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ARTICLES

THE JURISPRUDENCE OF JUDGE KENESAW MOUNTAIN LANDIS

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This article debunks the conventional view of Judge Kenesaw Mountain Landis, a man who served as district court judge in the Northern District of Illinois (1905-1922) and as the first commissioner of Organized Baseball (1921-1944).[1] Relying on a realist lens of analysis, this novel work of legal history examines decisions from both halves of Landis's career to demonstrate that the "Benevolent Despot" was neither arbitrary nor unprincipled, as biographers have portrayed him to be. By exploring the rhetoric and content of the Landis opinions, letters, and pronouncements, this article reveals the common methodologies that Landis employed to legitimize the outcomes stemming from his focus on pragmatism, economic analysis of transactions, and Progressive era principles of moral justice. This article is relevant beyond its ability to utilize tools of jurisprudential analysis to correct an errant account of a legendary figure; it also provides a useful framework for exploring the benevolent dictator model within private ordering. Drawing on Landis's success, this article identifies several characteristics from the case study that suggest when a benevolent dictatorship would be an attractive form of extra-legal governance.

INTRODUCTION

According to popular mythology, Judge Kenesaw Mountain Landis was a mountain of a man. Whether serving as a district court judge in the Northern District of Illinois or as the first commissioner of Organized Baseball, Landis was perceived as his own man: a man who did what he wanted, when he wanted, with little regard to what anyone else thought.[2] Either in spite of his

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1. J.G. TAYLOR SPINK, JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL 73-77 (1974).

2. RICHARD CAHAN, A COURT THAT SHAPED AMERICA: CHICAGO'S FEDERAL DISTRICT COURT FROM ABE LINCOLN TO ABBIE HOFFMAN 54 (2002) (quoting attorney Levy Mayer as saying about Landis "[d]on't make book on him following the law, no matter how clearly it seems written. He calls them as his conscience sees them."); JEROME HOLTZMAN, THE COMMISSIONERS: BASEBALL'S MIDLIFE CRISIS 19 (1998) (quoting the editor of the New York *Daily Mirror,* Jack Lait's description of Landis's behavior as "more arbitrary than the behavior of any jurist I have ever seen before or

idiosyncratic behavior or because of it, Landis was considered a great success. His judicial opinions were mostly popular in the press,[3] with the bar,[4] and within the academic world,[5] even when he faced reversal from above. His commissionership is heralded as the shining example of what a benevolent dictator can accomplish for professional sports.[6] Indeed, Landis has been referred to as having "saved" baseball.[7] The legend of Landis, the myth of the mountain, all contribute to the current understanding of Landis as an iconoclast.[8]

A more careful analysis of the Landis decisions, however, demonstrates that the conventional view of Landis is limited by an analytical approach akin to photographing individual trees or even branches rather than a landscape

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since."); DAVID PIETRUSZA, JUDGE & JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS 452 (1998) (concluding that Landis may have been "arbitrary" and "capricious"); SPINK, *supra* note 1, at 246. ("he may have been arbitrary, self-willed, and even unfair, but he 'called 'em as he saw 'em'"). *But cf.* JOHN HENDERSON, "THE MOST INTERESTING MAN IN AMERICA": FOLK LOGIC AND FIRST PRINCIPLES IN THE EARLY CAREER OF JUDGE KENESAW MOUNTAIN LANDIS 262 (1995) ("Landis, then, was less of a maverick judge, operating off on his own, than a throwback to an older style of jurist").

3. *See, e.g.*, CAHAN, *supra* note 2, at 57 (citing the *Chi. Trib.* editorial praising the *Standard Oil* decision); ROBERT C. COTTRELL, BLACKBALL, THE BLACK SOX AND THE BABE: BASEBALL'S CRUCIAL 1920 SEASON 15 (2002) (citing to favorable press accounts of Landis); HENDERSON, *supra* note 2, at 201, 209-10, 216-23 (quoting the *Cleveland Leader* praise of the *Dowie* decision, the *New York Sun* and *Chi. Examiner* praise of the first *Standard Oil* opinion, and the various press responses to the *Standard Oil* fine, which were mostly favorable); PIETRUSZA, *supra* note 2, at 65-67 (summarizing press accounts of *Standard Oil*).

4. HENDERSON, *supra* note 2, at 201.

5. Charles G. Little, *Punishment of a Corporation—The Standard Oil Case*, 3 U. ILL. L. REV. 446 (1908) (defending Landis's decision to pierce the corporate veil in *Standard Oil*); H. L. Wilgus, *The Standard Oil Fine*, 6 MICH. L. REV. 118 (1907) (justifying the jury verdicts and Landis sentence).

6. Sean Bukowski, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 109 (2001) (referring to Landis as the paradigm model of a powerful commissioner); John C. Dodge, *The Baseball Monopoly as a Utility: Is it Time for Regulation?*, 13 ENT. & SPORTS LAW. 3 (1995) (referring to Landis as "[t]he 'Benevolent Despot'"); J.C.H. Jones & Kenneth G. Stewart, *Hit Somebody: Hockey Violence, Economics, the Law, and the* Twist *and* McSorley *Decisions*, 12 SETON HALL J. SPORT L. 165, 194 (2002) (noting the absence of the Landis model of commissioner in modern professional sports); Jason M. Pollack, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1658 (1999) ("Kenesaw Mountain Landis did not merely influence the position of commissioner; he defined the very nature of the position itself. . . . Landis established the benchmark by which all future commissioners would be measured").

7. *See, e.g.*, PIETRUSZA, *supra* note 2, at 451 (quoting Landis's legacy from his plaque at the Baseball Hall of Fame in Cooperstown, New York: "His Integrity and Leadership Established Baseball in the Respect, Esteem, and Affection of the American People."); SPINK, *supra* note 2, at 246 (Judge Landis, along with Babe Ruth, were "credited by their rival admirers with having saved baseball").

8. SPINK, *supra* note 1, at 29 (referring to "Landis and his unorthodox, iconoclastic procedures").

portrait of the forest. Legal scholars have examined isolated decisions that Landis issued as federal judge;[9] none have undertaken a systematic analysis of Landis on the bench, let alone included his role as ultimate arbiter over baseball. Biographers,[10] whether they have included the pre-baseball era or not, have focused primarily on Landis's personality, the relationships he cultivated with people, and the long-term effects of his baseball decisions.

This article presents a systematic analysis of the jurisprudence of Judge Landis both on the bench and presiding over baseball. It suggests that to understand Landis and explain his overall success, one must view the rhetoric and content of his rulings and opinions through the lens of legal realism. It argues that the scholarly divorce of Landis in the district court and Landis on the diamond is an artificial one. In both contexts, Landis: (a) relied on a common set of principles in reaching his decisions; (b) used opinion writing or public pronouncement to rationalize and legitimize results by making them seem inevitable and morally right; and (c) carefully employed the press, guarding some material as private while sharing other information. This methodology both garnered popular support for his judicial acts and allowed the public to see Landis as the man who established the integrity of professional baseball.

A pragmatist on the bench and in baseball, Landis comfortably borrowed from the legal principles and procedures of the federal court when it suited his purposes in governing in the non-legal setting of Organized Baseball, while shedding formalistic constraints dictated by either the law itself or the presence of higher authority. Landis consistently was apprised of popular sentiment prior to his rulings, and public opinion, along with the inherent jurisdictional power grant, acted to constrain his authority. As decision-maker in both the legal and non-legal settings, the mountain was not without limitation.

Part I of this article briefly sketches Landis's biography, describing his ascent from small-town lawyer to federal judge and, ultimately, to "Czar of Baseball."[11] Next, Part II explains what legal realism is—to the extent this theory can be defined—and sets up a lens that will enable a more thorough analysis of Landis' decisions.

In Part III, this article explores the opinions of Landis as district court

9. *See* Little, *supra* note 5 at 466; Wilgus, *supra* note 5 at 118.

10. Though many baseball books discuss Landis, there are essentially three biographies of the Judge. For the most comprehensive biography of Landis, see PIETRUSZA, *supra* note 2. The other two biographical accounts cover different aspects of Landis's life. Shortly after Landis died, Taylor Spink, long-time editor of *The Sporting News*, published an admittedly biased and secretly ghost-written (sportswriter Fred Lieb was the true author) book focusing on Landis as commissioner of baseball; *see* SPINK, *supra* note 2. The best biographical study of Landis in his pre-baseball days is a dissertation written by a doctoral candidate in the University of Florida history department; *see* HENDERSON, *supra* note 2.

11. SPINK, *supra* note 1, at 80.

judge, discussing Landis's treatment of several different types of cases: (1) antitrust (railroad rates cases, Federal League suit against Organized Baseball);[12] (2) the equitable doctrine of constructive trust (the financial dealings of evangelically-established Zion City);[13] and (3) wartime criminal prosecutions under the Espionage and Sedition Acts (the International Workers of the World and Socialist Party cases).[14]

Part IV analyzes the rulings of Commissioner Landis, Lord of Organized Baseball, presenting Landis's decisions in cases regarding: (1) fixed baseball games (the infamous 1919 Black Sox scandal, the Ty Cobb-Tris Speaker affair);[15] (2) impermissible "barnstorming" (Babe Ruth);[16] (3) legal obligations incurred by players and the responsibility of Organized Baseball (criminal prosecutions of Benny Kauff and Alabama Pitts, Rick Ferrell foul ball lawsuit, Johnny Gooch bankruptcy);[17] and (4) player contracts and the farm system (Detroit secret contracts, St. Louis multi-franchise control).[18]

This article concludes with lessons from Landis. It argues that Judge Landis—iconoclast or not—not only fits the quintessential realist model of how decision-makers act, but also demonstrates how specific rulings and judgments can gain the salience needed to create law (the institution). While it is useful to acknowledge the significance of Judge Kenesaw Mountain Landis as a historical figure, understanding Landis—the methods and the decisions—is important for reasons other than simply setting the legal history straight. Subsequent arbiters in the professional sporting world and beyond can learn how to best create Law from Landis's use of the investigative process, decision-making methodology, and relationship with the press.

In addition, the Landis model illustrates to non-legal entities how power, generally speaking, and benevolent dictatorships, more specifically, may or may not be structured to serve that organization's goals. This case study identifies the characteristics of professional baseball that enabled Lord Landis to successfully rule, namely: (1) reliance on contractual relationships; (2) existing quasi-legal structures and processes; and (3) the need for a solution to complex, multi-equilibria repeat-player games. This lays the foundation for future inquiries into when the empirical reality of various systems of private ordering suggests that such an extra-legal system is likely to benefit from a

12. PIETRUSZA, *supra* note 2, at 153-57.

13. Id. at 43-47.

14. Id. at 138-46.

15. SPINK, *supra* note 1, at 79-82, 135-41.

16. *See id.* at 241-53; SPINK, *supra* note 1, at 95-99.

17. Id. at 88-89, 166, 187-91; In re Player E.C. Pitts (June 17, 1935) (on file with the National Baseball Hall of Fame Library, Cooperstown, New York, in the Landis Papers, Folder 4).

18. SPINK, *supra* note 1, at 199-205.

benevolent dictator.

I. THE MAN BEHIND THE MOUNTAIN

Kenesaw Mountain Landis was born in 1866.[19] He was named after the location of the bloody Civil War battle in which his father, Dr. Abraham Landis, was wounded in the leg.[20] Though born in Ohio, Landis was raised primarily in Logansport, Indiana.[21]

Education was important to Abraham Landis, but young "Kennie" despised his formal schooling and had a particular aversion to math. As a result, he left school at age fourteen without consulting anyone.[22] In 1882, on the advice of a friend, Landis learned the Pitman shorthand system and got a job in the county stenographer's office, which provided his first exposure to the legal system.[23] In 1884, the "Squire," as he was nicknamed, threw himself into working on the Republican presidential campaign, giving his first public speech and beginning on a path of making political connections.[24] The Landis family was no stranger to political life; two of Landis's older brothers were heavily involved in politics and would ultimately become Congressmen.[25]

Based on his experiences as stenographer and in the political arena, Landis determined that he wanted to become a lawyer. Living during the tail end of the era before legal education became formalized, Landis was able to register with the state as an attorney on his twenty-first birthday, despite having received no formal law education nor even having attended school since he was fourteen.[26] Landis later would boast about not being a college graduate.[27]

Nonetheless, Landis realized that his potential for advancement in the legal profession hinged upon attaining a law school degree.[28] In 1889, Landis enrolled in the Cincinnati YMCA Law School.[29] One year later, Landis began

19. PIETRUSZA, *supra* note 2, at 2.

20. SPINK, *supra* note 1, at 17.

21. HENDERSON, *supra* note 2, at 15-17.

22. *Id.* at 45.

23. *Id.* at 46.

24. *Id.* at 50-51.

25. SPINK, *supra* note 1, at 19.

26. HENDERSON, *supra* note 2, at 52.

27. SPINK, *supra* note 1, at 22 (quoting Landis's comment to Tom Swope of the *Cincinnati Post* where he stated, "Because I'm a lawyer, people naturally think I'm a college graduate. But I'm not, and I'm proud of it").

28. HENDERSON, *supra* note 2, at 66-67 (explaining that Landis had no interest in the educational experience of law school, but rather wanted a law degree to appear more prestigious and attract clients).

29. PIETRUSZA, *supra* note 2, at 11-12.

a lifelong connection with Chicago, moving to the city and completing his law degree at Union College of Law (now the Northwestern University School of Law).[30]

Perhaps the most important result of Landis's move to Chicago was the relationship he developed with Judge Walter Gresham, an old friend of the family who had served as district court judge, postmaster general, and secretary of the treasury, and who was almost nominated for vice-president in 1884 and president in 1888.[31] When President Grover Cleveland appointed Gresham as Secretary of State in 1893, Gresham took his protégé with him to Washington.[32]

Landis returned to Chicago after Gresham's death in 1895, where he practiced law and reconnected with the local Republican party after having served in the administration of President Cleveland, a Democrat.[33] In 1905, when President Theodore Roosevelt sought a progressive ally to nominate for the new judgeship in Chicago, Landis received the nod.[34]

As one of two district court judges serving in the Northern District of Illinois, Landis was at the epicenter of the Midwest, presiding over a major railway center, during the Progressive Era. Trusts and monopolies drew the wrath of Roosevelt, Congress, and public opinion, leading to the first attempts to enforce the Sherman Antitrust Act.[35] The Elkins Act was passed in 1903 to ban railroad rebates;[36] ultimately, this would place the Standard Oil corporation(s), John D. Rockefeller, and Judge Kenesaw Mountain Landis on a collision course.

While the first half of Landis's judgeship is best marked by his involvement in early antitrust cases involving railroad corruption and rebates, the second half is noted for his involvement in the World War I era government prosecutions of socialists under the Sedition Act.[37] Landis's involvement in these high profile cases, combined with his flair for theatrics,[38] brought his de-

30. *Id.* at 12.

31. HENDERSON, *supra* note 2, at 65.

32. SPINK, *supra* note 1, at 24.

33. HENDERSON, *supra* note 2, at 120-50.

34. SPINK, *supra* note 1, at 28.

35. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?,* 62 N.Y.U. L. REV. 936, 983 (1987); Rudolph J. Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition,* 40 HASTINGS L.J. 285 (1989); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 54-96 (1955).

36. Act of Feb. 19, 1903, ch. 708, 32 Stat. 847 (repealed 1978).

37. 40 Stat. 553 (1918) (punishing acts of interference with foreign relations).

38. SPINK, *supra* note 1, at 29 (noting that Landis's courtroom "won the reputation as one 'in which juries never sleep'").

cisions and behavior to national attention. After *Standard Oil*,[39] Landis was dubbed the "most talked of person in America."[40]

A baseball fan since the creation of the National League in 1876,[41] Landis was placed in a rather precarious position in 1915, when he found himself presiding over the antitrust lawsuit brought by the Federal League, an upstart league, against the National League and American League, which combined through the National Agreement to form Organized Baseball (currently known as Major League Baseball).[42] Landis delayed ruling on the case for an entire baseball season and beyond; ultimately, the parties reached a settlement.[43] This decision through omission will also be discussed in greater detail in Part III.

Landis's treatment of the Federal League suit placed him on the radar screen of the baseball owners. Starting in 1916, there were rumors that Landis would be asked to join the three-man National Commission that governed Organized Baseball.[44] In 1920, Organized Baseball sought a "chairman," after the Commission's governance had fallen apart and eight members of the Chicago White Sox had been indicted for allegedly throwing the 1919 World Series to the Cincinnati Reds.[45] After serving in the district court, where his pronouncements were subject to the approval of the Seventh Circuit Court of Appeals and the Supreme Court, Landis insisted on absolute control over Organized Baseball. Before accepting the job of lording over baseball, Landis forced the owners, by unanimous vote, to grant him broad powers and to refrain from criticizing his decisions.[46] Thus, any controversial question would create a

39. United States v. Standard Oil Co., 148 F. 719 (N.D. Ill. 1907); United States v. Standard Oil Co. of Indiana, 155 F. 305 (N.D. Ill. 1907).

40. HENDERSON, *supra* note 2, at 245 (quoting the *Chi. Examiner*).

41. SPINK, *supra* note 1, at 20. Landis was especially a fan of the Chicago Cubs in an era when he could witness the triumph of his heroes (e.g., Mordecai Brown, Tinker-Evers-Chance) at West Side Park. *Id.* at 29.

42. *Id.* at 37.

43. *Id.* at 42-43.

44. PIETRUSZA, *supra* note 2, at 161; N.Y. TIMES, Nov. 11, 1916.

45. SPINK, *supra* note 1, at 60-62.

46. "We, the undersigned . . . hereby pledge ourselves loyally to support the Commissioner in his important and difficult task; and we assure him that each of us will acquiesce in his decisions even when we believe them mistaken and that we will not discredit the sport by public criticism of him and one another." PIETRUSZA, *supra* note 2, at 174 (citing GEORGE WHARTON PEPPER, PHILADELPHIA LAWYER: AN AUTOBIOGRAPHY 358 (1944)); Article VII, Section 1 of the Major League Agreement of 1921 states: "The major leagues, and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive all right of recourse to the courts as would otherwise have existed in their favor," and Article IX, Section 1 states: "Each of the parties hereto subscribes to this Agreement in consideration of the promises of all the others that no diminution or powers of the present or any succeeding Commissioner shall be made during his term of office." Major League Agreement of 1921, *reprinted in* THE REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE FOR 1921, at 41-42 (Fran-

vote of confidence in Landis, who despite being handed the reins to govern, was still an employee of the baseball owners.

In January 1921, Judge Landis began his reign over Organized Baseball. He served both as commissioner and federal judge for a little more than a year before resigning from the bench.[47] Landis would continue to preside over baseball until his death in 1944.[48] His most famous decision as commissioner came early in his baseball career, when Landis banned eight members of the Chicago White Sox for their role in the 1919 fix. Landis may have taken a hardline stance against players accused of fixing a game and gamblers in general, but he was also pro-player when it came to other matters, such as contract disputes.[49] Despite a culture among baseball owners in which close friends would turn into bitter enemies and no slight was too small to be worthy of a lengthy grudge, Landis managed to maintain his popularity with both the owners and the players. During his time as commissioner, questions of the integrity of baseball were laid to rest, and baseball retained its place as America's national pastime.

It is important to recognize the role that Kenesaw Mountain Landis's personality and ambition played in his career. He was no Forrest Gump[50]—a man who happened to be in the right place at the right time to launch himself into positions of great influence. Though this brief biographical sketch presents an overview of the chronology of the life of Landis, it leaves to the biographers many of the details that describe how Landis put himself in a position to achieve great power. Landis did not become a federal judge by accident; he actively campaigned for the creation of the position as well as his own candi-

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cis C. Richter ed., 1921) [hereinafter Major League Agreement].

47. Landis's attempts to function in the dual role of federal judge and commissioner drew some criticism. In February of 1921, Congressman Benjamin Welty, a lame-duck representative from Ohio, moved to impeach Landis based on the alleged conflict of interest. Despite Welty's allegations, there was no evidence of prejudice. The impeachment attempt and surrounding controversy likely only delayed Landis from announcing the inevitable: there was simply not enough time in the day for both jobs. Yet Landis waited until the dust had settled before announcing his resignation from the bencl.. *See Conduct of Judge Kenesaw Mountain Landis: Hearings Before the House Comm. on the Judiciary*, 65th Cong. (1921) (statement of Rep. Benjamin F. Welty); PIETRUSZA, *supra* note 2, at 206 (quoting Leslie O'Connor, Landis's assistant, as revealing that, "[h]e waited until one of those Washington storms blew over-so that it wouldn't look like he quit under fire and then quietly resigned").

48. In fact, shortly before he died, the baseball owners voted to extend his contract for another seven years, even though he was seventy-eight at the time. *See* PIETRUSZA, *supra* note 2, at 451.

49. Landis was considered the "player's commissioner." *Id.* at 371-73 (quoting various players praising Landis). As one player explained concerning a contractual matter, "There's only one guy I trust on this—Judge Landis . . . if there's anyone at all on the side of the players, it's Landis. It's certainly not the owners." *Id.* at 359 (describing the Henrich free agency case).

50. FORREST GUMP (Paramount Pictures 1994).

dacy.[51] Likewise, at a time when American League President Ban Johnson was grooming a candidate of his own, Cook County Judge Charles A. McDonald, to govern baseball, Landis aided his own candidacy, influencing the press throughout his courtship with Organized Baseball.[52]

Though this article disputes the role that Landis's iconoclastic personality played in his actual decisions, clearly his personal convictions and ambitions played a significant part in establishing that Landis—as opposed to anyone else—would get to be the arbiter in the first place. The man truly wished to be a mountain;[53] amazingly, he was able to manipulate the shifting continental plates of the time to thrust himself into the positions of power that he most desired.

II. THE LENS OF LEGAL REALISM

The life of Judge Kenesaw Mountain Landis overlaps with the rise of the legal realists and the downfall of legal formalism.[54] Tracing roots back to the writings of Oliver Wendell Holmes, Jr.,[55] the realists gained salience within the legal world in the 1920s and 1930s.[56] Just as Landis's entrance into the legal profession was affected by the changing nature of legal education, his participation in the judiciary occurred at a time when scholars began critically examining the proper role of judges in the development of the law[57] and judges

51. HENDERSON, *supra* note 2, at 179-84.

52. PIETRUSZA, *supra* note 2, at 162-68.

53. Landis once stated, "when I was a youngster, I had an ambition to become the head of something." PIETRUSZA, *supra* note 2, at 8-9 (citing LOGANSPORT PHAROS-JOURNAL (Logansport, Ind.), Oct. 17, 1883).

54. MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1957) (describing how the industrial revolution led to the collapse of legal formalism).

55. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881); Oliver Wendell Holmes, Jr., *Book Notice*, 14 AM. U. L. REV. 233, 234 (1880), *reprinted in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, VOL. 3 103 (Sheldon M. Novick ed., 1995); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457-62 (1897). *But see* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 33-63, 109-43 (1992) (arguing that "early" Holmes was a formalist).

56. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (1930); GRANT GILMORE, THE AGES OF AMERICAN LAW 137 (1977) (characterizing the Llewellyn-Pound debates); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 493-508 (1996) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)); N.E.H. Hull, *Some Realism About the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921; Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Roscoe Pound, *The Call for a Realist Jurisprudence,* 44 HARV. L. REV. 697 (1931).

57. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT, 73-83 (1973); JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY 147-227 (1990). For examples of realist thought, see Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV.

themselves explored new rationales for their own behavior.[58]

It is only fitting, then, to analyze the jurisprudence of Judge Landis through this very same lens that emerged concurrently with his judicial and baseball career.[59] For over fifty years, scholars have written thousands upon thousands of pages discussing the origin and definition of legal realism;[60] accordingly, this section merely highlights legal realist thought to lay the basis for further exploration into Landis's words and decisions.

Rejecting the formalist approach to the law, the legal realists theorized that judges did not "find" law; rather, through their decisions, they created what the law was.[61] The opinions themselves served as *ex post facto* rationalizations of decisions that were reached as a result of judicial "hunch" or "intuition," based on the underlying facts.[62] Much like the brick veneer that hides the columns which truly support the house, so too were judicial opinions the façade behind which stood the actual process of judging.

Examining decisions through the lens of legal realism requires trifurcating the analysis between the bricks (the pro-offered explanation), the hidden structure (the true reason), and the house (the outcome). The latter two have received the lion's share of the attention. Indeed, Black's Law Dictionary defines legal realism as "[t]he theory that law is based, not on formal rules or principles, but instead on judicial decisions that should derive from social interests and public policy."[63] It is possible that the need for result-oriented descriptions of legal realism stems from the desire: (1) to repudiate the errant view that re-

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L. REV. 591 (1911); Llewellyn, *supra* note 56; Pound, *supra* note 56; Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

58. *See, e.g.*, THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 55; *The Path of Law*, *supra* note 55, at 457-67; BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) (explaining how a common law judge decides cases); Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274, 275 (1929), *reprinted in* JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14, 16 (1938).

59. This is not the first work to employ the lens of legal realism in an effort to understand the jurisprudence of an important decision-maker. *See, e.g.*, Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L. J. 419, 420-21 (1993) (examining "Justice White's thinking about our political system and the judiciary's role within that system."); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 92-124 (1990) (demonstrating that Cardozo was writing for an audience of judges, choosing words that would be adopted by other courts).

60. *See, e.g.*, KALMAN, *supra* note 56; Grey, *supra* note 56, at 493-508.

61. M.R. COHEN, *"Finding or Making the Law"* in LAW AND SOCIAL ORDER (1993) *reprinted in* MORRIS R. COHEN & FELIX S. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 452-54 (1951).

62. Jerome N. Frank, *What Courts Do in Fact*, 26 U. ILL. L. REV. 645 (1932); Hutcheson, Jr., *supra* note 58.

63. BLACK'S LAW DICTIONARY 907 (7th ed. 1999)

alist ideology dictates all decisions as indeterminate and arbitrary;[64] or (2) to counter competing claims to the legacy of the legal realists from various modern schools of thought.[65] The focus on the realist description of the true source of judicial outcomes ought not to detract any attention away from the role that methodology in decision-making (the bricks) plays in affecting the way the general public receives those results.

Applying the lens of legal realism to the decisions of Judge Kenesaw Mountain Landis, then, presents two different claims about his jurisprudence: one regarding outcome, the other regarding process. Each of these claims will be discussed in the sections that follow.

When analyzing the results of the Landis decisions, realism would dictate that the outcomes are no more arbitrary or idiosyncratic than those of any other decision-maker. The realist lens rejects the view that the mountain was an island, influenced solely by his personality and convictions. Rather, if the realists were correct, one would find that the Landis results were merely a product of his intuition, as based on a host of factors that include external social forces.[66] A systematic analysis of Landis's decisions can reveal the social policy or policies that most influenced his decision-making process.

One could argue that there is no significant difference between the traditional view of Landis and a realist account: no man has beliefs or principles that were not shaped by some external force. To the extent this is true, the benefit of relying on realism as a legal theory that explains Landis's outcomes is that it places him on the same plane as other judicial decision makers; in this regard, his decisions were not necessarily as unique as the popular historical account contends.

The process-related claim that the realist perspective adds to the understanding of Judge Landis is that he used opinion-writing and public proclamation as a method of legitimizing his decisions to the public. Thus, one ought to view the rhetoric of Landis decisions not merely as a reflection of his flair for the dramatic. Instead, Landis selected words that would sway the masses of the moral correctness or inevitability of his end result.

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64. *See, e.g.*, ROBERTO MANGAEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 109-17 (1986); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 917-19 (1987).

65. *See* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 274 (1997) (contradicting the common view in Anglo-American jurisprudence that "we are indeed 'all Realists now' ").

66. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935) ("A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality . . . a judicial decision is an intersection of social forces").

The inquiry that follows demonstrates how the jurisprudence of Judge Landis fits the realist expectations in process and outcome alike, and it identifies a set of common principles that drove the end result.

III. LANDIS ON THE BENCH

While serving as district court judge in the Northern District of Illinois,[67] Landis presided over a wide range of cases in law, equity, and bankruptcy. This part explores his decisions in three different types of cases.

First, the heart of this analysis features Landis' opinions in railway rate cases: *Interstate Commerce Commission v. Reichmann*,[68] *United States v. Chicago & Alton Railway Co.*,[69] and *United States v. Standard Oil*[70] and *United States v. Standard Oil Co. of Indiana*.[71] It demonstrates how Landis vindicated his Progressive politics in these early antitrust decisions by combining a purposivist view of the Elkins Act with an economic analysis of the facts in each case. This section then contrasts the railroad rate cases to the Federal League's antitrust suit against Organized Baseball, discussing the challenge that case presented to Landis.

To demonstrate that the Landis focus on pragmatism, economics, and Progressive era moral justice extended beyond the field of antitrust, this section next describes the Landis decision in *Holmes v. Dowie*,[72] a suit brought in equity to resolve the financial matters of the evangelically-funded Zion City, Illinois.

Finally, this section briefly explores Landis's actions, declarations, and sentences in the prosecutions of members of the International Workers of the World and Socialist Party in the *Haywood* and *Berger* cases.[73] It presents evidence that the realist framework reveals the method behind the mountain and lays the foundation for the principles that Landis would rely upon as Supreme Ruler of Baseball.

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67. "The Northern District of Illinois and its predecessors have played a pivotal role in every period of United States history. . . . It was here that the great issues of the twentieth century took center stage: where business monopolies were checked, where big labor was clipped, where Prohibition gangsters and Depression-era schemers were thwarted." CAHAN, *supra* note 2, at xiii-xiv.

68. 145 F. 235 (N.D. Ill. 1906).

69. 148 F. 646 (N.D. Ill. 1906).

70. 148 F. 719 (N.D. Ill. 1907).

71. 155 F. 305 (N.D. Ill. 1907), *rev'd* 164 F. 376 (7th Cir. 1908).

72. 148 F. 634 (N.D. Ill. 1906).

73. United States v. Haywood, Criminal Case No. 6125 (U.S.D.C. Chi. 1918); United States v. Berger, Criminal Case No. 6260 (U.S.D.C. Chi. Feb. 20, 1919).

A. The Railway Rate Cases

In the early 1900s, the federal government began its efforts to prevent corporate trusts and monopolies from continuing in their economically ruinous practices. An important historical figure in early "trust-busting," President Theodore Roosevelt launched a Progressive assault from the White House. In 1902, he ordered the Justice Department to bring suit against the Northern Securities Company railroad monopoly under the Sherman Act,[74] during that law's infancy, and supported the creation of the Bureau of Corporations, an investigative arm of the new Department of Commerce and Labor.[75] It is no coincidence that Landis received his appointment to the federal bench from Roosevelt.

The history of the development of the railroad system is mired with corruption.[76] One of the abuses that Congress sought to curtail was the secret dealing and discounting—rebates—that railway companies would provide to large corporations. The cheaper rates enabled these companies to drive out competitors. While the Interstate Commerce Commission was created in 1887,[77] not until 1903 did Congress pass the Elkins Act,[78] which forbade railroads from receiving rebates. Several years later, the Hepburn Act replaced the Elkins Act, significantly increasing the penalties for illegal rebates.[79]

Many rate cases came before Judge Landis in the district court. This section explores the rhetoric and content of three such decisions. In each case, the government was victorious. Even more importantly, though, was the common theme in all the Landis rate decisions: the functionalist approach that, (1) placed the focus on the economics of the underlying arrangement, and (2) accepted Progressive notions of equality and uniformity.

1. *Interstate Commerce Commission v. Reichmann*[80]

The case arose when the Interstate Commerce Commission (ICC) called Reichmann, who was Vice President of Street's Western Stable Car Line, as a witness in a proceeding before the agency.[81] The Commission inquired about

74. 15 U.S.C. § 1 (2002).

75. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1219 (1986).

76. *Id.* at 1197-99.

77. Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887).

78. Act of Feb. 19, 1903, ch. 708, 32 Stat. 847 (repealed 1978).

79. Hepburn Act, ch. 3591, § 4, 34 Stat. 584 (1906).

80. 145 F. 235 (N.D. Ill. 1906).

81. *Id.* at 236.

any rebates that the corporation had returned to shippers. Reichmann chose not to respond to the inquiry on the grounds that his corporation, which owned cars used for transporting live stock by rail, was not a common carrier, and, thus, not subject to the jurisdiction of the ICC.[82] The car company would provide cars to the railway company and receive a payment based on the mileage each car was used. Presented before Judge Landis was the question whether the commerce clause of the Constitution and the Elkins Act (enacted based on this Congressional power) granted the ICC the authority over a private car company, such as Street's Western Stable Car Line, that had made rebate payments to freight shippers.[83]

When presented with *Reichmann*, Judge Landis focused on the purpose of the enactment—uniform treatment of shippers—and the underlying economics of the arrangement that Reichmann's corporation engaged in. Avoiding any significant constitutional or statutory interpretation, he quickly dismissed any constitutional question regarding the meaning of the "commerce" power.[84]

Landis rejected a formalist view of the ICC's power to regulate, noting that Congress gave the agency authority not "to regulate one class of corporations engaged in commerce," but rather "to regulate the thing itself, by whomsoever carried on or participated."[85] Instead, Landis used a pragmatic approach and analyzed the transaction as follows:

> That the person to whom the payment is made has been, thereby, removed from the level of equality, to establish which the laws were passed, is too plain to justify extended consideration. With respect to the transportation of his property, he is just as much better off than the general run of shippers as the payment amounts to. The net cost of the transaction to him—his freight expense—has been reduced just that much.[86]

Landis continued to describe this economic effect in even simpler terms. He offered a hypothetical example of "John Jones, cattle shipper," who shipped via a railroad company using Street Company cars. Jones paid the normal railroad rate, and the railroad paid the Street car company for the usage of its cars. Then Street made a payment to Jones. Landis argued that Jones had

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82. *Id.*

83. *Id.*

84. *Id.* at 238 ("The real question, therefore, presented, is not merely whether Congress has authority to regulate private car companies, but, rather, 'is the power to require a uniform freight rate an attribute of sovereignty?' I am not aware that the general principle that this authority does exist is now seriously antagonized"). Compare this treatment with the discussion of commerce in United States v. E.C. Knight Co., 156 U.S. 1 (1895) (defining commerce narrowly to dismiss antitrust suit).

85. *Reichmann*, 145 F. at 238.

86. *Id.* at 237.

been given an advantage over hypothetical competitor "Smith," who had to pay the published rate without receiving any rebate.[87]

After articulating that the purpose of the law was to establish uniformity among shippers, and that the net effect of the car company's practice was to create a rebate, the Landis ruling seemed inevitable: "the law prohibits the car company from giving to any shipper of property a favor or advantage not publicly offered to all shippers,"[88] and the ICC therefore had jurisdiction to query Reichmann, as agent of the car company, about any rebate payments made.

The outcome in favor of the ICC was a product of the way Landis "felt" about the facts in question as informed by the external influence of the Progressive era; the greedy car company in cahoots with the even greedier railway company would lose. The government must have the authority and intention to prevent the ruinous practices.

Landis legitimized this result by ascribing a moral purpose to the Congressional regulation—that of uniformity and equality—and through the use of economic analysis. Ever the pragmatist, Landis broke down the transaction to its most basic form to demonstrate the inevitability of his ruling. The methodology sold the result.

2. *United States v. Chicago & Alton Railway Co.*[89]

The Chicago & Alton Railway Company and several of its officers were prosecuted under the Elkins Act for having granted rebates. Chicago & Alton provided rail service east of Kansas City, Missouri, while Belt Railway Company provided service between Kansas City, Missouri and Kansas City, Kansas. Both Chicago & Alton and Belt published and filed tariffs on shipments of packing-house products.[90]

The case arose concerning the treatment of the Schwarzschild & Sulzberger Company, a Kansas City, Kansas-based corporation engaged in meatpacking, that owned a private track immediately adjacent to the Belt line. Chicago & Alton collected both its own published rate and Belt's rate from Schwarzschild & Sulzberger, remitted the published rate to Belt, and then further returned to Schwarzschild & Sulzberger a rebate payment.[91] It was this practice that led prosecutors to charge Chicago & Alton with violating the Elkins Act. When Chicago & Alton sought a directed verdict, Landis offered an

87. *Id.* at 241.

88. *Id.* at 242.

89. 148 F. 646 (N.D. Ill. 1906).

90. *Id.*

91. *Id.* at 647.

opinion explaining his denial of the motion.

In his brief decision, Landis first focused on the economics of the arrangement between Chicago & Alton, Belt, and Schwarzschild & Sulzberger. Landis posed the following question: "Has the payment back to the shipper of $1 per car out of the money paid by the shipper to the railway company in the first instance resulted in the shipper getting its property transported at a less cost to it than that specified in the published schedules?"[92] Landis then answered that "to state this question is to answer it."[93] Clearly, the net effect of the Chicago & Alton payments was to create a rebate.

Mirroring his decision in the *Reichmann* case, Landis also engaged in a discussion of the purpose of the law. He reasoned, "no rate can possibly be reasonable that is higher than anybody else has to pay. Recognizing this obvious truth, the law requires the carrier to adhere to the published rate as an absolute standard of uniformity."[94] Like in the prior case, the statutory text plays no role in the opinion.

It is no surprise when the reader finishes the short decision that the result was the denial of the motion in favor of the defendants. The outcome was as inevitable as that in the *Reichmann* case; the process of justifying this result similar as well.

3. *United States v. Standard Oil Co.*[95]

Standard Oil, the third in the trilogy of railway cases this article discusses, was the most high profile of all the cases Landis would preside over during his seventeen years on the federal bench. Standard Oil, the quintessential monopolist, had long evaded any penalties for the ruthless methods by which it drove out competition.[96]

In 1906, federal prosecutors charged the Standard Oil Company of Indiana with violating the Elkins Act during a period from 1903 through 1905 by paying the Chicago & Alton Railway Company less than its published rates for the transportation of Standard Oil's property. The indictment contained 1,903 counts, each based on the movement of one car of oil. Two of Landis's decisions in the *Standard Oil* litigation ultimately would be reported.[97]

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92. *Id.*

93. *Id.*

94. *Id.* at 648.

95. *See Standard Oil Co.*, 148 F. at 719 and *Standard Oil Co. of Indiana*, 155 F. at 305.

96. BRUCE BRINGHURST, ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890-1911 (1979). In 1911, the Supreme Court authorized the break-up of the Standard Oil Corporation. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

97. *Standard Oil*, 148 F. at 719; *Standard Oil Co. of Indiana*, 155 F. at 305.

First, Standard Oil challenged the indictments on the grounds that the enactment of the Hepburn Act, which ratcheted up the penalties for parties who offered illegal rebates, served to repeal the Elkins Act.[98] To Judge Landis, this argument was morally incomprehensible. In order to explain how the statute ought to be interpreted, Landis stated,

> [I]t is inconceivable that the Congress of the United States, while addressing themselves to the task of drafting a law the great object of which was to secure to all men fair treatment in respect of the transportation of property on the basis of absolute equality, could possibly have gotten into such a frame of mind that they would divide all prior offenders into two classes, and say that those who had been indicted should be punished, and those who, up to that time, had avoided the grand jury, should be pardoned. For Congress to do such a thing would be both absurd and unjust.[99]

And so, the case against Standard Oil proceeded. The jury found the corporation guilty on 1,462 counts, and Landis ruled on the penalty to be imposed.

As a first matter, Judge Landis laid out the moral obligation that common carriers bear. He noted that the railway company was a "public functionary" that must use the property acquired "for the benefit of the public; not part of the public, but all of the public."[100]

Next, Landis moved on to an economic analysis of the wrongdoing. Standard Oil advanced numerous theories that would limit the amount they could be penalized for the rebates. In response to the argument that all the counts ought to be grouped as one ongoing act of wrongdoing, Landis declared that functionalism would prevail, "It is the substance of the thing, and not the mere form, with which the law is concerned. The defendant here is in precisely the same position it would occupy if it had paid the Alton Company at the unlawful rate each time a car was shipped."[101]

Standard Oil also advocated that since no competitor was engaged in shipping on the same route, no harm had existed. Landis used this opportunity to express moral outrage at the actions of the company, while explaining that the economic effect of the illegal rebating was precisely to eliminate competition, declaring,

> It is the defendant's position that its offense was wholly technical; that nobody has been injured, because there was no other shipper

98. *Standard Oil Co.*, 148 F. at 722-23.

99. *Id.* at 726.

100. *Standard Oil Co. of Indiana*, 155 F. at 309-10.

101. *Id.* at 314.

> of oil; and that, therefore, the punishment, if any, should be a modest fine. This impresses the court as a peculiar argument. It is novel indeed for a convicted defendant to urge the complete triumph of a dishonest course as a reason why such course should go unpunished. Of course, there was no other shipper of oil, nor could there be so long as by a secret arrangement the property of the Standard Oil Company was hauled by railway common carriers for one-third of what anybody else would have to pay.[102]

Landis, then, determined what the penalty ought to be. He reasoned that the economic harm caused by the illegal rebating was not merely to drive out competition, but also that the rates not paid by Standard Oil were passed on to shippers of other property, whose rates ostensibly were higher. Landis did not offer evidence to support this theory, and it is not clear that Landis was correct in fact; his assumption was that the published rates themselves accurately reflected the cost to the railway companies of shipping goods, which seems fairly unlikely.

Despite his discussion of the economics, however, Landis did not attempt to calculate the fine based on economic harm, perhaps recognizing the difficulty of demonstrating antitrust injury. Instead, he accepted that the statute in question was punitive and emphasized the moral reprehensibility of the conduct being punished, noting that "[t]he men who thus deliberately violate this law wound society more deeply than does he who counterfeits the coin or steals letters from the mail."[103]

In his next step setting up the penalty, Landis pierced the corporate veil, identifying the Standard Oil Company of Indiana as only the nominal defendant. This enabled him to consider Standard Oil's true wealth; for the purpose of determining what amount would deter the corporation in the future, Landis approximated that Standard Oil Company of New Jersey was worth $100,000,000.[104] In the process, Landis subpoenaed John D. Rockefeller to testify, creating the greatest public spectacle of the trial. Rockefeller avoided service for some time, creating a drama that would render his testimony, once he finally was served and appeared, anti-climactic.[105]

And last, after lamenting the fact that the Elkins Act had an "obvious defect" in that it "only" permitted punishment by a fine, not imprisonment,

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102. *Id.* at 319.

103. *Id.* It should be noted that Landis handed out fairly severe sentences for mail theft. HENDERSON, *supra* note 2, at 197.

104. *Standard Oil Co. of Indiana*, 155 F. at 319.

105. PIETRUSZA, *supra* note 2, at 53-59.

Landis announced his sentence: Standard Oil was fined $29,240,000.[106] This represented the statutory maximum fine ($20,000) multiplied by the number of counts on which the company was found guilty (1,462).[107]

The fine, which was the largest that had ever been issued in the country, created a source of debate and controversy. By and large, the press and the public approved of Judge Landis's decision. It is difficult to determine how much of the acceptance was due to Landis's process—combining the moral justification of the law with the economic realities of the Standard Oil's practices—as opposed to the fact that Landis merely shared the same Progressive sentiments as those who applauded him.

The rhetoric and content of Landis's sentencing opinion did not convince everyone. When he learned of the fine that Landis issued, Rockefeller declared that, "'Judge Landis will be dead a long time before this fine is paid.'"[108] He was correct. The Seventh Circuit Court of Appeals reversed the sentence, using a formalistic definition of the term "transaction" to criticize the treatment of each shipment as a separate offense and a formalistic understanding of corporate structure to find fault with Landis's decision to piece the corporate veil.[109] The reversal was penned by Judge Grosscup, a man that Landis thought to be an ally,[110] but who had established a reputation for not enforcing antitrust laws against the railroad corporations.[111]

B. Federal League v. Organized Baseball[112]

In the aftermath of *Standard Oil*, Landis gained a national reputation as a "trust-buster." When the upstart Federal League began losing in court on contract claims brought by major league teams,[113] it delivered its counter-punch:

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106. *Standard Oil Co. of Indiana*, 155 F. at 320-21.

107. *Id.* at 306; Act of Feb. 19, 1903, ch. 788, 32 Stat. 847 (repealed 1978).

108. HENDERSON, *supra* note 2, at 223.

109. Standard Oil Co. of Indiana v. United States, 164 F. 376 (7th Cir. 1908), *rev'g* 155 F. 305 (N.D. Ill. 1907).

110. HENDERSON, *supra* note 2, at 239.

111. PIETRUSZA, *supra* note 2, at 82-83.

112. Fed. League of Prof'l Baseball Clubs v. Nat'l League of Prof'l Baseball Clubs, Equity Case No. 373 (U.S.D.C. Chi. 1915).

113. *See, e.g.*, Weeghman v. Killifer, 215 F. 289 (6th Cir. 1914) (holding that Federal League team that induced player to break his reserve obligation had unclean hands and could not prevent player from returning to his initial team); Cincinnati Exhibition Co. v. Marsans, 216 F. 269 (E.D. Mo. 1914) (finding that negative covenant preventing player from jumping to Federal League was enforceable); Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630 (1914) and Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914) (vacating injunctions against players who jumped to Federal League).

an antitrust suit against The National League.[114] In a move that could now be considered a strategic blunder, the Federal League filed its suit in the Northern District of Illinois, because both the American League and the Federal League were headquartered in Chicago, and secondly, as a form of forum shopping;[115] the league expected to find a sympathetic arbiter in Judge Kenesaw Mountain Landis.

The Federal League suit forced Landis to reconcile his love for baseball with his antitrust jurisprudence. Organized Baseball defended itself on several grounds, including that the labor of baseball players was not interstate commerce, and, thus, did not fall under the federal antitrust laws.[116] Ultimately, that same argument would prevail in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[117] when Justice Holmes determined that baseball was not interstate commerce.[118] Though this ruling was the foundation for the baseball antitrust exemption,[119] at the time, it was based on the more restrictive pre-New Deal understanding of Congressional commerce powers.[120]

Yet, while such a ruling—no federal jurisdiction—could come easily from Holmes, Landis could not embrace this view, despite his desire to save the sport he loved.[121] The difference between Landis and Holmes was not merely that the former cared for baseball. The jurisprudence of Landis demonstrates a form of judicial activism that does not exist in the decisions of Oliver Wendell

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114. *Fed. League*, Equity Case No. 373.

115. COTTRELL, *supra* note 3, at 15 ("The Federals deliberately sought out the jurisdiction of the United States District Court for the Northern District of Illinois, presided over by Judge Kenesaw Mountain Landis").

116. The Federal League brought both federal and state law claims. Since the parties lacked complete diversity, see Strawbridge v. Curtiss, 7 U.S. 267 (1806), however, jurisdiction was predicated on the presence of a federal question—namely a valid federal antitrust claim.

117. Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

118. *Id.* "The business is giving exhibitions of base ball, which are purely state affairs." *Id.* at 208.

119. Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). This exemption has been modified by the Curt Flood Act of 1998, 15 U.S.C. § 26b (2002).

120. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act's regulation of hours and wages in coal mines); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down a congressional law excluding from interstate commerce products made from child labor). *E.C. Knight Co.*, 156 U.S. at 1 (drawing a distinction between "manufacturing" and "commerce" and dismissing an antitrust lawsuit against a monopolizing sugar manufacturer).

121. In fact, when an attorney for the American League commented that he loved baseball, Landis replied: "[W]e have to keep love and affection out of this case." PIETRUSZA, *supra* note 2, at 156.

Holmes, Jr.[122] After expanding federal power in the rebate cases, it would have been difficult for Landis to write a federalist opinion declaring baseball off-limits from regulation, not because baseball was sacred, but rather because the federal government lacked jurisdictional power over the institution. In addition, Landis struggled to think of baseball as an economic enterprise.[123]

The Federal League case created tension between the outcome Landis desired—Organized Baseball must win[124]—and the process Landis employed—rejecting formal distinctions in an activist way, critically examining the economic reality of the situation, and relying on Progressive principles of moral justice. Accordingly, Landis disposed of the case in a manner befitting such dissonance: with silence. After a flurry of activity when the suit was first filed,[125] Landis intentionally delayed ruling on the case for over a year,[126] and ultimately, the parties reached a settlement,[127] sparing Landis the task of matching the principles he normally espoused with a result he could not justify consistently with his prior decisions.

C. Holmes v. Dowie[128]

Early antitrust cases only comprised part of the docket before Judge Landis. As only one of two district court judges, Landis presided over criminal and civil cases, cases in equity, and cases in bankruptcy. *Holmes v. Dowie* was an equity case brought before Landis that drew the public's attention.

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122. Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 593-94 (2002) ("Indeed, as a Supreme Court justice, Holmes became the leading advocate for judicial restraint and against judicial activism"). For examples of cases in which Holmes exercised judicial restraint, see *Hammer*, 247 U.S. at 277-81 (Holmes, J., dissenting) (upholding the child labor law); Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting). *But see* Arthur J. Goldberg, *A Tribute to Chief Judge David L. Bazelon*, 123 U. PA. L. REV. 247, 248 (1974) (referring to Holmes as a judicial activist); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 19 n.110 (1993) (linking takings law to Holmesian activism).

123. In response to the defense attorney's use of the word "labor," Landis exclaimed, "As a result of thirty years of observation, I am shocked because you call playing baseball 'labor.'" SPINK, *supra* note 1, at 41.

124. Landis explained, "Both sides must understand that any blows at the thing called baseball would be regarded by this court as a blow to a national institution." CAHAN, *supra* note 2, at 69.

125. *Id.* The case file demonstrates significant early action, with many depositions taken on January 14, 1915 and subpoenas issued on January 15. *Fed. League*, Equity Case No. 373.

126. SPINK, *supra* note 1, at 39-43 (noting that "Landis confided to intimates that he had put off [rendering] a decision, feeling that soon[er] or later the rival factions would come together."); *see also* CAHAN, *supra* note 2, at 69; PIETRUSZA, *supra* note 2, at 157.

127. DAVID QUENTIN VOIGT, AMERICAN BASEBALL VOL. 2 119 (1983) ("The Federal settlement cost the major leagues five million dollars as the price for preserving their baseball monopoly").

128. 148 F. 634 (N.D. Ill. 1906).

John Alexander Dowie was the leader of the Christian Catholic Apostolic Church, an evangelical group that developed a large following.[129] Using money that he had raised, Dowie founded Zion City, Illinois, purchasing land for residential and commercial use, building schools, and creating parks; the town members were nearly all members of the Church.[130] Within seven years, Zion City had a population of almost 10,000 people, and the property was valued at $21 million.[131]

In 1905, Dowie fell ill, and in 1906, he granted power of attorney over Zion City to Wilber Glen Voliva and appointed him as deputy overseer.[132] By this time, Zion City's financial situation was in disrepair. Staging a coup against Dowie, Voliva conveyed all the church's property to Alexander Granger, who in turn named Voliva head of the church.[133] Dowie sued in federal court to overturn Voliva's actions, placing the intra-Church dispute in the hands of Judge Landis, an admittedly irreligious man.

In dealing with the *Dowie* case, Landis turned to the economics of the transactions through which the property was acquired. Landis framed the inquiry as follows, "Did these offerings come to Dowie for his private purse, or did the contributors intend that the fund should be directed to charitable or religious uses? If for any other purpose than the purely personal benefit of Dowie the estate is a trust."[134]

In justifying this approach, Landis advocated for functionalism; "[i]t is the duty of the court to get at the substance of the thing, and in ascertaining the purpose of the gift the court is not limited to an inspection of written documents or other specific declarations of the parties made at the time."[135]

To demonstrate the morality of his finding that the property was donated in trust, Landis offered a simple analogy that explained his reasoning in terms that the non-fundamentalist mass of Christians could appreciate:

> It is just as if a contributor sitting in a church pew had placed the funds on the collection plate passed to him by a deacon. Surely in such case the court would not decree that the parson might put the money in his pocket on the alleged score of no agreement to the contrary, merely because the contributor had failed to rise in his

129. *Id.* at 636.

130. *Id.*

131. PIETRUSZA, *supra* note 2, at 44.

132. *Holmes*, 148 F. at 635.

133. *Id.*

134. *Id.* at 638.

135. *Id.*

place and exact a pledge of trusteeship from the pulpit.[136]

Further justifying his result, Landis explained that had the Church been incorporated, there would be no argument against the trust theory.[137] Much like in the *Standard Oil* case, where Landis demonstrated little favor for formal corporate structure, he considered the Church's failure to incorporate as a technical omission not worthy of legal significance.

Thus, Landis was able to morally and economically justify his end result that: (1) the Church property was held in trust by Dowie;[138] (2) Dowie was entitled to fair compensation for his service as overseer;[139] (3) Voliva, as overseer of the trust, did not have the power to dispose of Dowie in his staged coup;[140] and (4) the Church would hold elections to determine who would succeed Dowie.[141] This last element was perhaps the most controversial, and it demonstrated the importance of governance by consent to Landis, even for a theocratic world. This is a lesson that Landis, the autocrat, would take with him to his baseball commissionership.

D. Espionage and Sedition Acts

During World War I, patriotism swelled within the American public, translating into jingoism and strong hostility against anyone expressing anti-war sentiments. The Espionage Act of 1917[142] and the Sedition Act of 1918[143] were enacted to prohibit disloyal behavior. The latter forbade any disloyal speech that was intended to "encourage resistance to the United States, or to promote the cause of its enemies."[144] Prosecutions under these statutes were challenged on First Amendment grounds, leading to Justice Holmes's announcement of the "clear and present danger" test in 1919.[145]

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136. *Id.*

137. *Id.* at 638-39.

138. *Id.* at 640.

139. *Id.* at 642.

140. *Id.* at 641-42.

141. *Id.* at 642.

142. 40 Stat. 217 (1917). For an interesting perspective on the motivation behind the enactment of the Espionage Act, see Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003).

143. 40 Stat. 553 (1918).

144. *Id. See* ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-20 14 (1955).

145. The clear and present danger test preceded the modern incitement test as laid down in Brandenburg v. Ohio, 395 U.S. 444 (1969). Justice Holmes first introduced it in Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about

Even before the freedom of speech question reached the Supreme Court, Judge Landis presided over two well-publicized and well-politicized trials under these Acts. Both cases involved prosecutions of socialists. The first featured the prosecution of members of the Industrial Workers of the World (IWW a.k.a. "Wobblies"), including IWW leader Bill Haywood.[146] The second case was brought against five leaders of the Socialist Party, including Victor Berger.[147]

It is more difficult to analyze these cases as Landis decisions, because the nature of a criminal proceeding (jury trial and sentencing decisions) does not produce written opinions for analysis. Nonetheless, Landis's pronouncements from and behavior on the bench provide a glimpse into his decision-making approach.

1. The *Haywood* Trial

The first trial, *United States v. Haywood*,[148] occurred after a federal raid of forty-eight IWW halls, including its Chicago headquarters.[149] The U.S. Attorney brought just over one hundred defendants to trial in the Northern District of Illinois on five separate charges that the Wobblies had conspired to hinder war efforts.[150]

Despite his own patriotic beliefs,[151] Landis conducted the trial in a fair and even manner that impressed even the socialist detractors.[152] Part of his success stemmed from his rejection of judicial pomp and circumstance. For example, Landis did not wear a robe and often left the bench to stand by the jury box.[153] In addition, Landis showed compassion for the defendants, releasing many of

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the substantive evils that Congress has a right to prevent"). *See also* Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) (purporting to apply the clear and present danger test while voting to reverse the convictions); Frohwerk v. United States, 249 U.S. 204 (1919) (applying the test to other Espionage Act convictions); Debs v. United States, 249 U.S. 211 (1919) (same). For more on the evolution of the clear and present danger test, see Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970); Frank R. Strong, *Fifty Years of "Clear and Present Danger" : From* Schenck *to* Brandenburg*—and Beyond*, 1969 SUP. CT. REV. 41 (1969).

146. *Haywood*, Criminal Case No. 6125.

147. *Berger*, Criminal Case No. 6260.

148. *Haywood*, Criminal Case No. 6125.

149. CAHAN, *supra* note 2, at 70.

150. PIETRUSZA, *supra* note 2, at 119-20.

151. Landis was contemplating stepping down from the bench, but after the country entered the war, he remained on the bench as part of the "war effort." CAHAN, *supra* note 2, at 69. Landis even "toyed with the idea of his own enlistment." PIETRUSZA, *supra* note 2, at 111.

152. CAHAN, *supra* note 2, at 70-71 (quoting writer John Reed).

153. *Id.*; PIETRUSZA, *supra* note 2, at 122-23.

them during the trial on their own recognizance.[154]

At one point, Landis even took on the press, criticizing the *Chicago Tribune* for running a story that he had received death threats in the mail and informing the jury that the story was fabricated. He threatened to close his courtroom to the press if they printed anything about the trial that did not occur in court.[155]

The Landis charge to the jury attempted to focus their attention to the specific behavior involved and whether it violated the laws, not whether the IWW beliefs were valid.[156] Haywood admitted that the instructions were "fair enough."[157]

In just over an hour, the jury returned guilty verdicts.[158] Two weeks later at sentencing, Landis spoke for nearly two hours justifying the result.[159] He legitimized the Acts themselves because of the existence of the war.[160] He then offered his opinion that all the evidence pointed towards the convictions: "the jury was left, in my opinion, no avenue of escape from its verdict."[161]

Afterwards, Landis delivered the sentences starting from the least culpable defendants. Two of the most minor IWW employees received a sentence of ten days in jail. One dozen were imprisoned for one year and fined $25,000. Twenty-six were sentenced to five years and fined $30,000. Another seven were sentenced to five years in Leavenworth and $20,000 in fines. Landis sentenced the next thirty-three defendants to ten years and $30,000 fines. The remaining fifteen defendants, including Bill Haywood, were sentenced to twenty years in Leavenworth and fined $30,000. The total amount of the sentences surpassed eight hundred years of imprisonment and $2.3 million in fines.[162]

The press, caught up in the patriotism of the war, applauded Landis's efforts and decisions.[163] Yet more interestingly, even the reporter for the *New York Call*, a Socialist paper, praised Landis. Despite his expectation that Landis would mete out maximum sentences for the defendants, David Karsner wrote of Landis that "the fates did well in placing the Indiana lawyer in a

154. PIETRUSZA, *supra* note 2, at 125.

155. *Id.* at 126-27.

156. *Id.* at 132 (quoting from the CHI. TRIB., CHI. HERALD & EXAMINER, and N.Y. TIMES).

157. *Id.*

158. *Id.* at 132-33.

159. *Id.* at 133-34.

160. *Id.* at 134.

161. CHI. TRIB., Aug. 31, 1918, at 5.

162. PIETRUSZA, *supra* note 2, at 134-35.

163. *See, e.g.*, N.Y. TIMES, Aug. 31, 1918, at 6.

United States Courtroom."[164] The outcomes—the jury verdicts and the Landis sentences—clearly reflect the anti-socialist sentiment in the country during the war. Yet the methodologies Landis employed in presiding over the trial: adherence to principles of due process and fairness, rejection of legal formalities, and careful interaction with the press, assuaged even the opposition.

2. The *Berger* Case

During World War I, hundreds of members of the Socialist Party were indicted and convicted under the Espionage Act, including former presidential candidate Eugene V. Debs.[165] In 1918, Victor Berger, a party leader, ran for Congress for the Milwaukee-based fifth district of Wisconsin on an anti-war platform and won the seat.

At the same time, Berger was indicted with four other party leaders for anti-war speech.[166] The prosecution mostly relied on Socialist Party literature to make its case.[167]

During the course of the trial, Landis lacked some of the warmth he extended the Wobblies.[168] Still, Socialist reporter Karnser wrote that he had not heard "a word of criticism of Judge Landis' conduct" from the defendants.[169] In his charge to the jury, Landis again expressly instructed that:

> the defendants had a right to entertain, communicate, and advocate in good faith, their religious, economic and political opinions, and their views respecting the war, its causes and affects . . . Against this right the law is not aimed, and if this is what the defendants have done, they are not guilty.[170]

As one might have expected, the jury convicted the defendants. One juror even stated afterwards, "I couldn't understand why they wanted a trial by an American jury."[171]

Landis devoted the bulk of his sentencing pronouncement to quoting the defendants' literature, filling nearly thirty pages with these words. With a focus on quantity, Landis wrapped up the summary, as he declared, "I deem it unnecessary to detail further the situation here."[172]

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164. PIETRUSZA, *supra* note 2, at 135.

165. Debs v. United States, 249 U.S. 211 (1919).

166. *Berger*, Criminal Case No. 6260.

167. PIETRUSZA, *supra* note 2, at 141.

168. *Id.* at 144.

169. David Karsner, *Kenesaw Mountain Landis*, THE CALL MAG., Apr. 6, 1920, at 20.

170. *Berger*, Criminal Case No. 6260.

171. CHI. TRIB., Jan. 9, 1919, at 2; CHI. TRIB., Dec. 12, 1918, at 13.

172. *Berger*, Criminal Case No. 6260.

Sentencing the defendants to twenty years imprisonment, Landis legitimized his decision through an appeal to the volume of evidence combined with the logic that if inciting insubordination "was not in the contemplation of the defendants, the whole enterprise was aimless or purposeless."[173]

Ultimately, though, the *Berger* conviction and sentence would be overturned on appeal.[174] In a previous case, Landis had made several anti-German remarks while sentencing a convicted German-American defendant found guilty under the Espionage Act.[175] Before Berger had been brought to trial, his attorney moved for a change of venue on the grounds that Landis was prejudiced against defendants with German ancestry. Landis denied the motion.[176] The Supreme Court found that Landis was obligated by statute to have turned the case over to another judge to rule on the question of potential bias.[177]

Despite the reversal, the press supported Landis's behavior in the *Berger* case. While agreeing with the Supreme Court decision, the *New York Times* argued that based on the record, there was no indication "that the defendants didn't have an absolutely fair trial; nor is there any apparent reason to suppose that the verdict would have been different with a different Judge."[178] The *Chicago Tribune* pointed out that the Court had not criticized Landis and that the trial itself had been more than "liberal" in admitting any possible defense.[179]

Though he refused to comment on the matter,[180] it is likely that the reversal in *Berger* re-affirmed Landis's belief that his judicial decision-making would always be curtailed beyond his desires, often by legal technicalities that bore no relation to actual justice. Accordingly, it is not surprising that Landis was receptive to a new position that would afford him even more power than the federal bench: Commissioner of Baseball.

IV. COMMISSIONER LANDIS

When the baseball owners approached Judge Landis to offer the commissionership, he imposed several conditions on his acceptance. First, it was im-

173. *Id.*

174. Berger v. United States, 255 U.S. 22 (1921).

175. *Id.* at 28-29 ("One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty"). Shortly before hearing the *Berger* case, Landis had declared, "If anybody has said anything about the Germans that is worse than I have said, I would like to hear it so I could use it myself." CHI. TRIB., Aug. 5, 1918.

176. 255 U.S. at 27.

177. *Id.* at 36.

178. Berger *and* Debs, N.Y. TIMES, Feb. 2, 1921, at 10.

179. CHI. TRIB., Feb. 4, 1921, at 8.

180. PIETRUSZA, *supra* note 2, at 152.

portant to Landis that his selection be unanimous.[181]

Next, Landis asked for judge-like powers over the affairs of baseball. The owners granted him investigative powers over "any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of baseball."[182] These powers were similar to those he held as district court judge, including the ability to summon witnesses, order the production of documents, and impose penalties in the face of a refusal to appear or produce. In addition, Landis was granted broad authority: "to determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Clubs, or Individuals, as the case may be."[183]

Not only did the owners confer a tremendous amount of power upon Landis, they also signed an oath to "acquiesce in his decisions even when we believe them mistaken" and not to "discredit the sport by public criticism of him and of one another."[184] Following through with such a commitment made it as though every Landis decision triggered a mini-vote of confidence from his employers.

With these broad powers in hand, Commissioner Landis set out to govern Organized Baseball.[185] This article discusses Landis' baseball rulings in four different contexts: (1) fixed baseball games, namely the infamous 1919 Black Sox scandal as well as the allegations against Ty Cobb and Tris Speaker;[186] (2) Babe Ruth's violation of the rule prohibiting World Series participants from off-season barnstorming;[187] (3) the legal obligations of baseball players and their relationship to organized baseball, focusing on the treatment of two players who were prosecuted for theft, the "foul ball" tort suit against Rick Ferrell, and the financial dealings of an insolvent player;[188] and (4) player contract cases, particularly the manipulation of player contracts and farm teams by the

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181. Phil Ball of the St. Louis Browns, a Ban Johnson supporter, never formally acquiesced in the Landis hiring. The Major League Agreement was ratified by the other fifteen franchise owners. HOLTZMAN, *supra* note 2, at 28.

182. Major League Agreement, *supra* note 46, art. I, § 2(a); Milwaukee American Ass'n v. Landis (Bennett), 49 F.2d 298, 299 (N.D. Ill. 1931) (upholding Landis's authority over Major League Baseball in a player contract dispute initiated by Ball and the St. Louis Browns).

183. Major League Agreement, *supra* note 46, art. I, § 2(b), at 41-42; *Landis (Bennett)*, 49 F.2d at 299.

184. PIETRUSZA, *supra* note 2, at 174; HOLTZMAN, *supra* note 2, at 22.

185. Major League Agreement, *supra* note 46, art. I, § 6, at 41-42 (designating Landis as Commissioner).

186. *See generally* COTTRELL, *supra* note 3.

187. Spink, *supra* note 1, at 95-99.

188. *Id.* at 88-89, 166, 187-91.

St. Louis Cardinals and Detroit Tigers.[189]

Relying on the realist framework described above, this section explains the actual impetus for each outcome, while demonstrating how Landis used his pronouncement to justify the result and maintain popular support for his rulings. It offers examples of Landis's willingness to import legal principles of procedural due process or to rely on quasi-legal structures into his "chambers" as commissioner. Furthermore, it sets the stage for an exploration into the characteristics that enabled Dictator Landis to govern.

A. Eliminating the Fixes

1. Eight Men Out - The 1919 Black Sox Scandal

Judge Landis began his reign as commissioner when the public was reeling from the knowledge that the 1919 World Series may have been fixed.[190] The heavily favored White Sox lost the series to the Cincinnati Reds, and the evidence demonstrated foul play.[191] Eight members of the Chicago White Sox were implicated in the scandal.[192] Confessions from three of the eight members, which were used to indict the players, magically disappeared before trial.[193]

Ultimately, a Cook County jury acquitted the players on the charge brought—that they had not only conspired to throw the 1919 World Series, but had done so with the specific intent to defraud the public.[194] At a time when baseball and boxing each faced charges of corruption, Landis established a zero tolerance policy for any offense that would undercut the integrity of the sport. Shortly after the players' acquittals, Judge Landis issued his decision to place all eight players on baseball's permanently ineligible list:

> Regardless of the verdict of the juries, no player that throws a ball game; no player that undertakes or promises to throw a ball game; no player that sits in a conference with a bunch of crooked players and gamblers where the ways and means of throwing games are

189. *Id.* at 199-204.

190. *Id.* at 65 ("There was especially bitter feeling that this crisis in baseball's history had come at a time when the game had no real government or executive head").

191. COTTRELL, *supra* note 3, at 215-23.

192. The eight players indicted were: pitchers Eddie Cicotte and Claude Williams, first baseman Arnold (Chick Gandil), shortstop Charles (Swede) Risberg, third baseman George (Buck) Weaver, leftfielder Joe Jackson, centerfielder Fielder Oscar (Hap) Felsch, and utility infielder Fred McMullin. SPINK, *supra* note 1, at 57.

193. HOLTZMAN, *supra* note 2, at 31.

194. *Id.*

> planned and discussed and does not promptly tell his club about it, will ever play professional baseball. . . regardless of the verdict of the juries, baseball is entirely competent to protect itself against crooks, both inside and outside the game.[195]

The most interesting aspect of the Landis ruling was the treatment of Buck Weaver, one of the eight White Sox players banned. The best evidence available demonstrated that while Weaver knew of the plan, he received no money and did not actually try to throw the games.[196] The Landis pronouncement affixed silence with the moral equivalency of game-fixing. That is, Buck Weaver's mere knowledge of the plan and failure to report it was just as wrong as if he had thrown a baseball game.[197] Landis achieved this outcome with rhetoric that listed each offense as though it were the same.

While Landis relied on moral reasoning, one could explain the decision to ban Weaver on pragmatic grounds. In the aftermath of a sordid affair, such as the Black Sox scandal, it would be difficult to demonstrate who participated in a fix. Failure is so common in baseball, and the sample size of one game or even one series so small, that absent a confession it would be nearly impossible to prove whether a player was "in the fix." Accordingly, the Weaver decision makes sense from an evidentiary perspective: it was important to penalize knowledge of the fix, because that would be much easier to prove than actual participation.

Furthermore, the rule created an incentive for players to report any future shady dealings about which they may have learned. The rule also chilled the ability of potential game-fixers to plan with one another, as players would not be able to trust that a teammate they approached would remain silent.[198]

Yet, it is not clear if Landis reached his decision based on this reasoning. Buck Weaver was a popular player, and it is unlikely that Landis could have garnered the support of fans for banning Weaver simply to prevent future evidentiary difficulties or to change player incentives for reporting potential fixes.[199] It is difficult to ascertain the true motive for Landis's behavior, because he selected every word he spoke so judiciously. Part of what makes Landis so interesting to study is the fact that he left no personal diary or jour-

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195. *Baseball Leaders Won't Let White Sox Return to the Game*, N.Y. TIMES, Aug. 4, 1921, at 1.

196. PIETRUSZA, *supra* note 2, at 193.

197. PIETRUSZA, *supra* note 2, at 194 ("What Landis did in banning Weaver was to *ex post facto* place guilty knowledge of crooked play on the same level as the deed itself").

198. Within a few years after this ruling, two game-fixing attempts—the Phil Douglas case in 1922 and the O'Connell-Dolan case in 1924—were immediately brought to Landis's attention and there have been no known efforts since. PIETRUSZA, *supra* note 2, at 194; SPINK, *supra* note 1, at 102-04, 117-25 (describing the two cases).

199. COTTRELL, *supra* note 3, at 261-62.

nal; even his "private" correspondences all appear to have a calculated purpose.

A second important matter in justifying the Landis Black Sox pronouncement was the assertion that baseball protects itself, rather than juries or the court system. Meant to combat any complaint that Landis ignored the jury verdicts, Landis explained that baseball judicial proceedings were independent and perhaps even superior to those in (state) court. Note that at the time of this utterance, Commissioner Landis was still serving as Judge Landis on the federal bench.

2. The Cobb-Speaker Wager

Another fix, less well-known today than the Black Sox scandal, allegedly occurred at the close of the 1919 regular season. The White Sox had clinched the American League pennant, and the Cleveland Indians were locked into second place. On September 25, 1919, the Detroit Tigers were playing the Indians and would finish in third place—the last team to collect playoff money—with a victory over Cleveland.[200]

Apparently, Detroit players Ty Cobb and Dutch Leonard, along with Cleveland players Tris Speaker and Smoky Joe Wood, agreed to bet on the Tigers to win.[201] At the time of the alleged wager, Landis was not yet commissioner and betting on baseball was not illegal. When all was said and done, Speaker played well for Cleveland,[202] Cobb did not play well for Detroit,[203] neither Leonard nor Wood played at all,[204] and the Tigers defeated the Indians anyway.[205] The players were not all able to get their bets in either. While it is unclear exactly what the players intended, whatever the plan, it was not executed correctly.[206]

In 1926, Leonard, who had a falling out with the irascible Cobb, turned over letters between the players to American League President Ban Johnson, a

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200. HOLTZMAN, *supra* note 2, at 37.

201. SPINK, *supra* note 1, at 138.

202. Speaker went 3-5 with two triples and successfully fielded six put-outs. *Tigers Win Bating Orgy*, N.Y. TIMES, Sept. 26, 1919, at 8.

203. Cobb went 1-5, grounding out three times. *Id.*

204. *Id.* Both Wood and Leonard were pitchers. *See* Pitcher Register entries, in THE BASEBALL ENCYCLOPEDIA 2028, 2353 (9th ed. 1993).

205. *The 1919 Detroit Tigers Regular Season Game Log*, RETROSHEET, *at* http://www.retrosheet.org (last visited Mar. 13, 2005).

206. CHARLES C. ALEXANDER, TY COBB 186 (1984) (explaining that due to the large sums of money involved and the odds favoring Detroit, the local bookmakers would not take the bets without consulting their bosses); PIETRUSZA, *supra* note 2, at 285-87 (printing copies of letters between Leonard and Cobb explaining that the bets were not properly executed).

Landis rival, as evidence of a fix.[207] Johnson determined that both Cobb and Speaker, who were aging player-managers, should quietly be ushered out of baseball.[208] Within a few weeks of one another, each tendered his resignation.[209]

When the matter came before Commissioner Landis, he refused to rubber stamp the arrangement.[210] Instead, he investigated the accusation,[211] turned over evidence to the press,[212] and ultimately cleared the names of Cobb and Speaker, ruling that, "[t]hese players have not been, nor are they now, found guilty of fixing a ball game. By no decent system of justice could such a finding be made."[213] The Commissioner permitted Cobb and Speaker to return to their respective clubs.

Landis had a long-standing contempt for gambling and gamblers in general. He had forced Giants team owners John McGraw and Charles Stoneham to divest their interests in a race track in Cuba,[214] and he constantly clashed with Hall of Famer Rogers Hornsby over non-baseball gambling.[215] Yet in exonerating Cobb and Speaker, Landis had to steer the focus away from the morality and incentives of the initial wager.

Instead, Landis couched his entire decision and his interpretation of the events that occurred around the issue of Leonard's failure to appear before him at the hearing. Landis announced that, "[a] wager had been made, but [Cobb, Speaker and Wood] vigorously denied that the game had been fixed and they insisted upon an opportunity to face their accuser."[216]

According to the Landis verdict, the initial attempts to resign resulted after Cobb and Speaker met with the Commissioner, and they "reached the conclusion that they would rather quit baseball than have a hearing with their accuser absent."[217] The Landis pronouncement explained that Cobb and Speaker believed that any exoneration that came without Leonard's involvement would be described by the press as white-washing what happened.[218]

The manner in which Landis handled the Cobb-Speaker affair demon-

207. HOLTZMAN, *supra* note 2, at 37-38; SPINK, *supra* note 1, at 137.
208. PIETRUSZA, *supra* note 2, at 287.
209. SPINK, *supra* note 1, at 136.
210. PIETRUSZA, *supra* note 2, at 287.
211. *Id.* at 287-91.
212. HOLTZMAN, *supra* note 2, at 38.
213. N.Y. TIMES, Jan. 28, 1927.
214. SPINK, *supra* note 1, at 85.
215. *Id.* at 174-76.
216. N.Y. TIMES, Jan. 27, 1927.
217. *Id.*
218. *Id.*

strated his ability to use the press to create and then respond to public opinion. Ban Johnson had intentionally kept the letters a secret, hoping to shield the public from the possibility of yet another scandal.[219] Landis, on the other hand, responding to the concerns of Cobb and Speaker,[220] who were the subject of rumors in the press,[221] not only gave copies of the letters to the press, but issued a lengthy report as well.[222]

Enraged, Johnson released a statement to the press regretting the fact that the affair had become a public scandal.[223] In a display that confirmed the authority of Landis as benevolent dictator, the American League owners passed a resolution "commend[ing] Judge Landis for his efforts in clearing baseball of any insinuations of dishonesty" and "unanimously repudiating any and all criticism appearing in the public press as emanating from Mr. Johnson."[224]

The public supported Cobb and Speaker,[225] and Landis's decision in favor of the players placated the fans, while undermining the authority of Landis enemy Ban Johnson.[226] Yet the rhetoric of the ruling acted to pre-empt any arguments of white-washing, while also steeping itself in the moral correctness of the fundamental right to face one's accuser. And so, the method helped justify the result.

One other significant decision came out of the Cobb-Speaker case. At the same time the allegations about the 1919 regular season were raised, Swede Risberg and Chick Gandil, two of the eight banned players from the White Sox, came forward to allege that members of the White Sox had fixed games at the end of the 1917 season as well.[227] Landis investigated the matter, which brought about a plea for reinstatement by Buck Weaver,[228] but it was clear that Landis did not want his reign to be weighed down by constant accusations about events that occurred before he was commissioner. Accordingly, in the aftermath of the Cobb-Speaker decision and the Risberg-Gandil investigation, Landis issued a "statute of limitations with respect to alleged baseball of-

219. HOLTZMAN, *supra* note 2, at 38.

220. ALEXANDER, *supra* note 206, at 189.

221. PIETRUSZA, *supra* note 2, at 293.

222. SPINK, *supra* note 1, at 138, 156.

223. HOLTZMAN, *supra* note 2, at 38.

224. *Id.* at 39.

225. PIETRUSZA, *supra* note 2, at 294-96.

226. *Id.* at 296 (arguing that Landis intentionally delayed in order to allow the public to "mull over how Johnson had expelled two of the game's greatest stars on flimsy evidence and in total secrecy"). Six months later, Johnson resigned from his post as American League President. HOLTZMAN, *supra* note 2, at 39-40.

227. SPINK, *supra* note 1, at 143-44.

228. COTTRELL, *supra* note 3, at 270-71.

fenses, as in our state and national statutes with regard to criminal offenses."[229]

While the Black Sox ruling forced Landis to declare independence from the American judicial system, the Cobb-Speaker affair and its surrounding events reaffirmed Landis's commitment to general principles of due process. In establishing the Law of baseball, Landis was more than willing to borrow from traditional court practices based on procedural fairness or judicial economy.

B. Commissioner Landis v. the Sultan of Swat

In 1921, Babe Ruth produced one of the greatest—if not the greatest—offensive season of all-time.[230] Led by Ruth's production at the plate, the New York Yankees won their first American League pennant and faced off against the New York Giants in the World Series. With Ruth hobbled with various injuries, the Yankees lost the series in eight games; the Babe appeared in only the first five.[231]

Prior to the World Series, Ruth had agreed to barnstorm with the "Babe Ruth All Stars" from October 16 through November 1.[232] However, Organized Baseball had a rule dating back to 1911 that forbade players on World Series teams from participating in off-season exhibition games.[233] The purpose of the rule was to prevent baseball's image from being tarnished by having its champions playing—and perhaps even losing to—other teams.[234] There may also have been racial overtones to the rule as well. Organized Baseball was a segregated society, but sometimes major league players barnstormed against Ne-

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229. THE SPORTING NEWS, Jan. 20, 1927. Landis proposed several rules that the owners adopted at the time. The most well-known is the rule of permanent ineligibility for anyone betting on a game in which he participated. *Id.*

230. *See* Roby Neyer, *The Best Seasons of All Time*, ESPN.COM, *at* http://espn.go.com/mlb/columns/neyer_rob/1281285.html (last visited Mar. 13, 2005) (listing Babe Ruth's 1921 season as the fifth best offensive season of all-time); *McGwire Improves With Age*, SPORTSLINE, Sept. 8, 1998, *at* http://ww3.sportsline.com/b/member/boxscore/baseball/boxscore09898.htm (last visited Mar. 13, 2005) ("Arguably the greatest offensive season ever posted was by Babe Ruth—not in 1927 when he belted 60 homers, but by Ruth in 1921 . . . "); Allen Barra, *The Best Season Ever?*, SALON.COM, *at* http://archive.salon.com/news/sports/col//barra/2001/06/20/bonds/ (last visited Mar. 13, 2005) (demonstrating that by using a statistical measure of SLOB—slugging percentage multiplied by on base percentage—in 2001, Barry Bonds outperformed even the great Ruthian seasons of 1920 and 1921).

231. The World Series and Championship Playoffs, *reprinted in* THE BASEBALL ENCYCLOPEDIA, *supra* note 204, at 2702; SPINK, *supra* note 1, at 97.

232. PIETRUSZA, *supra* note 2, at 230.

233. *Id.* at 229.

234. SPINK, *supra* note 1, at 97 (arguing against the rule because the fans "are all part of the game" and "deserv[ing of] consideration").

gro league players.[235]

Ruth had already encountered this rule in 1916, when he and several of his Red Sox teammates played an exhibition game after they had won the World Series. The players were fined $100 each.[236] In early 1921, the ban was reissued. When Ruth saw Landis in the Yankee clubhouse at the end of the regular season, he inquired about the rule against barnstorming, and Landis informed him that the rule would be strictly enforced.[237]

Despite being warned by Landis as well as Yankee owners Jacob Ruppert and Colonel Tillinghast Huston not to play, Babe Ruth played several games along with his "All-Stars."[238] Also on the team were Yankee players Bob Meusel and Bill Piercy.[239] After several games that suffered from inclement weather, Huston bought out the promoters and brought the affair to a close.[240]

At the time that the matter was in dispute, Landis carefully sampled public opinion to see if it would support him over the popular Babe. He received confirmation from the press that the public was on his side,[241] as were the owners of the Yankees,[242] and even John Montgomery Ward, the former player who had organized the first player's association in 1890.[243]

Armed with widespread support, Landis issued his ruling: Ruth, along with Meusel and Piercy would be suspended for one quarter of the 1922 base-

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235. Ban Johnson had forbidden American League teams to barnstorm because "[w]e want no makeshift club calling themselves the Athletics to go to Cuba to be beaten by colored teams." PIETRUSZA, *supra* note 2, at 405. There is a dispute over Landis's legacy on the issue of integrating professional baseball. One view castigates Landis for this failure. *See, e.g.*, KEN SOBOL, BABE RUTH AND THE AMERICAN DREAM 134 (1974) (calling Lands "openly biased" against non-whites). For a lengthy discussion of the debate, see PIETRUSZA, *supra* note 2, at 405-30 (concluding that while Landis was not an advocate for integration, the bulk of the blame lay with the baseball owners, who favored segregation).

236. PIETRUSZA, *supra* note 2, at 229-30.

237. *Id.* at 230.

238. SPINK, *supra* note 1, at 96-99.

239. COTTRELL, *supra* note 3, at 263.

240. PIETRUSZA, *supra* note 2, at 236.

241. *See, e.g.*, *The San Francisco Bulletin* prediction that "if the axe falls and the Babe gets his, baseball writer and fans will be back of Landis almost to a man." COTTRELL, *supra* note 3, at 264-65 (citing to multiple press accounts, including *Baseball Magazine* and *The Sporting News* that supported Landis over Ruth). After Landis suspended Ruth, a "fan petition with thousands of signatures was sent to Landis asking him to pardon the Babe." HOLTZMAN, *supra* note 2, at 37.

242. PIETRUSZA, *supra* note 2, at 234-35 (admitting that Ruth left Landis no alternative). *But see* SPINK, *supra* note 2, at 98 (pointing out that after the suspension was issued, the Yankees owners complained that the true party punished was the Yankees, not the players).

243. PIETRUSZA, *supra* note 2, at 234 (noting that Ward stated that even though the rule itself was unfair, "[t]he Commissioner's position in the matter is unassailable, of course, and he ought to be sustained by the leagues, the press and the public").

ball season.[244]

To legitimize this decision, Landis first linked the rule violated to the integrity of the game, explaining that, "[t]his rule was enacted in 1911, only after repeated acts of misconduct by world series participants made its adoption imperative for the protection of the good name of the game."[245] Objectively speaking, it is not clear that the rule in question has anything to do with the integrity of the game. One could also argue that the rule was counter-productive from an economic standpoint: allowing players to barnstorm could create more interest in the "real" baseball season. But by making this connection, Landis offered a moral argument in favor of the suspension.

Second, and even more important, Landis framed the issue as stemming from Ruth himself: "The situation involved not merely rule violation, 'but a mutinous defiance intended by players to present the question: Which is bigger – baseball, or any individual in baseball?'"[246] The case and penalty would not have arisen had Ruth not insisted on presenting the question. Thus, any blame for the decision rested with Ruth himself, not Landis, who as arbiter merely had his hand forced in needing to deal with the matter.

Landis's treatment of Ruth mirrored his treatment of Rockefeller, drawing on Populist principles of equality. And like in *Standard Oil*, the public sided with Landis. Yet in this case, Landis successfully took on a national hero, rather than a corporate suit. In this case, it is more likely that the methodology employed played a big part in the approval for the end result. And through this battle, the new Commissioner received confirmation that the owners, players, public, and press, all backed his iron rule.[247]

C. Players in Court

Commissioner Landis had broad powers to govern organized baseball, and he imposed his own judgment and sentence on matters involving the legal obligations of baseball players. This section details Landis's treatment of three different kinds of cases that represent the intersection of baseball players and the state courts.

First, this section offers the Landis rulings on the eligibility of two players—Benny Kauff and E.C. "Alabama" Pitts—who were each criminally prosecuted for a form of theft. Next, it describes the events surrounding a tort suit against Rick Ferrell, a player who hit a foul ball that injured a spectator,

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244. The players were suspended until May 20, 1922. COTTRELL, *supra* note 3, at 265.

245. *Ruth Suspended, Fined Series Money*, N.Y. TRIB., Dec. 6, 1921, at 14.

246. N.Y. TIMES, Dec. 6, 1921, at 22.

247. *See* PIETRUSZA, *supra* note 2, at 240 (explaining that, for Landis, the Ruth suspension "was a major step in achieving autocratic control over the national game" for Landis).

and the Landis determination of who bore the obligation of compensating the victim. And last, it explains Landis's involvement in the financial affairs of Johnny Gooch, an insolvent baseball player who declared bankruptcy in the 1930s.

1. Can Criminals Play Baseball?

One issue that Commissioner Landis grappled with was whether a player who found himself in trouble with the law should be eligible to play professional baseball. In dealing with the 1919 Black Sox scandal, Landis articulated the principle that the determinations of courts or juries would not govern baseball.[248] Yet in that instance, the issue before Landis was a baseball one: did the players fix baseball games? And one could easily understand the Landis dismissal of the juries' verdicts on the ground that the question before them was not the precise matter before the Commissioner.

But even before the Black Sox ruling, Landis had demonstrated his independence from in court determinations, when he issued his ruling on the eligibility of Benny Kauff, a player criminally prosecuted for auto-theft.[249] Years later, he would face a similar, though not identical situation, when Alabama Pitts, a convicted felon, sought to play minor league baseball.[250] This section contrasts Landis's treatment of the two cases of criminals playing baseball.

a. The Case of Benny Kauff

Though once known as the "Ty Cobb of the Federal League,"[251] Benny Kauff gained notoriety not for his behavior on the diamond, but rather for his activity off of it. During the off-season following the 1919 fix, Kauff and two employees in his tire business allegedly stole a Cadillac and resold it.[252]

Kauff was indicted for theft, but was able to delay his trial so he could play the entire 1920 season.[253] At the same time, new charges arose against Kauff; Ban Johnson claimed that Arnold Rothstein had linked Kauff to the 1919 World Series fix.[254] Another banned player, Heinie Zimmerman, accused Kauff of throwing a game at the end of the 1919 regular season.[255]

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248. *See* PIETRUSZA, *supra* note 2, at 187.

249. SPINK, *supra* note 1, at 88-89.

250. *Id.* at 187-91.

251. PIETRUSZA, *supra* note 2, at 180.

252. *Id.*

253. *Id.* at 181.

254. *Id.* at 180-81.

255. *Id.* at 180-81; SPINK, *supra* note 1, at 62, 88.

In the spring of 1921, the new commissioner summoned Kauff for a hearing concerning the felony indictment and placed him on the ineligible list pending the resolution of the matter.[256] Once faced with this ruling, Kauff's attorneys managed to expedite the proceedings. The trial took place in May of 1922.[257] Despite the fact that Kauff's employees implicated him during the trial, the jury acquitted Kauff. Commentators found the verdict fishy and suspected that the jury had been tampered with or bribed.[258]

In the aftermath of the acquittal, Landis ruled that Kauff would remain permanently ineligible to play baseball. In his pronouncement, Landis declared:

> the evidence in the Bronx County case disclosed a state of affairs that more than seriously compromises your character and reputation. The reasonable and necessary result of this is that your mere presence in the line-up would inevitably burden patrons of the game with grave apprehension as to its integrity.[259]

In his ruling, Landis rejected the jury verdict, and offered his own moral judgment: the overwhelming evidence demonstrated that Kauff engaged in theft and other reprehensible behavior. Landis allowing someone with this type of reputation to play would harm the integrity of baseball. And so, the resulting ban seemed justified.

The Landis verdict was not the end of the story. Kauff sued in state court, seeking reinstatement. In September of 1921, he successfully obtained temporary restraining order requiring his reinstatement.[260] Landis, through his counsel, J. Conway Toole, informed the court that "notwithstanding Kauff's acquittal his character and reputation were so seriously compromised that his mere presence in the line-up would inevitably burden patrons of the game with grave apprehensions as to its integrity."[261] A few months later, the court reluctantly denied Kauff's request for a permanent injunction, declaring that "[w]hile the papers disclose that an apparent injustice ha[d] been done the plaintiff," the action was moot because Kauff's contract had expired after the 1921 season.[262]

Despite being couched in terms of the morality of theft, the Landis deci-

256. PIETRUSZA, *supra* note 2, at 181.

257. *Id.*

258. SPINK, *supra* note 1, at 88.

259. *Id.* at 89.

260. N.Y. TIMES, Sept. 13, 1921.

261. THE REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE FOR 1922, at 61 (FRANCIS C. RICHTER ED., 1922).

262. *Benny Kauff Loses in Supreme Court*, N.Y. TIMES, Jan. 18, 1922, at 15.

sion against Kauff, however, more likely stemmed from his desire to eliminate unsavory characters that consorted with gamblers. At the time of the Kauff banning, Landis had not yet declared the Black Sox permanently ineligible. As a result, while cleaning up the game necessitated Kauff's removal, Landis would have been loath to do so merely on the say-so of rival Ban Johnson or the crooked Zimmerman. The theft prosecution offered Landis the perfect reason to take action. Furthermore, it allowed Commissioner Landis to use an unpopular defendant to establish the precedent that he would not merely follow the dictates of a jury and that state courts were limited in their ability to affect the Law of baseball, a system created by the contractual relationships between its various participants.

b. The Case of Edwin Collins "Alabama" Pitts

Not only did Commissioner Landis have authority over Major League Baseball, he also had power to govern certain aspects of Minor League Baseball as well. One of the most famous minor league decisions that Landis issued involved E.C. "Alabama" Pitts.

Pitts was convicted for robbing a grocery store.[263] He had an impressive baseball "career" playing for the Sing Sing prison team.[264] In 1935, when Pitts was due to be paroled, the International League Albany Senators offered Pitts a contract to play baseball for them.[265] The matter went before the appropriate minor league authorities: Judge William Bramham and the National Association Executive Committee. Bramham and the Committee ruled against the Albany team, declaring Pitts ineligible to play.[266]

The case was appealed to Commissioner Landis. Bramham had consulted with Landis before issuing his ruling, and the latter had approved of the determination against Pitts and the team.[267] However, public opinion strongly favored Pitts; even the victim of the robbery appealed on his behalf.[268] Much of the press coverage sought to portray Pitts as someone caught in the wrong place at the wrong time or a mere lookout, despite the fact that this was contrary to the evidence brought out at trial.[269] So, when it came time to rule on

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263. SPINK, *supra* note 1, at 187.

264. In twenty-one games, Pitts batted .500 and slugged eight homeruns. PIETRUSZA, *supra* note 2, at 375.

265. The general manager of the Albany club was the former Cub, Johnny Evers. SPINK, *supra* note 1, at 187-88.

266. PIETRUSZA, *supra* note 2, at 375.

267. *Id.*

268. SPINK *supra* note 1, at 188-89.

269. PIETRUSZA, *supra* note 2, at 376.

the eligibility of the player, Landis faced tension between the moral principles he had previously espoused (e.g., in the *Kauff* case) and the desire to find Pitts eligible to placate the fans.

Furthermore, by 1935, questions of baseball's integrity had been laid to rest. There was no real practical reason to forbid Pitts from playing. And if Kauff was really banned not because thieves undermined the public confidence in baseball, but because of his involvement in the 1919 fix, there clearly was no reason to rely on his case as controlling precedent.

Accordingly, Landis wrote an opinion that delivered the desired outcome—Pitts could play for Albany—while denouncing the popular version of the crime.[270] Landis discredited the belief that Pitts was merely a look-out and noted that "Pitts has been in at least five other robberies."[271]

To justify his outcome, then, Landis reframed the moral question involved. He distinguished his decision from Bramham's on the grounds that the prior ruling was only on the general matter of hiring felons. On the other hand, Landis legitimized allowing Pitts to play: (1) by relying on new evidence that excluding Pitts would have a "destructive effect upon Pitts' effort toward rehabilitation" and (2) because "[r]eputable people have expressed to me their belief that there has been a complete reformation in Pitts' character, and their confidence in his earnest intent to regain an honorable position in society."[272] And so, Pitts was allowed to play minor league baseball.

2. Rick Ferrell and the Foul Ball

In 1936, while playing in Cleveland, Boston Red Sox All-Star Rick Ferrell hit a foul ball that injured a spectator, Marie Kaeser.[273] Kaeser brought suit against the Cleveland ball club as well as Ferrell. Though Ferrell was served with the lawsuit, it is unclear exactly what happened to the papers.[274] Ferrell failed to appear in court and a default judgment was entered against him for $327.61.[275]

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270. *In re Player E.C. Pitts* (on file with the Landis Papers, *supra* note 17, at Folder 4).

271. *Id.* at Folder 1-2.

272. *Id.* at Folder 4.

273. Kaeser v. Ferrell (on file with the Landis Papers, *supra* note 17, Folder 3).

274. Letter from E.B. Eynon, Jr., Secretary of the Washington American League Base Ball Club to Landis (May 28, 1938) (on file with the Landis Papers, *supra* note 17, Folder 4) (bringing the matter to the attention of the Commissioner); Letter from Edward Collins, Vice President of the Boston American League Baseball Company to Landis (June 4, 1938) (on file with the Landis Papers, *supra* note 17) (describing the chain of events in which Ferrell turned the papers over to team officials).

275. In re Claim of Mary Kaeser 11-17 (on file with the Landis Papers, *supra* note 17) (explaining that the Cleveland Club did not defend Ferrell in court because its insurance would not cover him).

During the 1937 season, Ferrell was traded to the Washington Senators. When he failed to pay the delinquent judgment, Ferrell was threatened with arrest if he came with his team to play against the Indians.[276] The question came before Commissioner Landis: from the various parties involved—Ferrell, Cleveland, Boston, and Washington—who should pay Ms. Kaeser?

During the hearing on the matter, Landis immediately asked the baseball owners to set aside a strictly legal analysis, shying away from finding them liable solely on the legal standards of *respondeat superior*. Instead, he guided the owners through a pragmatic approach. In an exchange with Tom Yawkey, owner of the Boston Red Sox, Landis framed the issue as follows:

> Landis: [A]s a legal question it may be that the ball player, . . . as a technical legal matter that he would be under obligation to see that he was represented, but as a practical matter, in the operation of our business can we go on the theory that the ball player, in that situation, has got to provide himself with counsel?
>
> Yawkey: Well, as a practical man, I would say no.
>
> Landis: . . . as a practical operation of our business, a club has got to take care of that ball player's rights in that lawsuit . . . .[277]

This exchange set up the ultimate ruling: Boston must pay. In his letter that explained the outcome, Landis engaged in process of elimination reasoning. Ferrell could not be held responsible, because he was merely an employee of the Red Sox acting in his scope of employment and it would not be practical to expect players to pay.[278] Washington could not be held responsible, because it did not acquire Ferrell until after the incident in question.[279] Cleveland could not be held responsible, because it had no relationship with the player. As such, the only party left to pay would be Boston.[280]

Even though the resolution of this matter was entirely an internal matter for the major league clubs involved, Landis used several hearings and correspondence letters not only to gather evidence, but also to legitimize his decision. A review of the case demonstrates adherence to procedural due process but a rejection of a formalistic understanding of the Law of baseball.

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276. PIETRUSZA, *supra* note 2, at 386.

277. *In re Claim of Mary Kaeser* 25-27 (on file with the Landis Papers, *supra* note 17).

278. Letter from Landis to Boston American League Club (Nov. 19, 1938) (on file with the Landis Papers, *supra* note 17).

279. *Id.*

280. *Id.*

3. The Gooch Bankruptcy

It is difficult to imagine the commissioner of any professional sport today engaging in rulings concerning the day-to-day affairs of players like those that came across the desk of Commissioner Landis. One such matter was the financial dealings of Johnny Gooch, a player and coach who spent the bulk of his career with the Pittsburgh Pirates.[281]

Gooch's financial problems stemmed from the combination of poor decisions, the Great Depression, and the willingness of many businesses and people to extend credit to a professional baseball player.[282] It was no surprise when creditors forced the insolvent Gooch into bankruptcy.

Despite the bankruptcy proceeding and discharge of debts, several creditors turned to Commissioner Landis to ensure that Gooch would repay what he owed them.[283] Two of these creditors were ball players who had lent money to Gooch, their coach.[284] By modern standards, all of these efforts at debt collection run afoul of the Fair Debt Collection Practices Act.[285]

Landis was upfront about the fact that Gooch had no legal obligation to repay debts that were discharged in bankruptcy. Nonetheless, he actively sought the repayment of the debts owed to other baseball players, while politely explaining to any other creditors that he was powerless to see that Gooch repaid extinguished debts. Landis justified his debt collection on moral grounds; the integrity of baseball would be jeopardized if one player or coach owed another money.

Landis wrote to the Union National Bank, "I do not know of any method whereby this office can attempt to enforce collection of an ordinary commercial obligation discharged by bankruptcy."[286] Yet in a letter to the President of the Pittsburgh club, Landis explained, "[H]e is going to repay the amounts he got from his fellow ball players with bad checks involved or he is going on the

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281. For information about Gooch's playing career see Johnny Gooch, *Player Statistics*, BASEBALL REFERENCE, *at* http://www.baseballreference.com/g/goochjo01.shtml (last visited Mar. 13, 2005).

282. Documents from John B. Gooch Matter (on file with the Landis Papers, *supra* note 17, Folder 19).

283. *See, e.g.*, Letter from Campbell & Company to Landis (June 4, 1935) (on file with the Landis Papers, *supra* note 17) (requesting contact information for Gooch); Letter from Commercial Adjustment Company—Collections & Adjustments to Landis (Aug. 24, 1935) (on file with the Landis Papers, *supra* note 17) (requesting assistance in collecting various debts).

284. Letter from Landis to Gooch (Aug. 17, 1937) (on file with the Landis Papers, *supra* note 17). "Two of your baseball comrades have written me about your failure to repay loans you secured from them as the result of friendship." *Id.*

285. 15 U.S.C. § 1692 (2002).

286. Letter from Landis to Robert M. Baldridge, President Union National Bank (July 22, 1936) (on file with the Landis Papers, *supra* note 17).

ineligible list as a person whom it is unsafe to have on a baseball team."[287]

Ultimately, the baseball players were repaid, and Landis indicated to all other creditors that he had passed along their requests for repayment, but his involvement with them had ended.[288] This case demonstrates the manner in which Landis was able to use the commissioner's office to ensure that moral obligations with baseball-related effects and concerns were dealt with appropriately. The process—letters to the parties involved—both framed and justified the result sought.

D. Player Contract Cases

If fixed baseball games and dealing with gamblers marked the first half of the Landis era, the second half of his term focused on disputes over player contracts and the farm system.[289] Though Landis ruled on many individual player contracts, this section will explore the Landis decisions in two paradigm cases: the case of the Detroit Tigers' secret contracts and the case of Cedar Rapids and Branch Rickey's St. Louis Cardinals.[290]

In order to understand each of these cases, it is important to recognize that the relationship between major league and minor league clubs differed than the current state of affairs and the term "player draft" does not refer to the current version of the entry draft.

At the time Landis became Commissioner, the minor leagues were separate and autonomous from the major leagues. In accordance with the rules, the major league teams would option players that they had signed to various minor league teams. They were also able to purchase or draft players from minor league teams that had signed these athletes through a specific set of rules that defined priorities, price, and restrictions on these acquisitions. The rules required teams to register these transactions with the league.

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287. Letter from Landis to William E. Bernswanger, President, Pittsburgh Athletic Club (Aug. 17, 1937) (on file with the Landis Papers, *supra* note 17).

288. *See, e.g.*, Letter from Landis to J.P. Campbell, Campbell & Company (Dec. 10, 1938) (the Landis Papers, *supra* note 17).

289. This does not mean that player contract issues did not occur in the first half of Landis's reign. In fact, the very first ruling Commissioner Landis issued involved a conflict over a player contract. Branch Rickey had signed Phil Todt when the player was only seventeen, and then covered up the contract for two years. Subsequently, Todt signed with the Phil Ball's Browns. Landis ruled in favor of the Browns, lending his support to the one owner that did not originally support his candidacy over the man who would develop into a foe. SPINK, *supra* note 1, at 87-88.

290. *Id.* at 199-205.

1. The Cedar Rapids Case

As Vice President of the St. Louis Cardinals, Branch Rickey discovered that the best way to develop talent was to stockpile minor league players in the hopes that some would become major league caliber.[291] The Cardinals developed working arrangements with numerous minor league clubs, even with competing clubs in the same minor league.[292] Furthermore, besides controlling more than one team in any minor league, the Cardinals also signed vast quantities of prospects to contracts not filed with the league.[293]

In 1938, Landis discovered that the Cardinals maintained two separate farm systems: a legitimate one and an illegitimate one through the Class A Western League Cedar Rapids team. The Cedar Rapids club was connected to four different Class D leagues, and the Cardinals owned multiple teams in each league. Cedar Rapids engaged in transactions with one of these teams, the Cardinal's Monnett farm in the Arkansas-Missouri league, in the guise that it was acting on its own behalf, when it was actually acting on behalf of the St. Louis Cardinals. The Cardinals Pacific Coast League farm club and the Cedar Rapids' farm club in Newport had a similar "gentleman's agreement" for player transactions.[294]

Beyond those arrangements, Landis also found that in 1932, the Cardinals owned the Three-I League's Danville club, but had a standing agreement to purchase players from the Springfield Cardinals, a competing club in the same league.[295]

In 1938, Landis lashed out against the Rickey empire, granting free agency to seventy-four players in the Cardinals system. While Landis conducted his investigation and interrogation of Rickey in secret, he delivered his nine-page decision directly to reporters.[296]

Landis justified his ruling with his old standby—the integrity of baseball, explaining:

> The fundamental, indispensable basis of every league's operations—Major and Minor—is the unquestionable integrity of com-

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291. *America's Game: A Brief History of Baseball*, THE BASEBALL ENCYCLOPEDIA, *supra* note 204, at 7 ("Acquiring a network of minor league teams, Rickey stocked them with young players whose steady development enabled the poor-drawing Cardinals to win pennants and profit by the sales of surplus players").

292. At one point, Rickey's Cardinals controlled all the players in the Nebraska State League and the Arkansas-Missouri League. SPINK, *supra* note 1, at 199.

293. PIETRUSZA, *supra* note 2, at 362.

294. *Id.*

295. *Id.*

296. In re Cedar Rapids-St. Louis National League Club Relations (Mar. 22, 1938) (on file with the Landis Papers, *supra* note 17, Folder 4).

> petition within the league. Obviously, doubt of that must arise if players of two or more clubs competing in the same league are controlled by the one organization. . . .An individual club cannot, and will not, be permitted to make a contract destructive of public confidence in baseball's integrity.[297]

Interestingly, there was no claim that the Cardinals were actually moving players in such a manner that manipulated or harmed the legitimacy of the minor leagues. In fact, on its face, the secrecy appears to be the major problem, not the arrangement itself. Nonetheless, Landis was able to justify his decision by reference to the obvious problem that is potentially created by St. Louis having its hands in so many teams and so many players.

The penalty imposed was merely "remedial and preventive" rather than "punitive;"[298] if anything, the decision to free only seventy-four players was mild. In fact, Landis would later express regret for not having punished Rickey more severely, because "he never encountered anything equal to this case for brazen contempt of baseball law."[299] Landis had successfully taken on Rockefeller and Ruth; he could have completed the trilogy by banning Rickey, but failed to do so. Perhaps the reason he didn't is that by 1938, Landis had already established his authority over the sport and chose to restrain himself from using all the power available to him.

2. The Detroit Secret Agreements

Several years after the ruling in the Cedar Rapids case, Landis again tackled the problem of major league teams hoarding talent. However, the nature of the problem in the Detroit case was slightly different. In the Cedar Rapids case, Landis did not address the secrecy of the arrangements as the major objectionable component.

In the Detroit case, secrecy was the primary problem, namely that clubs used secrecy to hide the true rights of players from these players and other clubs.[300] In a separate ruling, Landis explained, "The *only* reason why such false documents have been filed is to camouflage secret understandings . . . *a truthful official transfer record is essential to any rules rights of the players concerned.*"[301]

Tired of dealing with constant problems from Detroit and perhaps regret-

297. *Id.* at Folders 3-4.

298. *Id.* at Folder 9.

299. PIETRUSZA, *supra* note 2, at 366 (citing Larry McPhail).

300. SPINK, *supra* note 1, at 203-05.

301. In re Farm Systems and Working Agreements 2 (Jan. 15, 1940) (on file with the Landis Papers, *supra* note 17, Folder 4).

ting his light treatment of the St. Louis Cardinals over the Cedar Rapids affair, Landis freed ninety-one players, required the team to make payments to fifteen other players, and chastised various club officials.[302] Given that Detroit did not possess a deep farm system like the Cardinals, this sanction devastated the Tigers.[303]

Landis further announced that penalties for secret contract arrangements would be greater in the future: "Ineligibility appears to be the only adequate penalty for improper conduct . . . notice hereby is given all League Presidents and Officials that in any such cases arising after this date they will be placed on the ineligible list."[304]

Several key principles can explain Landis's ruling in the Detroit case. First, Landis viewed the farm system as raising fundamental questions of moral justice. Though Landis supported the reserve clause that would bind players to teams, the idea that such contracts could be hidden such that the players did not even know their own rights conflicted with his Progressive notions of equality. Second, and just as important, the Detroit case demonstrated to Landis that unless he was willing to use the sanctioning powers at his disposal, the baseball owners would continue to act in their own self-interest and contrary to their collective interest or the best interests of the game.

V. LESSONS FROM LANDIS

The discussion above demonstrates that Landis's pronouncements, as Judge or Commissioner, were neither arbitrary nor unprincipled; rather Landis systematically relied on a pragmatic approach that merged the legal system with his own norm-based sense of governance. Furthermore, Landis did not act with unfettered discretion. In the district court, he faced the prospects of appeal and reversal from above. In addition, in the far background loomed impeachment. Even as Supreme Lord of Baseball, his decisions were cabined by popular opinion and his employers, the baseball owners. Nonetheless, Landis was a success in creating law—federal law and the non-legal Law of baseball—that appealed to a wide variety of audiences. What makes Landis so remarkable is that not only was he popular in his own day, his legacy has only grown in the years since he died.

This section extrapolates from the cases detailed above the key approaches

302. In re Detroit Club "Working Agreements" (Jan. 13, 1940) (on file with the Landis Papers, *supra* note 17).

303. PIETRUSZA, *supra* note 2, at 367-68. The estimated loss to the Detroit Tigers was $600,000. HOLTZMAN, *supra* note 2, at 41.

304. *In re Detroit Club "Working Agreements"* 5, *supra* note 302 (on file with the Landis Papers, *supra* note 17).

that made Landis so successful. Three methodological traits stand out: (1) the use of investigative powers and procedures; (2) the use of explanatory pronouncements to accompany rulings; and (3) the use of the press both to cultivate and to ascertain popular opinion. Each of these tools will be discussed briefly.

Then, this section employs Landis as a starting point for a theoretical analysis of the benevolent dictator model for non-legal governance. Based on the fact that Landis represents an example of a successful benevolent dictator,[305] it argues that benevolent dictatorships may be an attractive and acceptable power structure in non-legal systems that: (a) rely heavily on contractual relationships; (b) incorporate quasi-legal structures and processes; and (c) feature complicated, often multi-equilibria repeat-player games between participants.

A. The Landis Tools of Success

Judge Kenesaw Mountain Landis was popular on the bench and in baseball. At the same time, his decisions have withstood the test of time. Even though more modern approaches to the same cases may lead to different results, by and large, the outcomes Landis reached can still be supported by today's standards. The important question is why. What made Landis so successful? How has his legacy remained untarnished, even in the face of the widespread belief that Landis was arbitrary and unprincipled?

The answer lies primarily in the methodologies that acted to convince his contemporaries. First, Landis relied on an investigative process couched in the due process principles of giving notice and an opportunity to be heard. When pronouncing a judgment about an issue that had already been litigated or prosecuted in court (e.g., Black Sox, Kauff, Pitts), he mostly relied on the evidentiary record, but was not averse to seeking more information before issuing his *de novo* ruling.

In most situations, including but not limited to the Cobb-Speaker matter, the Cedar Rapids-St. Louis dealings, and the Ferrell foul ball lawsuit, he held hearings and deposed witnesses before rendering his decision. Even in matters too small to warrant in-person hearings, Landis used his correspondence to make inquiries and request evidence before he would rule, such as in ascer-

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305. ALEXANDER, *supra* note 206, at 156.

> Given virtually dictatorial powers, Landis began an autocratic reign that ended only with his death in 1944. The institution of the commissioner system, as much as the introduction of the lively ball and the enormous attendance boom, gave baseball a character distinctly different from what it had been up to the 1920s.

Id.

taining the debts owed other players in the Gooch bankruptcy or the status of Tom Henrich's player contract.

In addition, even in cases initiated by someone else, Commissioner Landis adhered to these principles of investigative process. Players regularly wrote Landis to inquire about their rights or to protest/appeal their treatment by their parent club. Landis did not always have "good news" to convey or rule in their favor, but the way he treated the matters brought to his attention—the process—made the outcome palatable to the parties involved.

Next and somewhat related to his use of principles of process, Landis utilized words, through written opinions, letters, and public pronouncements, to frame the issues in question and legitimize his decisions. Whether he was ruling publicly, such as he did in several of the decisions discussed above (e.g., Babe Ruth, Black Sox) or privately by letters (e.g., Gooch, Ferrell), the rhetoric and content played an important part in the way the outcomes were perceived.

Last, Landis recognized the cyclical role between himself and the press or public opinion. He used the press to shape what people thought, yet knew that the press and public acted as a constraint on his behavior as well. Referring back to the Babe Ruth case, for example, one can see how Landis used the press to argue why Ruth's violation was particularly troublesome; at the same time, he checked the press to make sure that the public stood by him and not with the great slugger. Landis did not feel compelled to follow public opinion, such as in his treatment of Buck Weaver, but he kept apprised of it and recognized when departing from it would not be worth the political capital such a departure would cost (e.g., the Pitts case).

While these methodologies all played a big part in Landis's success, it would be remiss to ignore the role that the outcomes themselves may have played in building the legacy of Landis. Though this article argues that how Landis justified his decisions mattered, some of his contemporaries may have approved of Landis simply because he reached decisions they liked rather than because he was successful in convincing them that he was right. That is, they may not have cared what principles of investigative process or *ex post facto* written rationalizations Landis employed. This possibility seems more likely given that modern day commentators, who tend to focus on the long-term effects of the decisions themselves, mostly approve of the Landis decisions too.

There are two responses to this potential critique. First, some of the Landis decisions themselves did not coincide with public opinion or with the viewpoints of the primary parties involved in the dispute. Yet they were still received well. And second, it is possible that the modern preference for the Landis outcomes directly relates to the influence of how he presented the evidence and framed in the issues in the first place. Accordingly, while the out-

comes themselves were important too, one can learn from the methodologies of success.

B. The Role of Benevolent Dictator

Judge Landis operated as a benevolent dictator over baseball. This dictatorship was created by contract. As long as the contract existed, Landis had broad powers to rule over Organized Baseball, a fully functioning non-legal—or extra-legal—governmental system.[306] Thus, this Landis case study offers an interesting example of the potential for the benevolent dictatorship structure of government in non-legal (otherwise known as normal) settings. This section argues in favor of the contractually-created dictator, particularly within subgroups that have more law-like norms and have competing interests internally.

Benevolent dictatorships have the potential to be more efficient than other governmental structures.[307] In addition, they also have the potential to create more just rules or "laws" than other options. The key, of course, lies in the identity of the dictator; that is, is the Dworkinian Hercules available to preside?[308]

Democratic theory[309] coupled with the historical events of the past century demonstrate that despite any potential benefits from the model, the benevolent dictatorship is a dangerous structure for legal governance.[310] Nevertheless, there is no reason to reject the concept of leadership by a benevolent dictator as an option for private ordering.

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306. Scholars have been studying extra-legal governance or private ordering for some time. *See e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Mark D. West, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, 26 J. LEGAL STUD. 165 (1997).

307. *See, e.g.*, Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 388 (1997) ("If efficiency were the sole goal, the optimal arrangement might be government by a benevolent dictator").

308. RONALD DWORKIN, LAW'S EMPIRE 238-58 (1986).

309. *See, e.g.*, JOHN STUART MILL, BEYOND CONSIDERATIONS OF REPRESENTATIVE GOVERNMENT (1861) (finding the concept of the benevolent dictator oxymoronic); PETER BACHRACH, THE THEORY OF DEMOCRATIC ELITISM (1967) (democratic theory is based on the principle that "the majority of individuals stand to gain in self-esteem and growth toward a fuller affirmation of their personalities by participating more actively in community decisions"), Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 803 (1999) ("we wouldn't accept the proposition that a community could, in the name of self-government, vote to relinquish its sovereignty to a benevolent dictator."); Kevin L. Yingling, Note, *Justifying the Judiciary: A Majoritarian Response to the Countermajoritarian Problem*, 15 J. L. & POL. 81, 106 (1999) (majority-elected dictator is undemocratic).

310. Robert Badger, *Ideal Firm Governance Honors 'Time is Money' Maxim*, 46 RES GESTAE 20 (Sept. 2002) ("The ideal form of governance is the benevolent dictator. . . This form is usually not recommended. As with infamous dictators of the 20th century, such governance might start out okay, but it can quickly become a dangerous situation").

Indeed, Landis, acting as benevolent dictator, appears to have been quite successful in establishing and maintaining the Law of baseball. Landis's personality played a big part in why he was able to flourish in the dictatorship role; not many people are so suited. Yet a significant reason that the benevolent dictatorship "worked" lies in the characteristics of organized baseball itself. These elements are the importance of contractual relationships, the existence of quasi-legal structures, and the need for coordination and prisoner dilemma solutions among parties that are both competitors and engaged in a joint venture. Each of these aspects will be discussed below.

1. Contracts and Consent

Despot Landis ruled with almost the complete consent of his employers, the baseball owners. He insisted on unanimous approval and nearly received it. Phil Ball, owner of the St. Louis Browns presented the only opposition to his candidacy. The importance of this initial grant of power should not be overlooked. In fact, while Ball ultimately acquiesced in the hiring, he later brought suit in federal court challenging Landis's right to rule on a player contract. It is unlikely that any of the owners who had originally supported Landis would have taken similar action.

This aspect of the Landis case study suggests that while the governing documents of a private organization may allow for a benevolent dictatorship to be created via majority rule, as the Major League Agreement does, the overall authority the dictator yields is not perfectly proportional. That is, if a dictatorship is created with seventy-five percent approval, this leader will possess less than three-fourths the actual power of a dictator selected by absolute consent. Landis's experience with theocracy in the *Dowie* case demonstrated to him the danger of even minority dissent.[311]

Baseball governance was created by the contractual relationship between the owners and Landis, via the Major League Agreement.[312] The National Agreement applied too, setting up rules concerning the interaction between the major and minor leagues. As employees, players agreed to be governed by these rules via their own contracts with teams.

Accordingly, no party was subject to this system absent his consent. The Major League Agreement specifically granted the Commissioner the power to pursue legal and non-legal steps necessary when dealing with any parties not bound to the major league system by contract, a recognition of the fact that the

311. PIETRUSZA, *supra* note 2, at 43-46.

312. SPINK, *supra* note 1, at 73-74.

dictator only ruled by consent.[313]

And general principles of American contract law existed in the background to ensure that the decision-maker acted reasonably. In one dispute that arose concerning the contract of future Hall of Famer Bob Feller, Feller's father threatened to sue in court "to see if baseball law supercedes civil law."[314]

The benevolent dictatorship is particularly appropriate when private organizations and institutions operate via contractual relationships, because then the chosen power structure represents order on top of law, not order without law. Or in other words, the dictatorship is not absolute.

2. Reliance on Quasi-legal Structures

Judge Landis requested investigative powers as part his commissioner powers. Clearly influenced by his experience on the bench, throughout his reign over baseball, Landis relied on concepts of procedural due process—notice and hearing. Yet under the National Commission, the previous baseball governing entity, organized baseball had already adopted several law-like norms. Thus, after his appointment, baseball easily followed Landis's "legalization" of its systems and procedures.

One of the critiques of the benevolent dictator is that it undercuts the fundamentally democratic concept of affording participants in the political process an opportunity to be heard. Yet Landis's use of traditional legal and political procedures was able to create the appearance of participation.

Much like Landis's opinions acted as ex post facto rationalizations of outcomes already decided, the law-like procedures legitimized the dictator's governance. But the quasi-legal measures were akin to the brick façade that instills confidence in the structure, whether it is warranted or not. The true source of the power rested in contract and consent, as noted above. Yet both the actual consent and the perception of participation may have been necessary to support the benevolent dictator model.

3. Solving Repeat-Player Games

The relationship between the baseball owners is complex. On the one hand, they are competitors on the playing field, yet at the same time, Major League Baseball is a joint venture, a cartel.

As a result, the owners often face difficult repeat-player games with one another. Sometimes, these are coordination games, where the owners could find mutually advantageous strategies provided they cooperate with one an-

313. Major League Agreement, *supra* note 46, at 41-42.

314. DON HONIG, BASEBALL WHEN THE GRASS WAS REAL 268 (1975).

other. The most obvious coordination "game" involves scheduling. Sometimes, these games pit one owner against another, like the standard prisoner's dilemma. The issue of revenue sharing, for example, falls into this category. An analytical exercise using one of the Landis decisions discussed above can demonstrate the type of problems involved.

The Babe Ruth rule violation provides a classic example. Ruth violated the rule against barnstorming.[315] Imagine that the underlying rule is justified, and the possibilities for punishment were either a small fine (lenient) or a significant suspension (severe). Assuming no deterrence effects, if the decision is made on a league-payoff basis in the one-shot game, the dominant strategy is a lenient penalty, since the overall winning percentage of the teams remains constant and every team loses money from the absence of the drawing card, Ruth.

Yet since one team—the Yankees—bears the brunt of the punishment, allowing teams to vote separately may produce a different outcome. The important question is whether the money (or pride/ego) gained from the increased winning percentage, from not having to play against Babe Ruth outweighs any gate receipts that he brings in. This distinction suggests that teams in the so-called second division, those with no potential to win with or without an opponent named Babe Ruth, would favor a lenient penalty, whereas those in direct competition with the Yankees may be better off with the severe penalty. If each team is allowed to vote on the outcome, the penalty may ultimately turn on how many teams feel that they can compete.

At the same time, the choice the team makes can act as a signaling device about whether the club thinks it has a genuine chance of winning. Franchises may not mind signaling this information to one another. But if the information can become public, an opponent may vote to penalize Ruth heavily as a signal to fans that it has a successful team that is worthy of watching. Voting for leniency for Ruth, on the other hand, would signal the opposite. The overall payoff would be affected by the presence or absence of such a signal.[316]

Adding in deterrence effects, which is a difficult item to quantify, merely changes the overall payoffs by making a severe penalty more favorable to a lenient one for all teams, but it does not solve the inherent conflict created by the competing interests of the teams.

Of course, considering this decision as a one-shot game is flawed. Disciplinary decisions are a repeat-game. Team owners do not know in advance,

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315. SPINK, *supra* note 1, at 95-99.

316. Another possibility is that in the macho world of professional sports, a team may want to prove that it can beat the Yankees with Ruth, much like teams choose to pitch to Barry Bonds, even when it is statistically unadvisable. I am grateful to Brian Bix for this idea.

necessarily, whether the next player who violates a rule will be one of theirs. Team voting could produce any number of strategies, even given an ability to communicate with one another. One team might prefer tit-for-tat, while another might favor stronger punishment for non-cooperation.

As a result, it would appear that deciding based on majority (or supermajority) rule by the franchises themselves is a recipe for disaster. The history of the labor strategy of baseball management certainly supports this claim. Even under the National Commission, competing league interests undermined the ability to reach the best collective solution. And many of the cases discussed above illustrate circumstances where the best interests of the game may have been served by one rule, but the various teams involved had competing interests with one another.

Given these difficulties, it is easy to see why organized baseball benefited from having a benevolent dictator decide. This dictator, provided he possessed at least as much of the same information as the teams do, could evaluate the best interests of the entire system and avoid the inevitable struggle between the competing/cooperating parties. Landis succeeded because he was able to get the owners to support his ability to make the long-term decisions that they strategically would not or could reach themselves.

CONCLUSION

Contrary to conventional wisdom, the jurisprudence of Judge Kenesaw Mountain Landis was neither unprincipled nor arbitrary. This article has demonstrated that though Landis may have had an iconoclastic personality, his decisions both as federal district court judge in the Northern District of Illinois and commissioner of Organized Baseball relied on a common set of methodologies as well as principles that served to legitimize his decision-making.

As a federal judge, Landis relied on a functionalist approach, rejecting the formalism of his predecessors. His opinions relied heavily on economic theory and Populist moral principles. As a result, his decisions were well-regarded by the public, the press, and even legal scholars.

Presiding over baseball did not present a major change of direction for Landis. Though the subject matter differed, he ruled in a similar manner to his behavior on the bench. He imported concepts of procedural due process into his baseball investigations, and he continued to rule through written opinions and letters or public proclamation, much like he did previously. Last, Commissioner Landis employed the press to shape public opinion and remain apprised of it, to avoid issuing a decision that would be poorly received.

Judge Landis's success provides an excellent model for further study of the benevolent dictator theory of governance within private ordering. As dictator,

Landis was both feared and loved, a unique combination. Based on the governing structure of baseball and the Landis model, this article articulated several characteristics of an organization or institution, such as strong contractual relationships, quasi-legal structures, and the presence of complicated repeat-player games, that may be well-served by governance through a benign dictator. While this article has righted the historical record concerning Landis, it also has laid the foundation for future inquiry into the role and effects of benevolent dictatorships in non-legal systems.