a license: “There is something inherent in the American culture about three strikes, probably because of our national pastime. . . . [E]ven in baseball, a batter is allowed more than three swings because a foul ball, which normally counts as a strike, does not count when it occurs on the third strike. Thus a batter may swing at several pitches before getting a hit, and it is no less a hit than if it had occurred on the first or second swing. . . . [A] pass on the fourth try is no less a hit than a passing grade on the first try. The analogy to baseball is not entirely apt, because after three strikes, the batter is only ‘out’ – not banned for eternity.”<sup>78</sup>

By helping another person, an individual or entity “goes to bat for” the person.<sup>79</sup> A party that takes the initiative “steps up to the plate,” as a batter does when he gets ready to face the pitcher.<sup>80</sup> A party that suffers a default

judgment without having received constitutionally sufficient notice is “called out on strikes without ever being allowed a turn at bat.”<sup>81</sup> When a party fails to satisfy a threshold requirement for relief, the party fails to “get out of the batter’s box,”<sup>82</sup> or else to reach “first base.”<sup>83</sup> When a court moves toward decision after more than one hearing, the judges “step back into the batter’s box, having allowed one to go by us and tipping another, in hopes that on our third and final swing we can avoid a judicial strike-out.”<sup>84</sup>

By advancing confusing or unexpected facts or arguments, a party or witness throws a curve ball, similar to the pitch designed to confuse a batter.<sup>85</sup> Parties showing apparent restraint may “bunt,”<sup>86</sup> but parties seeking immediate advantage with strong claims or defenses “swing for the fences,” like their baseball counterparts trying to hit a home run.<sup>87</sup> An experienced police officer may perceive a casual street encounter as a drug transaction, “just as a trained observer on the baseball diamond might be able to point out the bunt sign among an array of otherwise meaningless scratches and touches by the third base coach.”<sup>88</sup>

A party without standing suffers dismissal because “[t]o score a home run the plaintiff must first have touched first base.”<sup>89</sup> To show a substantial likelihood of success on the merits necessary to establish entitlement to a preliminary injunction, the movant “need not establish that he can hit a home run, only that he can get on base, with a possibility of scoring later.”<sup>90</sup> A party that enjoys overwhelming success before settlement or final judgment is akin to a batter who hits a “home run”<sup>91</sup> or a “grand slam”<sup>92</sup> with the bases loaded, or to a pitcher who turns in a “perfect game”<sup>93</sup> by retiring all 27 batters without allowing any to

reach base.

By focusing on the facts and claims, the parties and the court keep their “eyes on the ball,” an offensive and defensive fundamental in baseball and several other sports.<sup>94</sup> A judicially-created rule that shortcuts the ordinary method for calculating entitlement to relief “essentially allows the claimant, after successfully reaching first base, to be waved home and exempted from traversing to second and third bases, thus improperly converting a single into a home run”; as base runners know, they can be called out for leaving the base path, or for failing to touch a base on the way to the next.<sup>95</sup> A party that selects among reasonable alternatives executes a “fielder’s choice,” similar to the option enjoyed by the defensive team which, with one or more players on base, may get an out at any base to which an offensive player seeks to advance.<sup>96</sup>

Like a ballplayer who misses part of pre-season conditioning before Opening Day, a party making a belated argument may suffer for being “late to spring training.”<sup>97</sup> A party’s offer or estimate within a particular range may present a “ballpark figure.”<sup>98</sup> By seeking a continuance or otherwise postponing action, a party requests a “rain check,” similar to the substitute pass which permits ticket holders to attend a future makeup game when inclement weather causes postponement of today’s game.<sup>99</sup>

A party’s relatively inconsequential act, or its ineffective argument or action or request, may be “bush league,” that is, worthy only of a lower minor league game and not of major league competition.<sup>100</sup> An odd or unsupported argument or request may come “out of left field,”<sup>101</sup> but a well-crafted argument or judicial opinion “touches all the bases.”<sup>102</sup> When litigants approach

finality with the outcome in doubt, they may enter the “late innings,” the “ninth inning,” or may even approach “extra innings,” which opposing baseball teams play to break a tie at the end of the game.<sup>103</sup>

The court may call a judicial “infield fly rule” to thwart a party’s effort to profit from sharp tactics. (In baseball, the infield fly rule applies when there are less than two outs and a force play is possible at third base or home plate; so that the infielder cannot intentionally drop a fly ball and get an easy double play or triple play, the umpire calls the batter automatically out if the fly ball remains in fair territory and, in the umpire’s judgment, could be caught by the infielder with ordinary effort.)<sup>104</sup>

## b. The umpire

“Baseball fits America well,” said former Major League Baseball Commissioner A. Bartlett Giamatti, “because it expresses our longing for the rule of law while licensing our resentment of law givers” – the umpires.<sup>105</sup> “Much like an umpire in a baseball game who does not make the rules defining the strike zone but must only call the balls and the strikes,” says the Tennessee Court of Appeals, “the jurist has the duty to apply the laws as written.”<sup>106</sup> “[A] judge’s job,” adds the Wisconsin Supreme Court, “is like an umpire’s, . . . to make calls according to the rules, not according to the voices of a partisan crowd.”<sup>107</sup>

In *Haluck v. Ricoh Electronics, Inc.*, the California Court of Appeal rejected the defendants’ argument that the trial judge’s misconduct did not amount to reversible error because the misconduct affected both sides equally.<sup>108</sup> The panel likened the argument to “saying a baseball team could not complain if the umpire decided to call balls and

strikes with his eyes closed, as long as he kept them closed for both teams.”<sup>109</sup>

In *Canady v. Wal-Mart Stores, Inc.*,<sup>110</sup> a divided panel of the U.S. Court of Appeals for the Eighth Circuit affirmed summary judgment for the defendant store in an employment discrimination suit that arose from a white assistant store manager’s repeated use of racial slurs in the presence of the black employees and co-workers. One judge argued that the assistant manager’s apology for one early slur had no legal significance. “If a baseball player harassed an umpire over a called strike, thereafter apologized, but once again swore at the umpire, there can be little question that the umpire would eject the ballplayer from the game.”<sup>111</sup>

In *Huffaker v. Ramella*, the Ohio Court of Appeals reversed the trial court decision that had shortened the filing period provided in court rules; the decision below meant parties had “fallen victim to the old hidden ball trick typically practiced by a first baseman after an opponent has come up with a single. . . . [But] the tag was made by someone comparable to the first base umpire, *i.e.*, the judge, instead of the first baseman.”<sup>112</sup>

## Basketball

Even before President Barack Obama “shot hoops” before television cameras during the 2008 campaign and then became the game’s “first fan,” the National Basketball Association had moved “from a struggling sports league to an era-defining cultural phenomenon.”<sup>113</sup> Lower courts have taken notice. Judges have likened a party’s aggressive strategy, for example, to a “full-court press,” a basketball strategy used by the defensive team to pressure the offensive team up and down the court.<sup>114</sup> A candidate

who sought to disqualify a potential opponent from the ballot on a technicality was “trying to win the championship on a technical foul rather than taking the opposing team to the hoop in a spirited election contest. Unfortunately, you can win on a technical foul.”<sup>115</sup>

“A good judge in a trial is like a good referee in a basketball game; when he sees a foul committed, he blows the whistle and tries to right the wrong.”<sup>116</sup> In *Tejada v. Dubois*, the trial judge and defense counsel had provoked each other throughout the acrimonious trial, but the U.S. Court of Appeals for the First Circuit declined to apportion blame.<sup>117</sup> The panel found itself “in much the same position as a basketball referee who sees a player throw an elbow at an adversary but cannot tell if the blow was the initial foul or a retaliatory strike. . . . But unlike the basketball referee, [the court of appeals had] no need to decide whether to assess a single foul or a double foul” because the overall acrimony prejudiced the defendant’s effort to present an effective defense.<sup>118</sup>

“[A] stakeholder is to a ‘stake’ he controls as a basketball referee is to a jump-ball. He holds it, but he does not claim it for his own. Rather, he willingly allows the rival contestants to fight for it.”<sup>119</sup> In *Blackfeet National Bank v. Nelson*, the U.S. Court of Appeals for the Eleventh Circuit rejected the plaintiff bank’s claim that because the Federal Deposit Insurance Corporation fully insured an unmaturing certificate of deposit (to \$100,000) up to its maturity date, the CD was a bank deposit that the plaintiff could sell.<sup>120</sup> “We cannot decide the nature of this instrument at its maturity date any more than a referee could decide the winner of a basketball game at halftime.”<sup>121</sup>

In *State v. Weatherspoon*, a concurring judge observed that the need to justify race-neutral bases for peremptory strikes of potential jurors would put “pressure on trial judges, as there is now on basketball referees . . . to ‘roughly equalize the foul calls.’”<sup>122</sup> As basketball fans know, a team playing particularly rough or dirty should accumulate more fouls than the opposition, and “evening up” the number of foul calls for the sake of appearance or competitive parity may be the sign of poor refereeing.

**Next issue: Sports references in the lower federal and state courts (continued); how advocates and judges should use sports references in written advocacy and opinions.**

*Much of this two-part article originally appeared in 17 VILLANOVA SPORTS AND ENTERTAINMENT LAW JOURNAL 1 (2010). Reprinted by permission. Fuller notes appear in the LAW JOURNAL article.*

## ENDNOTES

1 See *Brigham City v. Stuart*, 547 U.S. 398 (2006).

2 *Id.* at 401.

3 See Elisabeth Bumiller, *An Interview By, Not With, the President*, N.Y. TIMES, July 21, 2005, at A1.

4 Brian Lampman, *Conclusion: Sport, Society, and Social Justice*, in LEARNING CULTURE THROUGH SPORTS 255, 257 (Sandra Spickard Prettyman & Brian Lampman eds., 2006).

5 KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA 16-19 (1996).

6 *United States v. Shortt*, 485 F.3d 243, 250 (4th Cir. 2007).

7 ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 111, 112 (2008).

8 *Id.* at 112. See also, e.g., RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 9.2, at 152 (rev. 1st ed. 1996) (“It is not unconstitutional to be interesting.”).

9 See, e.g., *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 702 (1967) (“ground rules”); *Divine v. Universal Sewing Mach. Motor Attachment Co.*, 38 S.W. 93, 98 (Tenn. Ct. Chan. App. 1896) (same); *Nippert v. Richmond*, 327 U.S. 416, 423 (1946) (“mental gymnastics”); *Hitaffer v. Argonne Co.*, 183 F.2d 811, 816 (D.C. Cir. 1950) (“legalistic gymnastics”); *Williams v. United States*, 3 App. D.C. 335, 341 (D.C. Cir. 1894) (“legal gymnastics”); *Savage v. Prudential Life Ins. Co. of America*, 121 So. 487, 489 (Miss. 1929) (“mental and legal gymnastics”); *Kellum v. State*, 1 So. 174, 174 (Miss. 1886) (“technical gymnastics”); *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952) (“out of bounds”); *Diamond Cab Co. v. Jones*, 174 S.E. 675, 678 (Va. 1934) (same).

10 See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting) (discussing “‘sporting contest’ thesis that government must ‘play the game fairly’”); *Brannan v. Stark*, 342 U.S. 451, 470 (1952) (Black, J., dissenting) (“body blow”); *Patriarca v. United States*, 402 F.2d 314, 319 (1st Cir. 1968) (defense counsel “touched all the bases”); *Probst v. S. Stevedoring Co.*, 379 F.2d 763, 766 (5th Cir. 1967) (“fielder’s choice”); *NLRB v. Kohler Co.*, 351 F.2d 798, 801 (D.C. Cir. 1965) (“extra-inning game”); *Walton v. Owens*, 244 F.2d 383, 388 (5th Cir. 1957) (“ringside seat”); *Pa. Crusher Co. v. Bethlehem Steel Co.*, 193 F.2d 445, 447 (3d Cir. 1951) (“Every lad who has stood at home plate anxiously awaiting the pitcher’s delivery realizes that a foul ball will not bolster his batting average.”); *Premier-Pabst Sales Corp. v. Grosscup*, 12 F. Supp. 970, 971 (E.D. Pa. 1935) (“line of scrimmage”); *Smoky Mountains Beverage Co. v. Anheuser-Busch, Inc.*, 182 F. Supp. 326, 333 (E.D. Tenn. 1960) (comparing relationship between inexperienced businessperson and his experienced counterpart “to a green rookie baseball player going to the big leagues in spring training and undertaking to tell a major leaguer who was seasoned in the business how to play baseball”); *Abernethy v. Burns*, 173 S.E. 899, 900 (N.C. 1934) (*pro se* plaintiff “may not get to first base, but he is entitled to come to the bat”), *rev’d on other grounds*, 188 S.E. 97, 97 (N.C. 1936) (explaining that the plaintiff “did come to the bat . . . and was called out on strikes. He again appeals, complaining at the rulings of the umpire.”); *State v. Strong*, 196 N.E.2d 801, 809 (Ohio Ct. App. 1963) (“touch all the bases”); *T. C. Young Constr. Co. v. Brown*, 372 S.W.2d 670, 675 (Ky. Ct. App. 1963) (“home stretch of a trial”); *People ex rel. Dep’t of Pub. Works v. Lillard*, 33 Cal. Rptr. 189, 193 (Ct. App. 1963)

(judge’s “function . . . is much more than that of a plate umpire at a baseball game calling balls and strikes”).

11 407 U.S. 258 (1972).

12 *Id.* at 288-89 (Marshall, J., dissenting).

13 *Id.* at 261-63.

14 *Id.* at 263 n.3.

15 See, e.g., JOHN HELYAR, LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL 151-70 (1994); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 190 (1979).

16 Thank you to Dean Jim Devine for suggesting this thought.

17 *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 937-38 (6th Cir. 2003).

18 JAMES A. MICHENER, SPORTS IN AMERICA 9 (1976).

19 See *Butts v. Nat’l Collegiate Athletic Ass’n*, 751 F.2d 609, 612 (3d Cir. 1984) (quoting Linda Green, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U. L.J. 101, 137 (1984)).

20 See R.A. Demorest et al., *Pediatric Residency Education: Is Sports Medicine Getting Its Fair Share?*, 115 PEDIATRICS 28, 28-33 (2005); FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA’S CHILDREN IN BRIEF: KEY NATIONAL INDICATORS OF WELL-BEING xiv (2009).

21 See Bari Katz Stryer, et al., *A Developmental Overview of Child and Youth Sports in Society*, 7 CHILD & ADOLESCENT PSYCHIATRY N. AM. 697, 697 (1998); see also, e.g., *Having Fun is a High Priority*, USA TODAY, Sept. 10, 1990, at 14C (estimating that only one in 20 children has played no organized sport).

22 See, e.g., U.S. DEP’T OF HEALTH AND HUMAN SERVS., HEALTHY PEOPLE 2000, at 55 (1991); ROBERT S. GOTLIN, DR. ROB’S GUIDE TO RAISING FIT KIDS 5-12 (2008).

23 JULIE STURGEON & JANICE MEER, THE FIRST FIFTY YEARS 1956-2006: THE PRESIDENT’S COUNCIL ON PHYSICAL FITNESS AND SPORTS REVISITS ITS ROOTS AND CHARTS ITS FUTURE 56 (2006).

24 See, e.g., *Hunton & Williams v. U.S. Dep’t of Justice*, 590 F.3d 272, 278 (4th Cir. 2010); *Hawkins v. Budd Co.*, No. 86-674, 1987 U.S. Dist. LEXIS 3063, at \*1 (E.D. Pa. Apr. 15, 1987).

25 See, e.g., *Jones v. Bock*, 549 U.S. 199, 213 (2007); *Edwards v. Carpenter*, 529 U.S. 446, 454 (2000) (Breyer, J., concurring); *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 463 n.12 (1995); *United States v. Foster*, 783 F.2d 1082, 1086 (D.C. Cir. 1986); *Pac. & Sw. Annual Conference of United Methodist Church v. Super. Ct.*, 147 Cal. Rptr. 44, 53 (Ct.

App. 1978).

26 *Commonwealth v. Thomas*, 692 N.E.2d 97, 103 (Mass. App. Ct. 1998) (Brown, J., dissenting in part); *see also, e.g., United States v. Weiss*, 599 F.2d 730, 739 (5th Cir. 1979) (discussing “the government’s hardball game” in its dealings with defendant); *First Interstate Bank, N.A. v. Serv. Stores of Am., Inc.*, 128 F.R.D. 679, 680-81 (W.D. Okla. 1989) (discussing “stereotypical attitudes about the lawyer who plays ‘hardball’ at any cost. . .”).

27 *See Walker v. Packer*, 827 S.W.2d 833, 848 (Tex. 1992) (Gonzalez, J., concurring).

28 *See, e.g., Hemi Group, LLC v. City of N.Y.*, 130 S. Ct. 983, 995 (2010) (Ginsburg, J., concurring in part and concurring in the judgment); *Kucana v. Holder*, 130 S. Ct. 827, 839 n.17 (2010); *Maryland v. Louisiana*, 451 U.S. 725, 765 (1981); *Moore v. City of East Cleveland*, 431 U.S. 494, 525 (1977) (plurality opinion) (Burger, C.J., dissenting).

29 *Chappee v. Vose*, 843 F.2d 25, 33 n.5 (1st Cir. 1988).

30 *See, e.g., Cleveland-Scott v. Hillside House Mgmt. Corp.*, 853 N.Y.S.2d 251, 254 (Sup. Ct. 2008); *State v. Hartfield*, 252 S.E.2d 139, 141 (S.C. 1979).

31 *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 401 (1987); *Muhammad v. Holder*, 2010 WL 454716, at \*3 (5th Cir. Feb. 10, 2010); *United States v. Mespouledé*, 597 F.2d 329, 335-36 (2d Cir. 1979); *United States v. Bell*, 506 F.2d 207, 226 (D.C. Cir. 1974).

32 In addition to decisions discussed in the main text or cited above, *see, e.g., United States v. Oakland Cannabis Buying Coop.*, 532 U.S. 483, 491 n.4 (2001) (“we decline to set the bar so high”); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (“throw-in-the-towel approach”); *Comm’r of Internal Revenue v. Estate of Hubert*, 520 U.S. 93, 128-29 (1997) (Scalia, J., dissenting) (ballpark figure); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (“touch all the bases”); *Perry v. Leeke*, 488 U.S. 272, 282 (1989) (majority sought to avoid depriving prosecutors of opportunity to “punch holes” in defendant’s testimony; dissenting Justice Marshall argued that holding would help assure that “the prosecutor would be more likely to face the punch-drunk witness who the majority thinks contributes to the search for truth.”); *Lehr v. Robertson*, 463 U.S. 248, 253 (1983) (trial court had not “dropped the ball”); *Texas v. New Mexico*, 462 U.S. 554, 557-58 (1983) (“false starts”); *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 578 (1982) (Burger, C.J., concurring) (“out of bounds”).

33 128 S. Ct. 2146, 2148 (2008).

34 128 S. Ct. 2343, 2349 (2008).

35 551 U.S. 393 (2007).

36 *Id.* at 441.

37 551 U.S. 449 (2007).

38 *Id.* at 474.

39 *See* 548 U.S. 230, 237-38, 262 (2006).

40 *Id.* at 280 n.4 (Stevens, J., dissenting).

41 *See* 511 U.S. 571, 584 (1994).

42 *Id.* at 593 (Ginsburg, J., dissenting);

*see also Oregon v. Elstad*, 470 U.S. 298, 316 (1985) (“[p]olice officers are ill-equipped to pinch-hit for counsel”).

43 505 U.S. 377 (1992).

44 *Id.* at 392.

45 *Id.* at 435 (Stevens, J., concurring)

(emphasis in original).

46 501 U.S. 923 (1991).

47 *Gomez v. United States*, 490 U.S. 858 (1989).

48 *See Peretz*, 501 U.S. at 940-41 (Marshall, J., dissenting).

49 *See, e.g., Dada v. Mukasey*, 128 S. Ct. 2307, 2325 (2008) (Scalia, J., dissenting)

(“interpretive gymnastics”); *Bryan v. United States*, 524 U.S. 184, 203 (1998) (Scalia, J., dissenting) (“mental gymnastics”); *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 631 (1992) (White, J., concurring in part and dissenting in part) (“analytic gymnastics”).

50 491 U.S. 376, 378 (1989).

51 *Id.* at 381-82.

52 *Id.* at 396 (Scalia, J., dissenting).

53 *See* 445 U.S. 622, 657 (1980).

54 *Id.* at 665 (Powell, J., dissenting).

55 435 U.S. 519, 524 (1978).

56 *Id.* at 547.

57 412 U.S. 580 (1973).

58 *Id.* at 587.

59 *See, e.g., Hennessey v. City of Melrose*, 194 F.3d 237, 243 (1st Cir. 1999) (“pinch hit”); *Fuhrman v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) (“Monday Morning Quarterbacking”); *Lowenstein v. Sears Roebuck & Co.*, 2010 WL 583958, at \*6 (N.D. Cal. Feb. 16, 2010) (“below par”); *Dwyer v. Maine*, 2010 WL 180919, at \*6 (D. Me. Jan. 15, 2010) (slam dunk); *Polaroid Corp. v. Eastman Kodak Corp.*, 641 F. Supp. 828, 872 (D. Mass. 1985) (“slalom”); *Champlin’s Realty Assocs. v. Tikoian*, 989 A.2d 427, 453 n. 21 (R.I. 2010) (“tie goes to the runner”).

60 *See* HARRIS INTERACTIVE, PROFESSIONAL FOOTBALL CONTINUES DOMINANCE OVER BASEBALL AS AMERICA’S FAVORITE SPORT 3 (2009), available at [http://www.harrisinteractive.com/harris\\_poll/pubs/Harris\\_Poll\\_2009\\_01\\_27.pdf](http://www.harrisinteractive.com/harris_poll/pubs/Harris_Poll_2009_01_27.pdf) (last visited Mar. 15, 2010).

61 101 F.3d 984 (4th Cir. 1996).

62 *Id.* (emphasis by court).

63 *See, e.g., Reynolds v. Giuliani*, 506

F.3d 183, 209 (2d Cir. 2007) (Wallace, J., concurring); *People v. Alleyne*, 98 Cal. Rptr.2d 737, 739 (Ct. App. 2000); *Gen. Elec. Co. v. U.S. Nuclear Reg. Comm’n*, 750 F.2d 1394, 1403 (D.C. Cir. 1984); *Herrell v. Maddux*, 535 P.2d 935, 938 (Kan. 1975).

64 *See, e.g., Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 136 (2d Cir. 2010); *Nosik v. Singe*, 40 F.3d 592, 597 (2d Cir. 1994); *DMG, Inc. v. Aegis Corp.*, No. 7619, 1984 Del. Ch. LEXIS 597, at \*11 (Del. Ch. Ct. June 29, 1984).

65 *See, e.g., Airgas, Inc. v. Cravath, Swaine & Moore LLP*, 2010 WL 624955, at \*2 (E.D. Pa. Feb. 22, 2010); *Dayton Power & Light Co. v. Deagle-Anderson Dev., Inc.*, 1993 WL 333651 \*2 (Ohio Dist. Ct. App. Sept. 1, 1993); *State v. Griffin*, 392 A.2d 681, 682 (N.J. Super. Ct. 1978).

66 *See, e.g., Posadas de Puerto Rico Assocs. v. NLRB*, 243 F.3d 87, 93 (1st Cir. 2001); *Huffman v. Koppers Co.*, 616 A.2d 451, 457 (Md. Ct. Spec. App. 1992).

67 *See, e.g., Lear Siegler, Inc. v. Lehman*, 893 F.2d 205, 208 (9th Cir. 1989); *Corporacion Insular de Seguros v. Garcia*, 680 F. Supp. 476, 479 (D. P.R. 1988).

68 *Kent Motor Cars, Inc. v. Reynolds & Reynolds Co.*, 988 A.2d 594, 602 (N.J. Super. A.D. 2010); *Benedict v. Ark. Dep’t of Human Servs.*, 242 S.W.3d 305, 319 (Ark. Ct. App. 2006).

69 *Heyl & Patterson Int’l, Inc. v. F.D. Rich Hous. of the VI., Inc.*, 663 F.2d 419, 426-27 (3d Cir. 1981).

70 *Bel v. United States*, 452 F.2d 683, 688 (5th Cir. 1971); *see also, e.g., Wilson v. IBM*, 323 F. Supp. 2d 370, 374 (N.D.N.Y. 2004) (“This Court’s function is not to armchair quarterback business decisions. . .”).

71 *United States v. Brown*, 597 F.3d 399, 407 (D.C. Cir. 2010).

72 *See, e.g., Newdow v. Rio Linda School Dist.*, 1007 F.3d 1070 (9th Cir. 2010) (Reinhardt, J., dissenting); *McMorris v. TJX Cos.*, 493 F. Supp. 2d 158, 166 (D. Mass. 2007); *In re Lionel Corp.*, 722 F.2d 1063, 1072 (2d Cir. 1983) (Winter, J., dissenting).

73 *See, e.g., Lampasas v. Spring Ctr. Inc.*, 988 S.W.2d 428, 437 (Tex. Ct. App. 1999).

74 *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706, 714 (5th Cir. 1986) (Brown, J., dissenting).

75 Memorable Quotes for Field of Dreams, <http://www.imdb.com/title/tt0097351/quotes> (last visited Mar. 13, 2010).

76 *State v. Eason*, 629 N.W.2d 625, 661 (Wis. 2001) (Prosser, J., dissenting).

77 988 S.W.2d 513 (Mo. 1999).

78 *Id.* at 520.

79 See, e.g., *Vincent v. United Aerospace Workers*, 63 Fed. Appx. 919, 920 (7th Cir. 2003); *San Francisco County Democratic Ctr. Comm. v. March Fong Eu*, 826 F.2d 814, 831 (9th Cir. 1987); *Idaho State Tax Comm'n v. Staker*, 663 P.2d 270, 275-76 (Idaho 1982) (Bistline, J., dissenting).

80 See, e.g., *Ellis v. United States Dist. Ct.*, 356 F.3d 1198, 1229 (9th Cir. 2004); *Doe v. Ariz. Dep't of Educ.*, 111 F.3d 678, 680 (9th Cir. 1997); *U.S. v. Elashyi*, 2010 WL 375340, at \*2 (N.D. Tex. Feb. 1, 2010).

81 *Birden v. Romaniello*, No. CV 8512-1975, 1987 WL 348964, at \*1 (Conn. Aug. 10, 1987).

82 See, e.g., *Hall v. Canal Ins. Co.*, 392 S.E.2d 340, 342 (Ga. Ct. App. 1990) (Beasley, J., concurring).

83 See, e.g., *Holland v. State*, 713 A.2d 364, 370 (Md. Ct. Spec. App. 1998).

84 *Hoskins v. Waimwright*, 485 F.2d 1186, 1187 (5th Cir. 1973).

85 See, e.g., *Local 879, Allied Indus. Workers of Am., AFL-CIO v. Chrysler Marine Corp.*, 819 F.2d 786, 798 (7th Cir. 1987) (Coffey, J., dissenting); *Bandoni v. State*, 715 A.2d 580, 608 n.34 (R.I. 1998); *Vernon v. Cuomo*, 2010 WL 935745, at \*6 (N.C. Super. Ct. Mar. 15, 2010).

86 See, e.g., *GTE Cal., Inc. v. FCC*, 39 F.3d 940, 949 (9th Cir. 1994) (Noonan, J., dissenting); *In re Smith*, 2007 WL 1406913, at \*4 (Bankr. E.D. Ky. May 9, 2007).

87 See, e.g., *In re Smith*, supra, 2007 WL 1406913, at \*4; *Wash.-Baltimore Newspaper Guild v. Wash. Post*, 959 F.2d 288, 290-91 (D.C. Cir. 1992); *Allgood v. Gen. Motors Corp.*, No. 1:02-cv-1077, 2007 WL 647496, at \*6 (S.D. Ind. Feb. 2, 2007).

88 *United States v. Johnson*, 488 F.3d 690, 698 (6th Cir. 2007); see also, e.g., *United States v. Merritt*, No. 95-5866, 1997 WL 297490, at \*4 (4th Cir. June 4, 1997).

89 *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 145 (9th Cir. 1989).

90 *Schiavo v. Schiavo*, 403 F.3d 1223, 1241 (11th Cir. 2005) (Wilson, J., dissenting).

91 See, e.g., *LaGrasta v. First Union Sec., Inc.*, 358 F.3d 840, 848 (11th Cir. 2004); *United States v. Bush*, No. IP 91-806-C, 1992 U.S. Dist. LEXIS 15634, at \*40 (S.D. Ind. Sept. 23, 1992).

92 *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1308 n.22 (11th Cir. 2008); *Barrett v. Catacombs Press*, 64 F. Supp. 2d 440, 447 (E.D. Pa. 1999); *In re Jordan*, 91 B.R. 673, 681 (Bankr. E.D. Pa. 1988).

93 See, e.g., *Muirhead v. Mecham*, 427 F.3d 14, 19 (1st Cir. 2005); *Ala. Power Co.*

*v. Gorsuch*, 672 F.2d 1, 26 (D.C. Cir. 1982) (Wilkey, J., dissenting); *In re Shamburger*, 189 B.R. 965, 974 (Bankr. N.D. Ala. 1995).

94 See, e.g., *United States v. Medina*, 430 F.3d 869, 877 (7th Cir. 2005); *Hardy v. Chemetroni Corp.*, 870 F.2d 1007, 1014 n.1 (5th Cir. 1989); *Dalmia v. Palffy*, No. 264088, 2007 WL 394884, at \*83 (Mich. Ct. App. Feb. 6, 2007).

95 *Casco v. Armour Swift-Eckrich*, 154 P.3d 494, 527 (Kan. 2007). Concerning failure to "touch all bases," see also, e.g., *R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 15 (1st Cir. 1991); *Trone v. Del. Alcoholic Beverage Control Comm'n*, No. 99A-11-007, 2000 WL 33113799, at \*7 (Del. Super. Ct. Dec. 28, 2000).

96 See, e.g., *Torrence v. Cherry Creek Sch. Dist.*, 119 F. Supp. 2d 1135, 1139 (D. Colo. 2000).

97 See *In re LTV Sec. Litig.*, 88 F.R.D. 134, 152 (N.D. Tex. 1980).

98 See, e.g., *Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006); *Republic Tech. Fund, Inc. v. Lionel Corp.*, 483 F.2d 540, 547 (2d Cir. 1973); *United States v. George*, 786 F. Supp. 56, 62 n.6 (D.D.C. 1992); *Schaub v. Job*, 335 N.W.2d 568, 572 (S.D. 1983).

99 See, e.g., *State v. Gore*, 184 P.3d 972, 977 (Kan. Ct. App. 2008); *State v. Brown*, 676 A.2d 350, 356 (Vt. 1996) (Morse, J., concurring).

100 See, e.g., *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990); *United States v. Burke*, 495 F.2d 1226, 1230 (5th Cir. 1974); *Savin Corp. v. Rayne*, No. 00-CV-11728 PBS, 2001 WL 34815751, at \*8 (D. Mass. Mar. 26, 2001).

101 See, e.g., *Karr v. Heffner*, 475 F.3d 1192, 1204 (10th Cir. 2007); *Harbor Ins. Co. v. Stokes*, 45 F.3d 499, 502 (D.C. Cir. 1995).

102 See, e.g., *United States v. Jimenez*, 498 F.3d 82, 87 (1st Cir. 2007); *Sanders v. Union Pac. R.R.*, 193 F.3d 1080, 1081 n.1 (9th Cir. 1999); *Raddish v. Raddish*, 652 S.W.2d 668, 670 (Ky. Ct. App. 1983); *Turner Gas Co. v. Workmen's Comp. Appeals Bd.*, 120 Cal. Rptr. 663, 667 (Ct. App. 1975).

103 See, e.g., *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998) (late innings); *Gennaro v. Rosenfield*, 600 F. Supp. 485, 489 (S.D.N.Y. 1984) (late innings); see also, e.g., *Sierra Club v. Penfold*, 857 F.2d 1307, 1317 (9th Cir. 1988) (ninth inning); *Chapman v. United States*, 553 F.2d 886, 892 (5th Cir. 1977) ("ninth inning play"); *AFG Indus. v. Cardinal IG Co.*, 594 F. Supp. 2d 889, 903 (E.D. Tenn. 2008) (ninth inning).

104 See, e.g., *Mann v. Lima*, 290 F. Supp. 2d 190, 194 (D.R.I. 2003); *In re J.T. Rapps,*

*Inc.*, 225 B.R. 257, 264 n.10 (Bankr. D. Mass. Sept. 30, 1998); *N. County Contractor's Ass'n v. Touchstone Ins. Servs.*, 33 Cal. Rptr.2d 166, 171 (Cal. Ct. App. 1994).

105 A. Bartlett Giamatti, *Baseball Almanac*, [http://www.baseball-almanac.com/quotes/umpire\\_quotes.shtml](http://www.baseball-almanac.com/quotes/umpire_quotes.shtml) (last visited Mar. 15, 2010).

106 *State v. Dabbs*, 1994 WL 504413, at \*5 (Tenn. Ct. Crim. App. Sept. 15, 1994).

107 *Helgeland v. Wis. Municipalities*, 745 N.W.2d 1, 7 (Wis. 2008).

108 60 Cal. Rptr.3d 542 (Ct. App. 2007).

109 *Id.* at 549.

110 452 F.3d 1031 (8th Cir. 2006).

111 *Id.* at 1021.

112 600 N.E.2d 1082, 1084 (Ohio Ct. App. 1991).

113 See, e.g., Larry Richter, *The Caucus: Now It's April Madness*, N.Y. TIMES, Apr. 3, 2008 (hoop skills); Viv Bernstein, N.Y. TIMES, Mar. 19, 2009, at B14 ("First Fan"); James Sullivan, *Cool Beyond White: How Pop Culture Sets the Tone of Diversity for the Country*, S.F. CHRON., Aug. 25, 2002, at R1 (book review).

114 See, e.g., *United States v. McCarther*, 596 F.3d 438, 442 (8th Cir. 2010); *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 33 (1st Cir. 2001); *Jenkins v. Tatem*, 795 F.2d 112, 112 (D.D.C. 1986).

115 *In re Olshefski*, 692 A.2d 1168, 1177-78 (Pa. Commw. Ct. 1997).

116 *Kreager v. Blomstrom Oil Co.*, 379 N.W.2d 307, 312 (S.D. 1985) (Henderson, J., concurring in part, dissenting in part).

117 142 F.3d 18 (1st Cir. 1998).

118 *Id.* at 24-25.

119 *Liberty Mut. Ins. Co. v. Constr. Mgmt. Servs.*, 2001 WL 1159203, at \*7 (N.D. Ill. Sept. 28, 2001).

120 171 F.3d 1237 (11th Cir. 1999).

121 *Id.* at 1240 n.5.

122 514 N.W.2d 266, 297 (Minn. Ct. App. 1994) (Randall, J., concurring specially).



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