Baseball on Trial: The Origin of Baseball's Antitrust Exemption, by Nathaniel Grow. Urbana, IL: University of Illinois Press, 2014. 296 pp.; illustrations, notes, bibliography, index; $95.00 cloth; $35.00 paper.

The 1922 *Federal Baseball* opinion of Justice Oliver Wendell Holmes is the piñata of Supreme Court jurisprudence. Justice William O. Douglas deemed the decision "a derelict in the stream of the law"; Second Circuit judge Jerome Frank termed it an "impotent zombi[e]"; and Holmes biographer G. Edward White regarded it as "remarkably myopic, almost willfully ignorant of the nature of the enterprise."

The holding that "base ball" was not interstate commerce within the meaning of the Sherman Act led, with later cases, to the anomaly that a single industry enjoys a judicially created antitrust exemption. The exemption's scope is debated to the present day, including a Ninth Circuit case pitting the city of San Jose against major league baseball over the reservation of Santa Clara County to the San Francisco Giants, contrary to hopes to relocate the Oakland Athletics.

In *Baseball on Trial,* Nathaniel Grow, an assistant professor of legal studies at the University of Georgia business school, places this brief decision in the context of both the case law and the disputes in which it arose. His original research at the Baseball Hall of Fame confirms the view of those who have defended the opinion as consistent with then-extant precedent on the meaning of "commerce." Grow skillfully shows that the result also stemmed from "strategic—and in some cases questionable—decisions by counsel" (p. 2).

Despite the subtitle, the bulk of Grow's book concerns the rules of equity confronting anyone who seeks an injunction restraining employment. The original reserve clause bound players to their current year's employer for next year's services (thus continuing indefinitely), while the contract was terminable by the club on ten days' notice. Plaintiffs early on challenged such contracts as lacking mutuality and being unconscionable. Conversely, litigants who induced players under contract to sign new pacts were alleged to have come into court with unclean hands, unworthy of equitable relief.

The National League and the upstart American League had launched the 1903 National Agreement governing the major and minor leagues, spreading use of contract forms with the player restraints. The Federal League emerged as a contender in 1913 by signing several major league players (including future Hall of Famer Joe Tinker), but some of them promptly signed contracts with their old clubs. Thus lawsuits were filed by both sets of teams, defending their own contracts or attacking the contracts of others.

Grow details the clever lawyering that reduced the vulnerabilities of the agreements over time. The Federal League clubs brought an antitrust and conspiracy case against the major leagues in Chicago; evidence was taken under submission by Judge (and future baseball commissioner) Kenesaw Mountain Landis, but no decision was forthcoming for months, and in late 1915 the majors settled with seven of the eight Federal League clubs.

The holdout was the Baltimore Terrapins, and the antitrust battle was joined in suits filed by the team first in Philadelphia in 1916 and then in Washington, D.C., in 1917. Philadelphia's George Wharton Pepper, counsel for the majors, cited precedents that exhibitions or services transpiring in a single state, such as vaudeville shows or specific sales of insurance policies, were not interstate commerce. But Grow shows that Pepper also shrewdly defended the substance of the clauses; without them, the courts agreed, players would surely gravitate to the largest cities with the largest payrolls and the game's competitiveness would be injured.

Grow is especially insightful about the litigators' choices and their consequences. Baltimore's counsel, William L. Marbury, produced evidence that equipment manufacturers, umpiring services, and Western Union reporting of scores aided the sport economically across state lines. Pepper did not dispute these aspects , instead calling them "incidental" to the single-state exhibitions. By dropping state law antitrust claims, Grow contends, Marbury sharpened the federal issue but limited his chances of success. The Baltimore lawyers labeled the majors with a string of pejoratives. In advice that could be addressed to present-day advocates, Justice Joseph McKenna cautioned Marbury to "cut down the adjectives and get down to the nouns" (p. 214).

Grow explains that the afterlife of *Federal Baseball* is more remarkable than the conclusions in the case itself. In *Toolson v. New York Yankees* (1953), the Supreme Court per curiam noted that, in thirty years, Congress had not overruled Holmes and, "without re-examination of the underlying issues," affirmed the holding "so far as that decision determines that Congress

had no intention of including the business of baseball within the scope of the federal antitrust laws." Nowhere did Holmes divine legislative intent with respect to baseball, so *Toolson* converted a judgment about baseball and commerce, as they appeared to the justices in 1922, into a form of federal industrial policy. The lengthy opinion in *Flood v. Kuhn* (1972) similarly let the exemption stand until Congress might speak. When Congress did speak, in the Curt Flood Act of 1998, it applied the antitrust laws to employment in the majors but otherwise declined to address the exemption.

With careful and measured scholarship, Grow urges later readers of *Federal Baseball* to recognize that the case was heard before widespread interstate radio coverage, and before the broad interpretation of "commerce" in the New Deal decisions. Grow aptly quotes Holmes' speech, "The Path of the Law" (1897), in which Holmes expressed revulsion at a rule's being enforced for no reason other than "so it was laid down in the time of Henry IV." The Yankee—from Olympus, that is—might well feel he has been unduly pine-tarred.

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