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## Who Exempted Baseball, Anyway? The Curious Development of the Antitrust Exemption That Never Was

Mitchell Nathanson\*

### ABSTRACT

This article takes a fresh look at baseball's alleged antitrust exemption and explains why, after all, the exemption is alleged rather than actual. This article concludes that, contrary to popular opinion, the Supreme Court's 1922 *Federal Baseball Club* decision did not exempt Organized Baseball from federal antitrust laws. Instead, the opinion was much more limited in scope and never reached the question of whether Organized Baseball should be treated differently than other, similarly situated businesses or institutions, although Organized Baseball clearly invited the justices to make this determination in its brief to the Court. As this article discusses, the Court's silence on this question spoke volumes as to just what it was ruling on and, more importantly, what it was not. Regardless, the notion of an antitrust exemption arising out of the *Federal Baseball* opinion eventually took root. This article attempts to answer the following questions: where did the notion of the exemption come from? When did it arise in the consciousness of the nation's popular and legal experts? When did it actually arise as a matter of legal doctrine? How and why did the popular notion of the game's exemption take root? And how and why did the exemption finally become a legal reality as opposed to a popular theory? In order to answer these questions, this article bypasses the well-trod traditional mode of analysis with

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\* Professor of Legal Writing, Villanova University School of Law. The author would like to thank Alyssa Mankin for her assistance in the research of this project.

regard to this issue — the Supreme Court’s “baseball trilogy” (The 1922 *Federal Baseball*, 1953 *Toolson*, and 1972 *Flood* cases) — and instead tackles the issues from the perspectives of those who argued those three cases before the Supreme Court. Specifically, rather than simply analyzing the opinions themselves, this article examines the briefs filed by the parties which led to them. Through this process, the intent of the parties can be observed in light of the opinions that resulted from the Justices’ consideration of them. What did the litigants seek in their cases? For what did they believe they were arguing? How did they characterize the issues presented to the Court? By examining these briefs, and by comparing their arguments with the opinions that resulted, this article attempts to reach at least some preliminary conclusions with regard to what the Court was saying, as opposed to what most scholars have come to believe it to have said. Through this process, this article likewise attempts to discern the nature and extent of each ruling within the baseball trilogy. What emerges is an analysis of law and baseball that throws new light on the game’s alleged antitrust exemption.

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## I. INTRODUCTION

Among baseball legal scholars, the question of who exempted Organized Baseball from the nation's antitrust laws leads to an obvious answer: clearly, the United States Supreme Court did, in its 1922 *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*<sup>1</sup> decision. The Supreme Court itself echoed this conclusion when offered the opportunity to reconsider its *Federal Baseball* decision in *Toolson v. New York Yankees, Inc.*<sup>2</sup> during the Court's 1952–53 term. Within that one paragraph *per curiam* decision, the Court hinted that Congressional silence on the matter in the three decades since the *Federal Baseball* decision amounted to an affirmative endorsement of *Federal Baseball*, given the passage of time, and refused to discuss the matter further.<sup>3</sup> Finally, two decades hence, in the last case of what is now commonly referred to as the “baseball trilogy,” *Flood v. Kuhn*,<sup>4</sup> the Court closed the matter for good when it announced that although professional baseball was a business and was engaged in interstate commerce, the *Federal Baseball* and *Toolson* rulings would nonetheless stand because baseball was “in a very distinct sense, an exception and an anomaly,”<sup>5</sup> so much so that the Court's two previous rulings on the relationship between the game and the antitrust laws amounted to “an aberration confined to baseball.”<sup>6</sup> There. That settled it. Except that perhaps it did not.

Perhaps the Supreme Court did not exempt Organized Baseball from the antitrust laws in 1922. And perhaps Congressional inaction was just that — inaction, nothing more. If so, then nobody had exempted baseball from the antitrust laws when the *Flood* case reached the courthouse steps. Perhaps that *Flood* decision, despite its reputation for merely confirming the game's longstanding antitrust exemption for the third time, instead broke new ground by inadvertently creating it out of whole cloth — which would most likely be news to the opinion's author, Justice Harry M. Blackmun. And perhaps, in an irony above all else, Congress's 1998 Curt Flood Act — a largely ceremonial gesture intended to honor the man who sacrificed his career by bringing that final case to the Court in 1972 — actually cemented the game's antitrust exemption once and for all rather than overturning it,

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<sup>1</sup> 259 U.S. 200 (1922).

<sup>2</sup> 346 U.S. 356 (1953) (*per curiam*).

<sup>3</sup> *Id.*

<sup>4</sup> 407 U.S. 258 (1972).

<sup>5</sup> *Id.* at 282.

<sup>6</sup> *Id.*

as its supporters lauded it for doing. Perhaps the world of baseball law is not as we have long understood it to be.

This Article takes a fresh look at Organized Baseball's alleged antitrust exemption. Importantly, this Article treats it as an allegation unless and until the facts demonstrate otherwise. This Article attempts to answer the following questions: where did the notion of the exemption come from? When did it arise in the consciousness of the nation's popular and legal experts? When did it actually arise as a matter of legal doctrine? How and why did the popular notion of the game's exemption take root? And how and why did the exemption finally become a legal reality as opposed to a popular theory? In order to answer these questions, this Article bypasses the well-trod traditional mode of analysis with regard to this issue — the Supreme Court's aforementioned "baseball trilogy" — and instead tackles the issues from the perspectives of those who argued those three cases before the Supreme Court. Specifically, rather than simply analyzing the opinions themselves, this Article examines the briefs filed by the parties which in ways both subtle and overt shaped the resulting opinions. Through this process, the intent of the parties can be observed in light of the opinions that resulted from the justices' consideration of such intent. What did the litigants seek in their cases? For what did they believe they were arguing? How did they characterize the issues presented to the Court? By examining these briefs, and by comparing their arguments with the opinions that resulted, we can reach at least some preliminary conclusions with regard to what the Court was saying, as opposed to what we have come to believe it to have said. Through this process, we can likewise try to discern the nature and extent of each ruling within the baseball trilogy. What emerges from this type of analysis is something that throws new light on the game's alleged antitrust exemption.

Beyond the briefs, this Article examines the popular and scholarly response to each of the cases within the trilogy. How was each case perceived at the time it was handed down? What did people in the 1920s and '30s believe the *Federal Baseball* case to have held? Did the lay and scholarly public conclude at the time that *Federal Baseball* created an exemption for the national game? Or did they believe that the Court's focus was elsewhere? Was *Federal Baseball* considered a landmark opinion in its day as it is now? If not, when and why did the perception of the case change? Through an examination of 1) the briefs filed in anticipation of, and 2) the responses as a result of the cases themselves, we can perhaps see the baseball trilogy differently than we have ever seen it before. Perhaps through these methods of inquiry we can then better understand what the cases say, and more importantly, what the cases mean, than through the traditional process of examin-

ing them through our modern lens which, no matter how polished, sometimes distorts rather than clarifies. Perhaps then we can finally answer the question that seemed so obvious just four paragraphs ago.

## II. CONGRESS, THE CONSTITUTION, THE FEDERAL LEAGUE, AND ANTITRUST LAW IN THE EARLY 20TH CENTURY – A BRIEF REVIEW

Before delving into the *Federal Baseball* briefs themselves, some context is necessary to make sense of them. Although a comprehensive analysis of antitrust law as it existed in the late 19th and early 20th centuries is beyond the scope of this Article, a brief summary will be attempted here.

Despite national fervor over the ominous presence of large trusts in the latter half of the 19th century, the Sherman Act itself was initially considered little more than a ceremonial concession to this growing national unease.<sup>7</sup> Something had to be done on the political level to respond, at least superficially, to the outcry, and so the Sherman Act was passed, although few governmental officials viewed it as a legitimate or even necessary check.<sup>8</sup> Despite his reputation as a “trust buster,” Theodore Roosevelt in fact held a rather generous view of most of them, considering all but the most obviously insidious a necessary function of a modern economy.<sup>9</sup> “The man who advocates destroying the trusts by measures which would paralyze the industries of the country is at least a quack and at worst an enemy to the Republic,” he remarked early in his presidency.<sup>10</sup> Consequently, he, not unlike many in positions of power during the era, was not looking for excuses to bring down trusts or break up monopolies.<sup>11</sup> Instead, he made, or at least attempted to make, distinctions between what he considered “good” and “bad” trusts.<sup>12</sup> As he believed that trusts and monopolies themselves were not “bad” by definition, he limited the staffing of the Antitrust Division of the Department of Justice to a mere five attorneys with an annual budget of \$100,000, which even then was a relatively paltry sum given the millions of dollars generated by the largest trusts.<sup>13</sup> In the words of historian Richard Hofstadter: “By definition, since only a handful of suits could be undertaken

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<sup>7</sup> RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 245 (1955).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 246.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 247.

<sup>13</sup> *Id.*



each year, there could hardly be very many 'bad' businesses. Such was the situation as T.R. left it during his presidency."<sup>14</sup> In sum, pursuant to Roosevelt's logic, because the modern American economy could not be inherently "bad," neither could there be many inherently "bad" trusts. Enforcement against the few bad apples pursuant to the Sherman Act would be the exception rather than the rule, his trust busting reputation notwithstanding.

By the second decade of the twentieth century and into the era encapsulating the *Federal Baseball* decision, the White House's view of trusts had not evolved very much. President Woodrow Wilson exchanged Roosevelt's rudimentary definitions of "good" and "bad" trusts for the only slightly less rudimentary concepts of "free" and "illicit" competition, with "free" competition resulting in increased "efficiencies" and "illicit" competition resulting in unwanted inefficiencies.<sup>15</sup> Like Roosevelt, Wilson believed in the necessity and inevitability of modern trusts: "the elaboration of business upon a great co-operative scale is characteristic of our time and has come about by the natural operation of modern civilization . . . we shall never return to the old order of individual competition . . ."<sup>16</sup> No one knew for sure what distinguished an efficient from an inefficient trust. In practice, it seemed as if, nomenclature aside, Wilson was still operating on the level of Roosevelt's playing field of "good" and "bad" trusts. And within such a framework, many trusts and monopolies would be left unchecked by the Sherman Act.

Not surprisingly, considering this environment, by the early 1920s a majority of the Supreme Court (whose members, after all, were nominated by the President) felt similarly, although the Justices expressed their beliefs in more technical language. Of course, each Justice had his own view on the matter and some Justices were more wary of trusts than others, but as a whole, the Court was hesitant to check them. Justice Holmes, the author of the *Federal Baseball* decision, viewed the Sherman Act with condescension, once remarking privately that it was "a humbug based on economic ignorance and incompetence."<sup>17</sup> While his fellow Justices may not have shared

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<sup>14</sup> *Id.* at 247–48.

<sup>15</sup> *Id.* at 250.

<sup>16</sup> *Id.* at 249.

<sup>17</sup> Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 38 THE BASEBALL RESEARCH J. 86, 87 (Fall 2009) (quoting letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 30, 1910), in 1 *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, at 163 (Mark DeWolfe Howe ed., 1944)).

the extremity of his disdain, the test the Court fashioned during this era resulted in many trusts and monopolies being held to be outside the scope of the federal antitrust laws. Unless the trust had a significant impact on interstate commerce, it would be allowed to stand; a mere incidental impact would not be sufficient.<sup>18</sup> This was consistent with the Court's more fundamental position that Congress's power to legislate pursuant to the Constitution's Commerce Clause was rather limited — a view that evolved significantly in later years<sup>19</sup> and an evolution that will become crucial to our understanding of the briefs later filed in the *Toolson* case during the Court's 1952–53 term. This test was rooted in the basic belief at the time that, as a general principle, trusts and monopolies were only “bad” (to use Roosevelt's term) when they significantly impacted local autonomy.<sup>20</sup> If they had only an incidental or indirect affect on it, they were not inherently odious and were therefore beyond Congress's grasp. Within this framework arose the *Federal Baseball* case.

### III. *FEDERAL BASEBALL CLUB OF BALTIMORE, INC. V. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS*

By way of brief background, Major League Baseball found itself before the Court as a result of its battle with an upstart and rival major league, the Federal League. Prior to the birth of the Federal League, Major League Baseball consisted of two major leagues: the National League, formed in 1876, and the American League, formed from the ashes of the old Western League and proclaimed (by its president Ban Johnson) in 1901 as an upstart and rival major league itself. After a brief war over players, the Nationals begrudgingly accepted the Americans in 1903 through the signing of a peace agreement known as the National Agreement, wherein each league agreed to recognize the other as an equal, recognize and honor each other's contracts and, most importantly, recognize and observe the reserve clause — a unilaterally imposed term inserted in all player contracts which bound each player to his team indefinitely. Through the reserve clause, Major League Baseball, through the National and American leagues, was able to control the contracts, and therefore the players themselves, for eternity, thereby impeding the ability of potential rival leagues to attract top talent away from the more established National and American leagues.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 92.

<sup>20</sup> ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877–1920* 52–53 (Hill and Wang, 1967).

In 1913 a rival league, the Federal League, emerged, although initially it claimed to be nothing of the sort. A year later, however, it expanded and, seemingly flush with capital, declared itself a third major league, a putative equal of the National and American.<sup>21</sup> It sought fans as well as talent from its more established rivals and refused to honor the reserve clause, using as its strategy the lure of larger salaries to entice National and American League players to abandon their contracts and jump to the upstart Federal League.<sup>22</sup> The result was inevitable: despite the presence of the reserve clause, major league player salaries increased rapidly as the established owners attempted to ward off the threat.<sup>23</sup> By the close of the 1915 season, the by now clearly underfunded Federal League was buckling under the weight of the salary war it started.<sup>24</sup> By December 1915, the Federal League was all but defunct: several of the Federal League owners had sued Major League Baseball and had accepted buyouts, while others were permitted to buy Major League franchises.<sup>25</sup> The Baltimore Federal League club, however, opted out of the settlement (or was not invited to the settlement meeting, the record is not clear).<sup>26</sup> The other Federal League owners subsequently attempted to settle with Baltimore but Baltimore refused, choosing instead to sue Major League Baseball (among others) in federal court.<sup>27</sup>

Technically, the Baltimore club filed suit under Section 4 of the Clayton Act,<sup>28</sup> which was enacted in 1914 as a supplement to the Sherman Act. In its pleadings, Baltimore alleged that the defendants violated the Act by monopolizing talent and restraining trade.<sup>29</sup> At the trial level, Baltimore emerged victorious when the judge instructed the jury that the defendants did indeed engage in interstate commerce and that, through the reserve clause and National Agreement, a monopoly was created.<sup>30</sup> Accordingly, the only question for the jury was the amount of damages. The jury found that

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<sup>21</sup> There are a number of excellent sources for the details of the Federal League dispute and the emergence of the antitrust exemption. Supreme Court Justice Samuel Alito's account is particularly acute and concise. *See, e.g.,* Alito, *supra* note 11.

<sup>22</sup> *Id.* at 88–91.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Clayton Act 15 U.S.C. § 15 (1914).

<sup>29</sup> Alito, *supra* n. 11, at 90.

<sup>30</sup> *See Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, Inc.*, 269 F. 681 (1920).

the Baltimore franchise suffered damages in the amount of \$80,000 which, when trebled pursuant to Section 4 of the Clayton Act, amounted to a verdict of \$240,000 in favor of the Baltimore club, plus counsel fees.<sup>31</sup> Major League Baseball appealed the verdict to the District of Columbia Circuit, which reversed the trial court's decision and set up the showdown at the Supreme Court. In essence, the D.C. Circuit court held that Major League Baseball did not engage in interstate commerce and, therefore, its actions could not be regulated by way of either the Sherman or Clayton acts.<sup>32</sup> This time, it was Baltimore's turn to appeal, which it did, thus presenting the Justices with the opportunity to consider Organized Baseball's status pursuant to the nation's antitrust laws for the first time.

Certainly, in hindsight, the *Federal Baseball* decision seems like a bad one. Indeed, upon consideration of it in 1970, the Second Circuit "freely acknowledges our belief that *Federal Baseball* was not one of Mr. Holmes' happiest days,"<sup>33</sup> while in his 1972 *Flood* dissent Justice Douglas remarked that the case was "a derelict in the stream of the law that we, its creator, should remove."<sup>34</sup> Baseball historians have been no kinder, with John Helyar, in his comprehensive treatise on baseball's labor issues, *Lords of the Realm*, summarizing both his and the received wisdom that Holmes's decision "was a piece of fiction, one that would grow sillier with each passing year."<sup>35</sup> However, when viewed within its historical context, the case seems to be more in keeping with its time than it would appear. This becomes even more evident when we delve more deeply into the case, by examining the briefs submitted to the Supreme Court on behalf of the Baltimore Federal League Club (the Petitioner) and Organized Baseball (the Respondent).

Given Congress's limited power to legislate pursuant to the Commerce Clause, the question, at least so far as *Federal Baseball* is concerned, is what the litigants on each side thought they needed to accomplish in order to prevail. How far did they believe they needed to go in order to receive a favorable ruling from the Court that would either preserve or advance their interests? For instance, did George Wharton Pepper, the lead appellate attorney for Organized Baseball, conclude that his best strategy would be to convince the Justices that Baseball was unlike any other business? Or did he

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<sup>31</sup> *Id.*

<sup>32</sup> *See id.*

<sup>33</sup> *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970).

<sup>34</sup> *Flood*, 407 U.S. at 286 (Douglas, J. dissenting).

<sup>35</sup> JOHN HELYAR, *LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL* 10 (1994).

believe that he could prevail if he argued the opposite — that Organized Baseball was no different from similarly situated industries? If the former, then it would appear that Pepper would have no choice but to argue for an exemption — a definitive and final, policy-based ruling from the Court that Organized Baseball, due to its unique requirements, was indeed something special that merited an exemption from the antitrust laws. This would be a difficult argument to make, as it would implicitly acknowledge that the Sherman and Clayton Acts technically applied to Organized Baseball but would argue that, notwithstanding this reality, other considerations unique to baseball merited a ruling that the antitrust laws nevertheless should not apply to Organized Baseball. Not today. Not ever.

If the latter, then a simpler, more straightforward argument would be all that was required — an argument that drove home the point that Baseball, like many other seemingly interstate businesses, was (upon further and closer analysis) nevertheless local in nature and, therefore, beyond the reach of Congress's power to regulate pursuant to the Commerce Clause. This purely legal argument, a much easier one by comparison, would protect Organized Baseball from upstarts like the Federal League for the moment but would perhaps not insulate Baseball from future attacks should the nature of either Organized Baseball or the Court's understanding of the Commerce Clause change in the future. Accordingly, the issue we can hope to resolve here by examining his brief was whether Pepper sought to win Organized Baseball's case that day or for all time.

Likewise, did counsel for the BaltFeds (as the club was sometimes referred to) believe that the possibility of a policy-based exemption for Organized Baseball was even within the realm of consideration? Or did they conclude that the issue before the Court was more basic: whether Organized Baseball, as it existed in the early part of the 20th century, constituted interstate commerce pursuant to the settled law on the issue? Ultimately, as the following analysis shows, both Organized Baseball and the BaltFeds made use of both arguments to varying degrees. For the most part, and perhaps contrary to what we might assume today given our current understanding of the resulting decision, the litigants on each side spent most of their time focusing on the more basic argument: whether Organized Baseball constituted interstate commerce. However, each side did pay some attention to the broader, more far-reaching argument as well: whether Organized Baseball was somehow and in some way "special" such that the antitrust laws should be held inapplicable even if the Commerce Clause permitted Congress to regulate our national pastime. How these arguments were received by the Court, as reflected in the *Federal Baseball* decision, perhaps says a lot about whether, regardless of the received wisdom regarding

this case, the Court did indeed take the bold step many now claim it to have taken by formally exempting Organized Baseball from the nation's antitrust laws then and forever.

A. *Petitioner's (Federal Baseball Club of Baltimore's) Brief*

The BaltFeds framed the issue as a basic one: whether Organized Baseball constituted interstate commerce so as to be subject to Congressional regulation pursuant to the federal antitrust laws.<sup>36</sup> They stressed that this was the sole issue facing the Court of Appeals and, accordingly, was likewise the only issue before the Supreme Court.<sup>37</sup> As a result, the overwhelming majority of their 202-page brief focused on this most basic argument. The BaltFeds drew the Court's attention to the reality that Organized Baseball operated in every state and, consequently, controlled professional baseball players at all levels of ability in every state.<sup>38</sup> To the BaltFeds, it was crucial that the Justices acknowledge the difference between the sport of baseball and the business of baseball: "In the beginning, it must be understood that the defendants in error are not baseball players. *They are voluntary associations and corporations engaged upon a vast scale, involving the investment of millions of dollars, in the business of providing, by the transportation from state to state of baseball teams and their necessary attendants and equipment, exhibitions of professional baseball.*"<sup>39</sup> Therefore, "[d]efendants in error who dominate ORGANIZED BASEBALL are not engaged in a sport. They are engaged in a money-making business enterprise in which all of the features of any large commercial undertaking are to be found."<sup>40</sup> From this perspective, the conclusion was obvious: "Inherently and essentially, the business of providing exhibitions of professional baseball is intersectional, intercity and interstate."<sup>41</sup> Without the necessity of interstate travel, the American and National leagues, as they were then comprised, would, in the opinion of the BaltFeds, cease to exist:

The circulation of the teams of these clubs around the organic unit of the League or circuit is as essential to the life of the League and its several constituent enterprises as is the circulation of blood around a human body

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<sup>36</sup> Brief on Behalf of Plaintiff In Error at 3, *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922) (No. 204).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 4–6.

<sup>39</sup> *Id.* at 116.

<sup>40</sup> *Id.* at 120.

<sup>41</sup> *Id.* at 13.

to the life of a human being. If that circulation is stopped the League dies.<sup>42</sup>

Accordingly, the answer to the question before the Court was self-evident because “[n]ot only is interstate commerce an element in the business of providing exhibitions of professional baseball . . . *it is the very essence and foundation of it.*”<sup>43</sup>

In the eyes of the BaltFeds, the fallout from this reality struck at the core of federal antitrust statutes such as the Sherman and Clayton Acts. Given that all professional baseball players were controlled by Organized Baseball (a point conceded at trial by Garry Herrmann, the Chairman of Organized Baseball’s National Commission — the tripartite body that governed the American and National Leagues prior to the creation of the Office of the Commissioner of Baseball)<sup>44</sup>, the resulting structure of Organized Baseball provided it with unparalleled market power that it could wield to stifle competition by crushing competing leagues such as the Federal League and sending them to their financial ruin.<sup>45</sup> Thus, business considerations, not sporting ones, resulted in the demise of the Federal League. To the BaltFeds the issue came down to one of business over pleasure: as the game itself was not the issue before the Court, its peculiarities and nuances — those unique qualities that rendered it our national pastime — were irrelevant to the analysis. Instead it was the business of baseball that confronted the Court. And this business, not unlike any other that operates interstate, was clearly subject to Congressional regulation pursuant to the Commerce Clause.

Addressing Organized Baseball’s contention that it was the game itself that was at issue before the Court, and not the alleged (at least in the eyes of Organized Baseball) “business” of baseball, the BaltFeds contended that:

Defendants in error ignore every element and every detail in their business except the playing of the baseball teams employed by them in the baseball field; the whole elaborate commercial system through which the business is organized and conducted, and all its manifold operations, over and through different states is brushed aside and they argue that the mere muscular contraction and relaxation of the player in the baseball field at a particular instant of time is not interstate commerce. They say that these muscular operations of the players are “*personal effort*” and not *articles* of interstate commerce . . . . The defendants in error seek to separate the act

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<sup>42</sup> *Id.* at 119.

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.* at 29–30.

<sup>45</sup> *Id.* at 29–30, 99.

of a player in throwing a ball upon a ball field, from all the steps which are taken to bring the ball player in the due course of business from other states . . . .<sup>46</sup>

Accordingly, each moment on the ball field was not a “new fact in history”<sup>47</sup> as Organized Baseball contended, but rather a mere point on the continuum of interstate transactions that were required to bring that moment to pass.

Moreover, Organized Baseball’s contention that baseball was merely an amusement and, therefore, not an article of interstate commerce, was likewise a diversionary tactic in the eyes of the BaltFeds. As the BaltFeds noted, “[d]efendants are not in the business of amusing themselves, but are engaged in conducting a business whose profit is derived by sending baseball teams from city to city in various states to gratify a desire for amusement on the part of the public.”<sup>48</sup> This profit-making enterprise succeeded in amusing customers who attended the games, as well as those who did not but who were informed of the results via the Telegraph facilities which by that point had been installed in all Major League ballparks, along with some minor league ballparks, and which sent game reports across state lines to fans throughout the country.<sup>49</sup> Thus, for all of these reasons, the BaltFeds spent the first 163 pages of their brief making the rather straightforward argument that Organized Baseball was little more than a standard business operation, no different than any other. Accordingly, the federal antitrust laws applied to it just as well.

The BaltFeds’ brief moved beyond the vanilla, however, when it came to addressing Organized Baseball’s contention that it needed to control the contract of every professional player in order to survive. The BaltFeds wondered what Organized Baseball was alleging via this contention: “Do they mean to contend that in order to conduct the *business* of providing exhibitions of professional baseball, every concern in that business in the whole country must be brought into one gigantic combination? But remarkable as it may seem, this in effect is exactly what they contend.”<sup>50</sup> Here, finally, was the argument that many today assume was the sole bone of contention within *Federal Baseball* — that there was something special, something unique about baseball that justified a ruling more sweeping than one that merely held that Organized Baseball did not rise to the level of “interstate

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<sup>46</sup> *Id.* at 142.

<sup>47</sup> *Id.* at 143; *infra*, note 52.

<sup>48</sup> *Id.* at 145.

<sup>49</sup> *Id.* at 154.

<sup>50</sup> *Id.* at 164.



commerce” as the term was then understood. For as the BaltFeds recognized, Organized Baseball appeared to be making the additional argument that, irrespective of the interstate commerce issue, the game deserved an exemption from the nation’s antitrust laws for other reasons.

To the BaltFeds, such a contention was both ludicrous and typical: all monopolists, the BaltFeds noted, allege that their business is somehow special and unique so as to justify their unfettered market power.<sup>51</sup> The BaltFeds asserted, however, that Organized Baseball was taking this argument a step further:

[I]t has never been argued before that individuals or corporations in private business are entitled to take the scope of their greed [i.e., their desire to control the contract each and every professional baseball player] as ‘the unit’ of a business and thereby remove it from the condemnation of a law which prohibits that very unification.<sup>52</sup>

Putting aside the obvious benefits of unregulated market power inuring to Organized Baseball, the BaltFeds could discern no societal rationale for the justification of such market power. “The suggestion that there is anything peculiar about baseball requiring a larger unit than a league is not supported by a scintilla of testimony.”<sup>53</sup>

This rebuttal was merely a sidebar, however, as the BaltFeds’ brief clearly contemplated the issue before the Court as being the more fundamental one; namely, whether the structure of Organized Baseball rose to the level of interstate commerce as contemplated by the Commerce Clause. From the BaltFeds’ perspective, the answer was obvious, and they dedicated the bulk of their brief to the analysis of this issue. Their refutation of the contention that baseball was somehow unique was passionate, but only ran a little more than two pages.<sup>54</sup> On this basis alone it appears as if the BaltFeds either believed that the Court would take such an argument seriously or would not reach that question at all.

### *B. Defendant’s (Organized Baseball’s) Brief*

Although technically a brief for the defense, Organized Baseball’s brief was attacking in nature; this was evident in both concrete and subtle ways. Organized Baseball overtly argued that when determining what constituted

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 165.

<sup>54</sup> *See id.* at 164–65.

a business and what did not, the BaltFeds had things backwards. By way of evidence, Organized Baseball immediately drew the Court's attention to the fact that far from a profit-making enterprise, the National and American leagues were "unincorporated association[s]." <sup>55</sup> Accordingly, each league "buys baseballs from the manufacturers and resells them at cost to the clubs."<sup>56</sup> Moreover, the Major League's governing body, the National Commission, "is an unincorporated body composed of the presidents of the two leagues and a third person selected by them. The commission is not a profit-making concern, but is merely an administrative body."<sup>57</sup> On the minor league level, Organized Baseball pointed out that things were run similarly: the National Association was little more than "an unincorporated association of minor leagues."<sup>58</sup>

Organized Baseball alleged that this non-profit mindset extended to all facets of the professional game. For instance, in order to determine which cities constituted appropriate homes for Major League clubs, a primary factor was a potential city's ability to allow its home team to merely break even financially: "The size and character of the population must be such as to warrant the expectation of a paid attendance at the games proportioned to the expense incident to the baseball produced."<sup>59</sup> All of this, contended Organized Baseball, was proof that the professional game was structured for entertainment purposes, not monetary gains.

By contrast, Organized Baseball intimated that the Federal League itself was organized for far different, seemingly more nefarious purposes: "Unlike the central organizations of the National League and the American League, the Federal League is itself a corporation. It exists under the law of Indiana."<sup>60</sup> As a money-making concern, the Federal League was hell-bent on destroying the unincorporated associations of Organized Baseball, and it was only these unincorporated associations that could be counted on to save the national game for the American public.<sup>61</sup> As Organized Baseball saw it, the organizers and backers of the Federal League were "determined to take a gambler's chance and publicly to announce grandiose plans for 'invading'

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<sup>55</sup> Brief on Behalf of Defendants In Error at 6–7, *Federal Baseball Club of Baltimore, Inc. v. The National League of Professional Baseball Clubs*, 269 U.S. 200 (1922) (No. 204).

<sup>56</sup> *Id.* at 6.

<sup>57</sup> *Id.* at 7.

<sup>58</sup> *Id.* at 8.

<sup>59</sup> *Id.* at 10.

<sup>60</sup> *Id.* at 18.

<sup>61</sup> *Id.* at 24, 26.

New York which they did not intend to carry out, but which if pushed would have ended in a collapse fatal to the credit and stability of professional baseball.”<sup>62</sup> Regardless of this evil plot, these unincorporated associations, contrary to the allegations of the Federal League during the course of the underlying trial, did not fear the Federals: “It was not competition, in the commercial sense, which they feared – it was the seduction of their players, the consequent destruction of the morale of teams and a deterioration in the quality of the baseball furnished to the public.”<sup>63</sup>

Organized Baseball perhaps sought to reinforce its primary point that it was anything but a formally-structured business throughout its brief in a far more understated, seemingly subliminal, way as well. Organized Baseball oftentimes referred to itself not as “Organized Baseball” but, in many places throughout its brief, by the much more casual moniker of “organized baseball.”<sup>64</sup> It is unknown if George Wharton Pepper consciously made the decision to forego capitalizing the title of his client’s “unincorporated association,” but the resulting effect is startling, particularly when his brief is read in conjunction with the BaltFeds’ brief, which is most likely how the Justices would have encountered them. Pepper did not consistently abstain from capitalizing the term (“Organized Baseball” does appear in several places later on in his brief)<sup>65</sup> but whenever his client’s corporate structure was discussed, it was, more often than not, referred to in the lower-case only. In fact, in the first heading of Organized Baseball’s argument (which, pursuant to Supreme Court rules, are required to be in all-caps), Pepper referred to his client as “ ‘ORGANIZED BASEBALL,’ SO CALLED . . . .”<sup>66</sup>

Once Organized Baseball (or “organized baseball”) turned to the specifics of the issue before the Court, it, like the BaltFeds, focused on the more fundamental one: whether it, as structured, constituted interstate commerce pursuant to the Commerce Clause. Here again, the bigger, more far-reaching argument that asked whether Organized Baseball was somehow unique was more of an appendage, although it was eventually broached.<sup>67</sup> For the most part, Organized Baseball simply sloughed off the interstate transit required of the clubs to play their games, contending that while it was indeed an “essential feature” of the sport, “transit is not the end in view . . . . The transportation of the paraphernalia is a wholly incidental and subsidiary fea-

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<sup>62</sup> *Id.* at 26.

<sup>63</sup> *Id.* at 24.

<sup>64</sup> *See id.* at 3, 5, 43; *but see* 23, 43 (wherein the term is capitalized).

<sup>65</sup> *See id.* at 23, 43.

<sup>66</sup> *See id.* at 45.

<sup>67</sup> *See id.* at 59–66.

ture, as would be the case with a surgeon's tools taken into another State for the purposes of an operation."<sup>68</sup> Rather:

[T]he central feature of the business is the local exhibition of skill. Each movement made by each player in the game is spontaneous; it is a new fact in history. The fact that the players come across the State line is a subordinate fact. That they have brought bats and balls with them instead of purchasing them locally is another subordinate fact.<sup>69</sup>

Indeed, the business aspects of Organized Baseball, such as its reserve clause, were not merely subordinate but necessary to protect the local autonomy of the clubs operating within it. Without the reserve clause, Organized Baseball averred, professional baseball would cease to exist, and if that should come to pass, there would be nothing for the local authorities to tax or regulate, thereby denying these local entities their ability to self-govern as well as the fruits of this self-governance.<sup>70</sup> Therefore, Organized Baseball surmised, federal regulation would be improper because, consistent with the prevailing understanding of the limited reach of the federal antitrust laws at the time, not only did the "trust" that comprised Organized Baseball fail to negatively impact local autonomy, it actually created an environment that permitted it to flourish. Without that trust, the National and American leagues, along with the multitudes of the minor leagues that likewise existed under its umbrella, would wither and die, and the deleterious effect of these deaths on the hundreds of localities that housed professional baseball teams would be both severe and obvious.

Beyond this basic argument, however, Organized Baseball likewise made a substantial and impassioned argument that, even should the Court conclude that its structure was such that it was subject to regulation pursuant to the Commerce Clause, it should nevertheless be held to be outside of Congress's grasp for policy reasons.<sup>71</sup> It was here where Organized Baseball reached for the stars, essentially asking the Court to declare it exempt from the Sherman and Clayton Acts, although the term "exemption" in any form, never appeared within its brief.

In essence, Organized Baseball asserted that, should the federal anti-trust laws be applied to it, the National Agreement (which bound each club and each league to honor the reserve clause) could very well be held illegal, and with disastrous effects:

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<sup>68</sup> *Id.* at 11.

<sup>69</sup> *Id.* at 52.

<sup>70</sup> *Id.* at 14, 67.

<sup>71</sup> *Id.* at 68–72.

If the National Agreement is an illegal document it must be because it regulates or restrains the freedom of action of each of the parties to it and of each of the clubs in the constituent leagues. But there is not a single feature of the National Agreement that is not necessitated by the end in view, namely the simultaneous contests for the pennant in each league, followed by the greatest of all sporting events, the contest for the world's championship between the two pennant winners. After everything is said that can be said about "reserve clauses," eligibility lists, assignment of players' contracts and every other feature of the organization, the fact remains that no part of the elaborate system was evolved for any other purpose except to create the situation in which the public takes so wholesome and vital an interest.<sup>72</sup>

In short, without the National Agreement, there would be no World Series:

[T]he thing sought to be produced, namely, dramatic and sensational contests between teams playing under precisely the same conditions, is attainable only by combination and restraint . . . . The question in this case before the Court is not whether the world's series games can be conducted to greater public advantage if the National Agreement is dissolved, but whether Congress intends that the crowning feature of the national game shall be done away with.<sup>73</sup>

In this respect, Organized Baseball clearly implied that baseball was ultimately unlike any other business. If a technical analysis of the business of baseball yielded a conclusion that it fell within the jurisdiction of the Sherman Act, the unique character of our national game dictated that it nevertheless should be held to be beyond its clutches.

In sum, Organized Baseball made four arguments to the Court:

First, that human energy, skill and labor, considered as ends in themselves and not in relation to the production of any article of commerce, are not the subjects of commerce and that combinations to regulate them are not within the Sherman Act.

Second, that while transit and other forms of interstate intercourse are subject to the regulatory power of Congress, yet this fact does not give jurisdiction to Congress where the transit is incidental to the activity and not its main element.

Third, that sporting competitions are peculiarly the subjects of local and not national regulation.

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<sup>72</sup> *Id.* at 69–70.

<sup>73</sup> *Id.* at 70–71.

Fourth, that the Sherman Act should not be construed to apply to a combination absolutely essential to the existence of so obviously a wholesome and popular sporting event as the world's series.<sup>74</sup>

The first three arguments were fundamental and asserted simply that Organized Baseball was not a proper subject of federal regulation pursuant to the Commerce Clause. The fourth argument, however, went further and called for an exemption on policy grounds should the first three arguments fail — a point buttressed by Pepper at Oral Argument where he made certain that the Justices understood that the World Series would be a casualty should they rule for the BaltFeds.<sup>75</sup>

### C. *The Opinion*

As is common knowledge, Pepper was ultimately persuasive: the Court not only ruled in favor of Organized Baseball, it adopted several of Pepper's arguments nearly verbatim.<sup>76</sup> Pepper was particularly proud of his achievement in not only convincing the Court of his arguments, but in putting his words in their mouths. Three decades after the fact, in the aftermath of the *Toulson* decision, he boasted to *The Sporting News*:

I knew that Justice Holmes had a keen appreciation for a well-turned phrase . . . and I thought that if I could implant such a phrase in his mind it might affect the court's decision. The phrase I selected was 'personal effort, not related to production, is not a subject of commerce.' Apparently I was successful because that same phrase occurs word for word in the Holmes decision.<sup>77</sup>

Indeed, the Court adopted Pepper's first three arguments, as outlined above, explicitly. But what about his fourth argument? Here, perhaps it is what the Court ultimately left out that says more about the decision than what it chose to include.

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<sup>74</sup> *Id.* at 71–72.

<sup>75</sup> *Big Leagues are Attacked in Suit*, N.Y. TIMES, Apr. 20, 1922, at 13. The *Times* noted that in the course of oral argument, Pepper averred that “the world's championship series would have to be ‘done away with’ should the national agreement be held unlawful.”

<sup>76</sup> See generally *Federal Baseball*, 259 U.S. 200 (1922).

<sup>77</sup> Lee Allen, *Radio and Video Have Not Altered Game, Says Pepper*, THE SPORTING NEWS, Nov. 25, 1953, at 4.

Although Justice Holmes's opinion mentioned the World Series in passing<sup>78</sup>, he did not go further, as Pepper urged him to in his brief, and hold that the application of the antitrust laws to Organized Baseball would result in the abolition of such championship series in the future. Rather, he grounded the Court's decision in the more fundamental proposition that, as presently structured, Organized Baseball's business simply fell outside of Congress's regulatory purview ("The business is giving exhibitions of baseball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business."<sup>79</sup>) Through the Court's acceptance of Pepper's first three arguments and its omission of his fourth, it seems clear that the Court never reached the more far-reaching question broached within Pepper's brief. As time passed, however, history would have a far different view of the nature of this rather straightforward decision.

Initially, at least, the popular press and the legal academy saw the case very much as Holmes did — not as an earthshaking decision and certainly not one that acknowledged any sort of unique status for the national pastime. Instead, much of the newspaper reaction focused on the Court's straightforward conclusion that Organized Baseball simply did not constitute interstate commerce pursuant to the contemporary understanding of that term in a legal sense.<sup>80</sup> Significantly, not a single article focusing on that decision published in the first two decades after it was handed down discussed it as having created any sort of an exemption for baseball. Even *The Sporting News*, nicknamed "the baseball bible" at the time, and infamous for its blind support of Organized Baseball's ownership cartel,<sup>81</sup> failed to read an exemption into the Court's ruling, even though the club owners surely would have preferred this to the opinion Holmes issued, and despite the fact that their lead attorney openly advocated for such an exemption

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<sup>78</sup> "When as the result of these [league] contests one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition for the world's championship between these two." *Federal Baseball*, 259 U.S. at 208.

<sup>79</sup> *Id.* at 208–09.

<sup>80</sup> See, e.g., *Knockout of Baltimore Feds Red Letter Day for Baseball*, *THE SPORTING NEWS*, June 8, 1922, at 3; *Baseball Gets O.K. of Supreme Court*, *THE SPORTING NEWS*, June 1, 1922, at 1.

<sup>81</sup> See *THE SPIRIT OF ST. LOUIS: A HISTORY OF THE ST. LOUIS CARDINALS AND BROWNS* 9, 55 (2001).

within his brief. Instead, *The Sporting News* satisfied itself with its conclusion that, in holding that baseball was not commerce, the Court demonstrated that it “knows its baseball.”<sup>82</sup> Although it opined in a sub-heading that “Had Those Damage Seekers Won In Supreme Court Then Whole System Under Which Game Is Organized Might Have Been Endangered,”<sup>83</sup> it did not go further and suggest that the decision signified that the national game had been placed upon a pedestal of its own. Moreover, although an earlier article within *The Sporting News* claimed that “the decision was such that no further suits can be based on the allegations that Organized Baseball is a trust under the meaning of the Sherman Act,”<sup>84</sup> it later clarified this suggestive assertion by stating that this was because “the court held that baseball clubs and players are not engaged in commerce any more than is a lawyer or a Chautauqua lecturer . . . .”<sup>85</sup>

Of course, the scribes at *The Sporting News* could hardly be considered to have been sufficiently versed in the nuances of the Commerce Clause and the Sherman Act to serve as reliable commentators on the true nature and reach of the *Federal Baseball* decision; they were baseball writers after all, not legal scholars. But their reaction to the opinion, along with those of the scribes at general dailies such as *The New York Times*, is nevertheless relevant in measuring the pulse of the populous at the time. Judging from the stories they submitted in the aftermath of the decision, it does not appear as if many believed *Federal Baseball* to have been the monumental ruling it is now considered. This perception does not change when we shift our gaze to the scholarly reaction to the decision.

In the Journal of the American Bar Association’s 1922 “Review of Recent Supreme Court Decisions,”<sup>86</sup> *Federal Baseball* was discussed, albeit rather briefly and in cursory fashion. The underlying legal dispute between the BaltFeds and Organized Baseball was summarized in two sentences, a paragraph of the Holmes decision was reprinted, and the names of the attorneys on both sides of the issue were identified. In summarizing the Court’s holding, the Journal stated that the Court held that “[t]he playing of organized professional baseball is not interstate commerce, and hence its participants do not come within the Sherman Act.”<sup>87</sup> Although the Journal’s yearly review of the Court’s decisions devoted several paragraphs to the anal-

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<sup>82</sup> *Knockout of Baltimore Feds Red Letter Day for Baseball*, *supra* note \_\_\_, at 3.

<sup>83</sup> *Id.*

<sup>84</sup> *Baseball Gets O.K. of Supreme Court*, THE SPORTING NEWS, June 1, 1922, at 1.

<sup>85</sup> *Id.*

<sup>86</sup> Edgar Bronson Tolman, 8 A.B.A. J. 490 (1922).

<sup>87</sup> *Id.* at 494.



ysis of other cases decided that term, it apparently concluded that the *Federal Baseball* decision did not warrant similar scrutiny and analysis. A 1927 Columbia Law Review article entitled “Anti-Trust Laws and the Federal Trade Commission, 1914–1927”<sup>88</sup> mentioned the case as well, but not as one which established a special status for Organized Baseball. Instead, it discussed *Federal Baseball* as fitting in neatly with the Court’s other pronouncements of Congressional reach pursuant to the Commerce Clause.<sup>89</sup> As such, it noted that, beyond interstate professional baseball, the Court had held that the Sherman Act did not apply to interstate publishers who “refused to accept advertising from an unapproved advertising agency,” organized mine workers who acted in concert to prevent the employment of non-union miners, interstate manufacturers who combined with their workmen to apportion labor among these manufacturers, and so on.<sup>90</sup> The thrust of the analysis therein was not that the Court ruled for Organized Baseball because there was something special about Organized Baseball, but rather because the specific activity at issue in *Federal Baseball*, not unlike the activity at issue in the cases involving the mine workers, publishers and manufacturers in those other cases, did not rise to the level of interstate commerce. Had the defendants in *Federal Baseball* been miners rather than a consortium of baseball club owners, the article implies, the ruling would have come out no differently.

Among the smattering of scholarly mentions of the case throughout the 1920’s and ‘30’s (and there was only a smattering), was a 1929 Wisconsin Law Review article entitled “Monopoly and Restraint of Trade Under the Sherman Act.”<sup>91</sup> Here again, the article did not consider *Federal Baseball* an anomaly, but merely another piece in the puzzle of how the Court treats industries that furnish amusement.<sup>92</sup> The article took note of how the Court viewed industries such as motion pictures, vaudeville, and baseball, and was able to parse a judicial theory from these decisions:

These decisions indicate that those amusements, which consist primarily in the personal efforts of the performers, such as in baseball and vaudeville, do not come under the Anti-Trust Act for in such cases the main work and the greater portion of the expense is incurred within the state, and interstate commerce is but incidentally affected in the preparation for such exhibit. However, in the case of motion-picture exhibitions, where the chief

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<sup>88</sup> 27 COLUM. L. REV. 650 (1927).

<sup>89</sup> *Id.* at 668–69.

<sup>90</sup> *Id.*

<sup>91</sup> 5 WIS. L. REV. 65 (1928–30).

<sup>92</sup> *Id.* at 67–69.

business consists in short leases of the films to be sent across state lines where the transportation of such films involves a large expense, interstate commerce is directly involved. It is analogous to buying and selling across state lines which is in essence interstate commerce. Hence, the distinction which the court draws in these two cases would appear to be sound.<sup>93</sup>

Later, *Federal Baseball* was referenced again, in the article's analysis of the perceived failure of the Clayton Act to fortify the Sherman Act as a trust-busting mechanism.<sup>94</sup> However, even here, where the focus of the argument was on the failure of the federal legislature to prevent or repress such trusts, the article did not suggest that the *Federal Baseball* ruling was an anomaly. Instead, it theorized that the decision was simply an example of the failure of the Clayton Act to expand Congress's ability to regulate interstate trusts given that disparate treatment of two seemingly similar amusement industries such as baseball and motion pictures remained even after passage of the Act.<sup>95</sup> Although the distinction between the baseball and motion picture industries, as created by the Court, made sound legal sense when analyzed through the prism of jurisprudential precedent, the article noted it was the Clayton Act, not *Federal Baseball*, that was to blame for the incongruity that nevertheless resulted when these decisions were viewed through a more expansive lens.<sup>96</sup> Thus, as the 1920's drew to a close, there was neither a general nor scholarly perception that *Federal Baseball* was in any way out of the ordinary. Baseball may not have been subject to the Sherman Act, but apparently nobody believed that this was because the Court had carved out an exemption for it.

Even by the late 1930's the prevailing view of *Federal Baseball* had not changed much. In conjunction with the purported centennial of the national pastime, a 1939 article in the *United States Law Review* examined the relationship between baseball and the law throughout the game's first hundred years, in an effort to provide "due recognition . . . to the lasting influence of baseball in the development of an important branch of American jurisprudence."<sup>97</sup> The 18-page article focused on the many different ways baseball and the law had become intertwined over that period but devoted only a single paragraph to *Federal Baseball*, 14 pages in.<sup>98</sup> Like those few scholarly articles that preceded it, there was no discussion of the impact of the deci-

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<sup>93</sup> *Id.* at 68–69.

<sup>94</sup> *Id.* at 89–91.

<sup>95</sup> *Id.* at 90–91.

<sup>96</sup> *Id.*

<sup>97</sup> Frederic A. Johnson, *Baseball Law*, 73 U.S. L. REV. 252, 252 (1939).

<sup>98</sup> *Id.* at 266.

sion beyond the Court's explicit holding that the business of baseball was not interstate commerce within the meaning of the Sherman Act.<sup>99</sup> The possibility of an exemption was not addressed, although the author did take pains to mention that the decision was delivered by Justice Holmes, who "was a pretty good ball player himself in his early years."<sup>100</sup>

#### IV. *TOOLSON V. NEW YORK YANKEES, INC. ET. AL.*

The decade of the 1930's did, however, see a gradual shift in the perception of the meaning of *Federal Baseball*, although the transformation of the decision's meaning would not be complete until the late 1940's and early 1950's, in the run-up to *Toolson*, the case that cemented the modern understanding of it. This shift was due to events that had nothing whatsoever to do with baseball: the Great Depression and the resultant labor movement, highlighted by the passage of the Wagner Act,<sup>101</sup> which compelled private-sector management to bargain collectively with recognized unions, during the 1930's. When viewed through these societal prisms, the status of professional baseball players — as laborers rather than merely as athletic entertainers — looked very different than it had in the early 1920's. Consequently, questions regarding the intent and ramifications of *Federal Baseball* were raised within Congress for the first time.

In 1937, in response to the U.S. Attorney General's opinion that baseball was not subject to federal antitrust laws pursuant to *Federal Baseball*, Wisconsin Congressman Raymond Cannon urged a Congressional inquiry into Organized Baseball's labor practices.<sup>102</sup> Cannon, a former semi-professional pitcher who once represented former Black Sox player Happy Felsch in his suit against White Sox owner Charles Comiskey for back pay, World Series money and damages (Cannon later represented Felsch's Black Sox teammates Joe Jackson, Buck Weaver and Swede Risberg), introduced a resolution on the House floor that tied the players' cause to that of organized labor: "The baseball players' constitutional rights are flagrantly violated without recourse . . . Such violation of players' rights serves only to increase the millions of annual profits of the great baseball magnates and does not improve baseball as a sport. The conventional contract exacted from ball

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<sup>99</sup> See generally *id.*

<sup>100</sup> *Id.* (The author attributed this observation to John Kieran, a *New York Times* sportswriter).

<sup>101</sup> 29 U.S.C. §§ 151–69, 1935.

<sup>102</sup> See *Baseball Inquiry is Urged on House*, N.Y. TIMES, May 5, 1937, at 11.

players is an affront to American labor.”<sup>103</sup> With the Wagner Act as a backdrop, *Federal Baseball* began to look a bit different than it ever had before. Cannon’s resolution continued:

The big leagues which control organized baseball are engaged in interstate commerce . . . and the whole country is affected by their activities. The baseball situation presents a national problem and it is the duty of Congress to abolish such nation-wide injustice and enslavement of hard-working ball players who are dependent for their living on their ability to sell their labor at a fair price and under decent working conditions and without sacrificing the basic rights of free men.<sup>104</sup>

Although no definitive Congressional action was taken as a result of Cannon’s resolution, the debate over what *Federal Baseball* said and, more importantly, what *Federal Baseball* meant, had now begun. Did the Court really mean to exempt Organized Baseball from the antitrust laws? For the first time, nearly two decades after the decision was handed down, the issue was finally coming to the fore.

A few years later, a Georgetown Law Journal article on the Sherman Act’s impact on the music industry drew interesting parallels between that “amusement industry” and Organized Baseball.<sup>105</sup> It noted that, like the 1922 *Federal Baseball* decision, the Court in 1918 held that ASCAP’s (the American Society of Composers, Authors and Publishers) operations, which consisted of providing licenses to radio stations and other venues permitting them to perform the works of ASCAP’s members in exchange for a flat fee, fell outside of the purview of the Sherman Act.<sup>106</sup> Regardless of this decision, the article contended that the passage of time rendered it useless, given the modernization of the radio and broadcasting industries over the subsequent decades.<sup>107</sup> Accordingly, the article implied that the 1918 decision did not bestow upon ASCAP an exemption from the Sherman Act but merely held that, given the technology of the time, its actions did not sufficiently impact interstate commerce as to trigger the Sherman Act.<sup>108</sup> The article noted the changes in the character of the recording industry since 1918, most notably, the explosion of radio and the resultant broadcasting of ASCAP material across state lines, which, by 1941, rendered it clearly an

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Marcus Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 Geo. L.J. 407, 423–24 (1941).

<sup>106</sup> *Id.* at 423–24.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

interstate activity.<sup>109</sup> Turning to *Federal Baseball* directly, the article argued that Justice Holmes's ruling was not an anomaly in that it merely "gave expression to a number of decisions which held that those engaged in artistic or literary expression were not engaged in commerce."<sup>110</sup> Times, in baseball as well as the recording industry, had changed in the intervening decades, however:

Owning, controlling and leasing theatres, and producing great operas have been held not to be commerce . . . . These cases were decided in 1907, 1914, and 1922, at a time when theatrical presentations may have been professional, but Lord Mansfield's remark that "theatres are not absolute necessities of life" was still held axiomatic. Radio and theatrical entertainers had not been organized on the gigantic basis that we know it today. This shift of dependency upon entertainment in the past decade — as attested by what the public pays for it annually — may well lead a court to rule that the performance of music is now commerce.<sup>111</sup>

As the article contended, all such "artistic and literary expressions" — music, theatre *and* baseball — may now be considered interstate commerce, previous Court decisions of an earlier era notwithstanding.<sup>112</sup>

Bringing the evolution of broadcasting into the discussion, as this article did, sharpened the debate over the meaning of *Federal Baseball*. Thereafter, commentators, legal and otherwise, would begin to line up on either side of the issue. Some would focus on these technological advances to posit that *Federal Baseball* was simply a decision of its time, and one which had been relegated to the dustbin of jurisprudence by technological innovation.<sup>113</sup> Others would argue instead that the broadcasting developments were immaterial and contend that *Federal Baseball* was not premised solely or even primarily on the technology of the era. These supporters would begin to make the argument for the first time that *Federal Baseball* was a decision for all time — that it established a rigid, policy-based exemption from federal antitrust laws, although the word "exempt" would not appear in conjunction with *Federal Baseball* for another six years.<sup>114</sup> Nobody on either side brought up perhaps the most salient point, however, and the one that likely could have ended the debate — the fact that Organized Baseball made an

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<sup>109</sup> *Id.* at 425–26.

<sup>110</sup> *Id.* at 427.

<sup>111</sup> *Id.* at 427–428.

<sup>112</sup> *Id.*

<sup>113</sup> See *infra* note \_\_\_\_.

<sup>114</sup> See *infra* notes \_\_\_\_–\_\_\_\_.

explicit plea for an exemption within its brief which was met by judicial silence.

A 1946 law review article likewise analyzing the entertainment industry pursuant to the Sherman Act responded to the sorts of contentions made by the 1941 Georgetown Law Journal article and in doing so, firmly established itself on the “exemption” side of the debate, although here again the term itself was never used:

It may be that baseball clubs use more means of interstate transportation than they used in 1922 when the *Baseball* case was decided, and that interstate transportation and communication is now used more frequently, and that the baseball exhibitions are broadcast nationally at the present time. Unless the object of the restraint is the national broadcasting or the interstate communication or transportation, the “effect on” such interstate activity is only incidental and constitutes neither “restraint” nor interstate activity or commerce . . . . Vague reference to new conditions and the expanding scope of interstate commerce is not sufficient . . . .<sup>115</sup>

To conclude otherwise, the article contended, would be to overrule *Federal Baseball*.<sup>116</sup> Although the term “exemption” was not used, the article clearly contemplated a *Federal Baseball* decision not of its era but for all eras, technological advancement notwithstanding. This interpretation was far different, and far broader, than any that had come before.

The following year, the term “exemption” was used in conjunction with *Federal Baseball* for the first time — a full quarter century after the decision itself was handed down. In a Fordham Law Review article entitled “Baseball and the Antitrust Laws,”<sup>117</sup> the author, an attorney in the Antitrust Division of the U.S. Department of Justice, understatedly used it to buttress his point that those who now claimed that *Federal Baseball* created an exemption were sadly incorrect:

The *Federal Baseball* case is a decision on baseball of another age. It antedates the era of nationally sponsored coast to coast broadcasts, television, million dollar gate receipts, and \$80,000 salaries . . . . In keeping with changing times, new philosophies in government, and new techniques in business, the Supreme Court has also evolved, and so has the law . . . . If [recent cases on the understanding of interstate commerce] are any portents of things to come, then *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, affords little *appui* to those

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<sup>115</sup> Bernard Reich, *The Entertainment Industry And The Federal Antitrust Laws*, 20 S. CAL. L. REV. 1, 34 (1946).

<sup>116</sup> See *id.* at 33–36.

<sup>117</sup> John W. Neville, *Baseball And The Antitrust Laws*, 16 FORDHAM L. REV. 208 (1947).

who would maintain that baseball is not commerce, and is therefore exempt from antitrust law enforcement.<sup>118</sup>

As the article noted, Organized Baseball constituted a big business monopoly, and although the Court in 1922 held it to be outside of the clutches of federal regulation pursuant to the Commerce Clause, the Court's interpretation of the Commerce Clause was hardly static. Rather, it had evolved significantly since 1922, "and what might have been 'indirect' or 'incidental' and consequently not interstate commerce in 1890 or even 1921, would not necessarily be so today."<sup>119</sup> Because so many of the interstate commerce cases from earlier eras had been abandoned, cases of a paradigm into which *Federal Baseball* fit squarely, it only made sense to reevaluate *Federal Baseball* as well. If the Court could hold in 1944 that the insurance industry now constituted interstate commerce and was therefore subject to the Sherman Act, reversing "an unbroken line of cases, covering a span of seventy-five years, which stood for the proposition that insurance was a personal contract and could not be a subject of commerce," then the propositions set forth within *Federal Baseball* were hardly set in stone either.<sup>120</sup>

As for the event that spurred this flurry of interest in the meaning of *Federal Baseball* after all those years, the Danny Gardella saga would only further crystallize the debate and set the stage for the *Toolson* decision — the case that would officially confuse things once and for all. Gardella was an outfielder with the New York Giants who bickered with team management over his 1946 contract. Eventually, he jumped to the rival Mexican League, a move that prompted baseball Commissioner Happy Chandler to impose a five-year ban on Gardella as well as 22 other players who similarly signed contracts with the Mexican League.<sup>121</sup> When Gardella attempted to return to Major League Baseball, he found himself blacklisted.<sup>122</sup> He sued MLB for reinstatement, but his case was thrown out at the trial level.<sup>123</sup> On appeal, however, the Second Circuit remanded the case to the trial court for a determination of whether baseball had developed into interstate commerce in the

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<sup>118</sup> *Id.* at 230.

<sup>119</sup> *Id.* at 215.

<sup>120</sup> *Id.* at 225.

<sup>121</sup> G. RICHARD MCKELVEY, *MEXICAN RAIDERS IN THE MAJOR LEAGUES: THE PASQUEL BROTHERS VS. ORGANIZED BASEBALL*, 1946 70 (2006).

<sup>122</sup> See BRAD SNYDER, *A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN BASEBALL* 26 (2006).

<sup>123</sup> See *Gardella v. Chandler*, 172 F.2d 402, 403 (2d Cir. 1949).

twenty-seven years since *Federal Baseball*.<sup>124</sup> If the language of Judge Jerome Frank in his concurring opinion was any indication, the answer was obvious. Frank took note of the “steadily expanding content of the phrase ‘interstate commerce’ in recent years,” and concluded that the sweeping expansion of the term had rendered *Federal Baseball* “an impotent zombi [sic].”<sup>125</sup> Clearly, he was not of the opinion that *Federal Baseball* had established any sort of exemption for Organized Baseball. By now, those on both sides of the debate over *Federal Baseball* were out for blood, a point recognized within a 1949 Yale Law Journal article discussing the issue of monopolies within baseball and other professional sports:

In the February 23 issue of *The Sporting News*, baseball’s weekly bible, appeared pictures of the late Justice Oliver Wendell Holmes and of Judge Jerome N. Frank. That the pictures were printed could not have surprised most readers. By that time, two weeks after the decision in *Gardella v. Chandler*, every baseball fan in the country knew of the controversy that was rocking professional sports. But it must have surprised some to see that in the pictures, Justice Holmes looked fierce while Judge Frank looked benign. In the eyes of most of the sports world, Justice Holmes should have worn the look of benevolence, while Judge Frank should have come equipped with horns.<sup>126</sup>

Judge Frank’s opinion in *Gardella* sharpened the debate because it dismissed, out of hand, any ongoing relevance of *Federal Baseball*. Instead, it ghettoized the case as a decision of an earlier era, one that, due to changed circumstances, had become an “impotent zombi” [sic] and which could therefore be wholly ignored. This argument, which had simmered in relative anonymity within the law reviews for a few years previous to the *Gardella* saga, was now before a broader audience. And many were concerned about what effect a narrow interpretation of *Federal Baseball* could potentially have on the modern game they knew and cherished.<sup>127</sup>

*Gardella*’s suit ultimately prompted a Congressional response in 1949: proposed legislation to formally exempt Organized Baseball, along with

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<sup>124</sup> See *Gardella*, 172 F.2d at 402. For a detailed discussion of the *Gardella* case within the context of the Sherman Act, see SNYDER, *supra* note \_\_, at 25–27, 101.

<sup>125</sup> *Gardella*, 172 F.2d at 409. The subsequent trial over this issue never took place because *Gardella* subsequently settled his case for \$60,000 along with reinstatement in MLB.

<sup>126</sup> Jay H. Topkis, *Monopoly in Professional Sports*, 58 YALE L.J. 691, 691 (1949).

<sup>127</sup> See *id.* at 694 (noting that representatives of baseball, including Commissioner Happy Chandler, feared that baseball would not survive without the “stringent” players market).



other professional sports, from the federal antitrust laws.<sup>128</sup> As the bill's proponents indicated, the 1922 *Federal Baseball* decision would most likely not save Organized Baseball from the grip of federal regulation, given that it was decided before the explosion of interstate radio and television broadcasts of the games.<sup>129</sup> Significantly, the tone of the proposed bill was consistent with the tone of Judge Frank's *Gardella* concurrence in that it did not assume that *Federal Baseball* established any sort of exemption for Organized Baseball. Rather, both Judge Frank as well as the Congressional bill assumed that the decision was a limited one, as well as one that did not survive into the modern era, for there would be no reason for Congress to propose an exemption in 1949 if the Court had already created one in 1922. The bill was met with less than enthusiastic reaction by members of the House and subsequently died on the floor.

Once *Gardella* ignited the embers of the controversy, however, the issue would not be so easily snuffed out. Judge Frank's concurrence spurred a backlash that led to the popular and modern distortion of the meaning of *Federal Baseball*. A 1950 University of Chicago law review article dissected *Gardella* by concluding that the district court had decided correctly by concluding, in effect, that Danny Gardella had no case under the Sherman Act because *Federal Baseball* held that Organized Baseball was exempt from it. Twenty-seven years later, nothing had changed:

It has been the general consensus of opinion both in and out of baseball that the *Federal* case disposed of the issue with respect to the character of the game, and that, since baseball was deemed not to be "interstate trade or commerce," it did not come within the ambit of the Sherman and Clayton Acts.<sup>130</sup>

On appeal, the article posited, Judge Frank misconstrued the essence of baseball, as well as Justice Holmes's understanding of both the game and the business, by concluding that Organized Baseball had "changed its spots" through his assertion that the emergence of broadcasting had somehow rendered it a fundamentally different game than it had been in 1922.<sup>131</sup> To the contrary:

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<sup>128</sup> See *Bill in Congress Proposes to Bar Anti-Trust Prosecution of Sports*, N.Y. TIMES, Apr. 6, 1949, at 40.

<sup>129</sup> *Id.* (quoting co-sponsors Rep. Albert Sydney Herlong, Jr. (D-FL) and Rep. Wilbur D. Mills (D-AR)).

<sup>130</sup> John Eckler, *Baseball – Sport or Commerce?*, 17 U. CHI. L. REV. 56, 60–61 (1950).

<sup>131</sup> *Id.* at 61.

The rationale of the *Federal* case is that baseball is not trade or commerce, and it is submitted that the court's decision would have been quite the same had the facts shown that every ball park was located on a state line and the players had to pass from one state to another as they ran from first to second base.<sup>132</sup>

According to this revisionist understanding of the case, interstate broadcasting was a red herring; *Federal Baseball* had exempted Organized Baseball from the federal antitrust laws for all time. In further support of its assertion, the article advanced a policy rationale similar to the one proposed within Pepper's 1921 brief: that baseball required special rules to maintain its integrity.<sup>133</sup> Thus, the unique properties of the game necessitated rules pursuant to "[b]aseball law" rather than federal law.<sup>134</sup> If a court failed to understand this, "a finding that the operation of 'organized baseball' violates the anti-trust laws would mean the end of baseball as we know it."<sup>135</sup> This was, at its core, not much different than Pepper's argument regarding the potential harm the Sherman Act would wreak upon the World Series — ironically the only argument advanced by Pepper not to be adopted by the Court. Now, three decades later, this article assumed that such a policy rationale was instead implicit within the decision. It was by now becoming a common misinterpretation of the holding that would only become crystalized further as the issue careened towards the Supreme Court once again.

As *Toolson* wound its way up the judicial ladder towards the Justices in 1952 and '53, the revisionist understanding of *Federal Baseball* became the predominant one. By now, many legal commentators blithely assumed not only that *Federal Baseball* had granted Organized Baseball a blanket exemption from federal antitrust laws, but that the decision itself was a monumental one. A 1953 Yale Law Journal Comment, typical of the era, remarked that "[t]he breadth of this opinion has given organized baseball an exemption which it would have been difficult for Congress to match."<sup>136</sup> Although the Comment recognized the reality that the foundations of the case had long since been washed away through the Court's evolving understanding of

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<sup>132</sup> *Id.* at 66.

<sup>133</sup> *Id.* at 76 ("'Baseball law' and the Uniform Player's Contract, for which it provides, are designed solely for the production of baseball games and to preserve all aspects of the games integrity.").

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 78.

<sup>136</sup> Comment, *Monopsony In Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 608 (1953).

the Commerce Clause, this was of little matter.<sup>137</sup> For the case was not limited in nature; although “[a]pplication of present-day tests to the facts revealed by the recent congressional investigation would indicate that organized baseball is unquestionably interstate activity,”<sup>138</sup> this was irrelevant. “Until [*Federal Baseball*] is overruled or distinguished, it will indefinitely perpetuate organized baseball’s intricately-woven monopsony . . . .”<sup>139</sup> In what must surely have been a surprise to the commentators of the 1920s and ‘30s who paid the case little mind, by the early 1950s the decision was thought by many to have given the game “*carte blanche* exemption from the antitrust laws.”<sup>140</sup> It was through this lens (rose-colored, at least from the perspective of Organized Baseball), that both the academic as well as popular commentariat increasingly viewed the upcoming *Toolson* showdown in the Supreme Court. Many viewed the case with intense interest, wondering if the Court would overturn the game’s three-decades-old exemption that closer inspection reveals it never created in the first place.

#### A. *Petitioner’s (George Earl Toolson’s) Brief*

By the time the Supreme Court’s briefing schedule had been established, the petitioners were swimming upstream against a heavy current. In his Petition for Writ of Certiorari to the Court, Toolson hoped to make the argument that *Federal Baseball* said what many believed it to have said when it was handed down, rather than what it by now had been interpreted and assumed to have said. He framed the issue as a fundamental circuit split: the Court of Appeals in the Ninth Circuit, in affirming the dismissal of his case in the District Court, held that organized baseball was not engaged in interstate commerce — splitting from the Second Circuit in *Gardella*, which held that organized baseball was engaged in interstate commerce.<sup>141</sup> Therefore, he urged the Justices to accept the case in order to resolve the divergence in views.<sup>142</sup> Turning to the merits of the case, Toolson perhaps erred in taking his argument further than he needed; not content to argue that the *Federal Baseball* opinion was limited in scope, he alleged that it was incorrect

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<sup>137</sup> *Id.* at 609–10.

<sup>138</sup> *Id.* at 610.

<sup>139</sup> *Id.* at 609.

<sup>140</sup> *Id.* at 630.

<sup>141</sup> Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof at 11, *Toolson v. New York Yankees, Inc.*, No. 647, 346 U.S. 356 (1953).

<sup>142</sup> *Id.*

even in its time.<sup>143</sup> Unintentionally, this had the effect of focusing the Court's attention on the appropriateness of the ruling, thereby opening the door for the opposing contention that not only was it properly decided in 1922, it created a blanket exemption for Organized Baseball. Rather than follow the lead of Judge Frank in *Gardella* and conceding that it perhaps was correctly decided in its time but had by now become Frank's "impotent zombi,"<sup>144</sup> Toolson went for broke and attempted to discredit *Federal Baseball* both now and as an historical document.<sup>145</sup> The upshot of this approach was to allow the Court to frame the issue as one of *stare decisis* rather than one created out of whole cloth. Consequently, the resulting burden on Toolson, who was thereby required to convince the Court to overturn its own precedent, grew even heavier than it already was.

Most of his Petition, however, focused on his better argument — that regardless of the merits of the decision in its time, *Federal Baseball* was simply no longer applicable, given both the modernization of society as well as the Court's broadened definition of the scope of the Commerce Clause.<sup>146</sup> It cited to *Gardella* for the proposition that the advent of radio and television made "the *Federal Baseball* case no longer applicable to professional baseball," and posited that:

This conflict is not as to present validity of the *Federal Baseball Club* case on its particular facts, but is a conflict as to present applicability of that decision to the modern professional baseball organization, which organization receives in excess of 10.5% of its gross revenues from radio and television exhibitions of its games . . . . Even if the *Federal Baseball Club* case were correctly decided on its facts it is not applicable to the present day situation and facts.<sup>147</sup>

Moreover, in an argument that drew upon the traditional view of *Federal Baseball* as a decision of limited scope, it noted that Congress itself paid the decision little deference when the 82nd Congressional House Sub-Committee on Study of Monopoly Power concluded that given "the modern judicial interpretation of the scope of the commerce clause," the Sub-Committee did

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<sup>143</sup> *Id.* at 11–12.

<sup>144</sup> *Gardella*, 172 F.2d at 409.

<sup>145</sup> *Id.*

<sup>146</sup> Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof at 12, *Toolson v. New York Yankees, Inc.*, No. 647, 346 U.S. 356 (1953).

<sup>147</sup> *Id.* at 18–19, 22.

indeed have jurisdiction to investigate and legislate Organized Baseball despite *Federal Baseball*.<sup>148</sup>

After the Court granted Toolson's petition, his brief on the merits reiterated many of the same points and also honed in on Organized Baseball's contention that *Federal Baseball* was a decision for all time. It took direct aim at both Pepper's final argument within his *Federal Baseball* brief and the Yankees' brief in the current litigation by dismissing the claim that the supposed unique qualities of baseball somehow justified special judicial treatment of its business practices.<sup>149</sup> Although it conceded that a team sport might be unable to exist in a completely free market, "it is no argument whatsoever that baseball is not within federal jurisdiction. To uphold the *Federal Baseball* case on such grounds would give organized professional baseball a carte blanche immunity to all otherwise illegal restraints on competition in the baseball industry whether they are necessary to the unique character of the industry or not."<sup>150</sup> Striking a patriotic theme, Toolson alleged that it was simply un-American to exempt the national pastime from the laws that govern nearly everyone else. Quoting Judge Frank in *Gardella*:

The system created by "organized baseball" in recent years presents the question of the establishment of a scheme by which the personal freedom, the right to contract for their labor wherever the will, of 10,000 skilled laborers, is placed under the dominion of a benevolent despotism through the operation of the monopoly established by the National Agreement. I may add that, if the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian minded will believe that high pay excuses virtual slavery.<sup>151</sup>

Given the tenor of the times, with the perceived "red menace" and McCarthyism in full flower, Toolson attempted to align himself with the growing nationalistic fervor, demonizing Organized Baseball's attempt to convince the Court that *Federal Baseball* went as far as many were now claiming as dictatorial, communistic and nearly everything else from which the House Un-American Activities Committee was then purporting to rid the United States.

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<sup>148</sup> *Id.* at 13.

<sup>149</sup> Petitioner's Opening Brief on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 44, *Toolson v. New York Yankees, Inc.*, No. 18, 346 U.S. 356 (1953).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 47 (quoting *Gardella*, 172 F.2d at 409).

B. *Respondent's (New York Yankees) Brief*

In their brief in opposition to Toolson's petition for certiorari, the Yankees took up the revisionist mantle by alleging that *Federal Baseball* had already resolved the issue of baseball's status under the federal antitrust laws and, as a result, there was no need to revisit it once again. They brushed off Judge Frank's contention that the emergence of radio and television broadcasting rendered *Federal Baseball* irrelevant, noting that Justice Holmes considered the issue of interstate transmission of game details and results (via the telegraph) and found it to be unpersuasive within the context of the Commerce Clause: "The advent of radio and television has not affected the basic character of the game of baseball as defined in the *Federal Club* case. It remains a local activity and a sport, not interstate trade or commerce."<sup>152</sup> They noted that even though the Court ruled in 1877 that telegraphing itself was interstate commerce, it held in *Federal Baseball* that this was of no matter.<sup>153</sup> As for Judge Frank, he, along with concurring Judge Learned Hand "overlooked the foregoing principles and establish[ed] no tenable basis for overruling the *Federal Club* decision."<sup>154</sup>

The Yankees' brief was most significant, however, for its repeated assertions that Organized Baseball was somehow unique and that it was this unique character that justified special judicial treatment. Unlike Pepper's *Federal Baseball* brief, where the purported unique characteristics of the game were merely a final argument tacked onto a brief that focused primarily on the more foundational issue of the ability of federal law to reach Organized Baseball at all pursuant to the Commerce Clause,<sup>155</sup> here the Yankees relied much more heavily on this argument, despite the fact that this was the one argument of Pepper's the Holmes Court failed to adopt. In dismissing Toolson's allegation that the Court's subsequent broadening of the definition of the Commerce Clause post-*Federal Baseball*, as indicated through its reversal of some of the foundational cases that underpinned it, rendered *Federal Baseball* itself outdated and legally unsupported the Yankees contended that this was only further evidence of the special status

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<sup>152</sup> Brief For Respondents In Opposition To Petition For Certiorari at 20, Toolson v. New York Yankees, Inc., No. 647, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>153</sup> *Id.* at 12–13.

<sup>154</sup> *Id.* at 22.

<sup>155</sup> See Brief on Behalf of Defendants In Error at 68–72, Federal Baseball Club of Baltimore, Inc. v. The National League of Professional Baseball Clubs, 269 U.S. 200 (1922) (No. 204).

of our national pastime.<sup>156</sup> From their perspective, those cases dealt with ordinary businesses and baseball certainly was anything but ordinary: “There is an inherent distinction between an athletic sporting contest and the sale of insurance policies.”<sup>157</sup> Although Toolson would allege within his brief that baseball was, in essence, no different than the traveling musical comedies which had previously been held to be subject to federal regulation,<sup>158</sup> the Yankees disagreed, contending instead that baseball was not analogous to any other type of activity.<sup>159</sup> Baseball, being baseball, required a different set of rules.

As the Yankees viewed the issue, that the underpinnings of *Federal Baseball* had been swept away in the 29 years since the decision had been handed down was of little matter. For even if the decision was presently doubtful as a legal proposition, the fact that so many had relied upon it for so long was enough. As the Yankees’ brief noted, the District Court opinion highlighted that “[u]ndoubtedly large investments have been made on the strength of Mr. Justice Holmes’ opinion in the *Federal Baseball Club* case . . . .”<sup>160</sup> To overrule it now would be simply unfair and inequitable. However, this argument assumed that Justice Holmes had intended for the *Federal Baseball* decision to reach three decades into the future. By not adopting Pepper’s argument regarding the alleged unique qualities of baseball, it is quite likely that he did not. Instead, the possibility exists that he simply issued a ruling that captured Organized Baseball’s national reach as it existed in the early 1920’s, pursuant to the contemporary understanding of the limited reach of the Commerce Clause.

In their brief on the merits, the Yankees drove home the “baseball is special” argument even more resolutely, arguing that to apply the Sherman Act to baseball as if it were no different than a shirt factory would be to imperil the game itself:

If the Court now overrules the *Federal Baseball* case, it cannot decree any modification of, or a partial application of, the existing Anti-trust Statutes, but must enforce them in their entirety even though that enforcement

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<sup>156</sup> *Id.* at 17.

<sup>157</sup> *Id.*

<sup>158</sup> Petitioner’s Opening Brief on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 35, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>159</sup> Brief For Respondents In Opposition To Petition For Certiorari at 30, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>160</sup> *Id.* at 30 (quoting *Toolson v. New York Yankees, Inc.*, 101 F. Supp. 93 (S.D. Cal. 1951)).

destroys the organization of professional baseball to the detriment of the players, the persons producing the games, and to the public.”<sup>161</sup>

Unlike typical businesses which produce optimal results through heavy competition, Organized Baseball was different; it required cooperation between clubs in order to run a successful league replete with numerous clubs and a well-ordered championship season: “Each club is almost as interested in the financial success of the others in the league as it is in its own success.”<sup>162</sup> Their brief likewise took note of the necessity of regulation “in such a way as to insure honest and keen competition in the playing of the game and thus to maintain public confidence in the integrity of that competition.”<sup>163</sup> As they contended, “[t]hese factors show the absurdity of applying statutes drawn to regulate commercial enterprises to the conducting of competitive team athletic exhibitions such as professional baseball games.”<sup>164</sup>

The Yankees’ argument was sound in all ways but for its premise, which assumed that the foundation of the *Federal Baseball* ruling was rooted in the Court’s consideration of the business of professional baseball. To the contrary, and on Pepper’s repeated urging, it was based on the game itself. As discussed above, the BaltFeds devoted much of their brief to their argument that the Court was required to separate the game of baseball, which was largely local, from the business of baseball, which was clearly national in scope. They criticized Pepper’s attempt to focus the Court’s attention on the vagaries of the game on the field rather than the business arrangements that were required to stage it. Contrary to Pepper’s assertion, the BaltFeds urged the Court to see each moment on the playing field not as “a new fact in history,” but rather, as one intricately connected with unavoidable interstate business transactions. However, the Court chose to view the issue through the lens provided by Pepper. Through its reliance on this faulty premise, the Yankees, most likely mistakenly, offered to the Court a case for the game’s antitrust exemption based on a theory not adopted within *Federal Baseball*, but argued as if it had been. Presented as merely an issue of *stare decisis*, it was, in actuality, something else altogether.

The Yankees put forth an additional, equally curious argument: “Plainly the question of whether the alleged activities of Respondents are within the orbit of the Sherman Act is also a matter of statutory construc-

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<sup>161</sup> *Id.* at 66.

<sup>162</sup> *Id.* at 24.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*



tion and not of constitutional power.”<sup>165</sup> Pursuant to this argument, the Yankees alleged that, contrary to *Federal Baseball*, Congress always had the power to regulate Organized Baseball but simply chose not to do so.<sup>166</sup> As such, it was a legislative decision to exempt Organized Baseball from the Sherman Act: “The error of the Petitioner is in assuming that because it [Congress] has such power it exercised it in the Sherman Act with respect to the Respondents’ activities alleged in this case.”<sup>167</sup> This argument was not a novel one, in that it had its roots with Pepper. Subsequent to briefing, but before the *Federal Baseball* decision was announced, Pepper suggested to *The New York Times* that “no statute can be construed as applying to combinations to regulate sport . . . unless Congress has plainly indicated that this should happen.”<sup>168</sup> This was consistent with Pepper’s “baseball is special” argument to the Court within his brief, in that it assumed that professional sports were unique and that Congress naturally would not include them in legislation pertaining to ordinary business absent measured consideration. Although the logical progression of this proposition is surely absurd, as Congress is certainly not required to specifically identify every trade or industry which it intends a particular statute such as the Sherman Act to cover, the point Pepper appeared to be making here was a more specific one: that professional sports were simply different, and consequently, the assumptions concerning Congressional intent regarding ordinary businesses did not carry over into the arena or playing field. According to Pepper, and now the Yankees, Congressional inaction was every bit as meaningful as clear Congressional action.

In furtherance of this point, the Yankees drew a distinction between the Court’s 1944 decision in *United States v. South-Eastern Underwriters Association*,<sup>169</sup> (which reversed the Court’s longstanding position that the insurance industry was not subject to federal regulation) and the situation presently facing the court in *Toolson*. In the former, the Yankees noted, “no decision involving the application of the Sherman Act or any other federal statute to the insurance business had theretofore come before this Court.”<sup>170</sup> Therefore, given the passage of the Sherman Act, the Court could take notice that Congress had indeed intended to exert its power over the indus-

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<sup>165</sup> *Id.* at 63.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Big Leagues are Attacked in Suit*, N.Y. TIMES, April 20, 1922, at 13.

<sup>169</sup> See *United States v. S.-E. Underwriters Ass’n*, 322 U.S. 533 (1944).

<sup>170</sup> Brief for Respondents at 63, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

try.<sup>171</sup> In the latter, Congressional silence in the aftermath of *Federal Baseball* apparently spoke volumes, indicating, at least to the Yankees, legislative intent *not* to exert authority over Organized Baseball.<sup>172</sup> Here too, their argument's premise was shaky in that it presumed that Congress was constitutionally empowered to take action in light of the Court's *Federal Baseball* decision. Given that the Court's ruling was based solely on Congressional reach pursuant to the Commerce Clause, however, and not on policy grounds (i.e., that baseball was somehow unique and, consequently, should be accorded special treatment under the law), Congress was powerless to act. Unless the Yankees believed that the principles of *Marbury v. Madison*<sup>173</sup> were likewise inapplicable to Organized Baseball, Congress was barred from overruling the Court on matters of Constitutional interpretation. Had the Court based its ruling on policy, the Yankees surely would have had a salient point here. But given that the *Federal Baseball* Court remained silent on this issue, there was no action available for Congress to take unless and until the Court (not Congress) broadened its definition of Congressional reach pursuant to the Commerce Clause.

The Yankees found a teammate in the courtroom as the Boston Red Sox, their rival on the field, filed an Amicus brief in the case.<sup>174</sup> Although largely irrelevant as a legal document, the Red Sox's brief was noteworthy for its persistence in asserting the revisionist interpretation of *Federal Baseball*. Misstating the basis for the opinion, the Red Sox alleged that "[i]t must be apparent to this Court, as it was to Mr. Justice Holmes and his colleagues more than thirty years ago, that baseball is a unique enterprise."<sup>175</sup> Given this imaginary framework, the issue came down to this:

The question is whether this Court shall overrule or distinguish the earlier baseball case and now hold that these rules and regulations are subject to the prescriptions of the Sherman Act notwithstanding the peculiar and anomalous characteristic of the enterprise of organized baseball and of the injuries to the game and to the public if there were a requirement of unbridled competition.<sup>176</sup>

In his reply brief, Toolson drew the Court's attention to the mischaracterizations of Organized Baseball as alleged by both the Yankees and

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<sup>171</sup> *Id.* at 63–64.

<sup>172</sup> *Id.* at 64.

<sup>173</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>174</sup> Brief For Boston American League Base Ball Company as Amicus Curiae at 2, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>175</sup> *Id.* at 2.

<sup>176</sup> *Id.*

the Red Sox: “The brief Amicus Curiae opens and closes with the argument that Baseball is unique. All through the brief of respondents is the same theme . . . .”<sup>177</sup> In his attempt to urge the Court to review the issues in much the same way the *Federal Baseball* Court did, Toolson advocated for a legal, rather than policy-based, ruling: “The trial court having the facts before it will judge the regulations of baseball with respect to their history, purpose and result [citation omitted]. If the regulations are reasonable, they of course will stand. If not, they are unreasonable and, no one can argue, an unreasonable regulation should fall.”<sup>178</sup> In the end, this proved to be too much to ask of the Court.

### C. *The Opinion*

In its one-paragraph per curiam decision, the Court announced its acceptance of much of the Yankees’ position, agreeing that Congressional silence in the three decades since *Federal Baseball* spoke louder than words.<sup>179</sup> Implicit in its ruling was the determination that *Federal Baseball* was, at its core, a policy-based decision, even though, as discussed above, it was in fact anything but. Through this misreading of *Federal Baseball*, the *Toolson* Court put its stamp of approval on the revisionist interpretation of the case, endowing it with significant power and rendering it, three decades hence, the most significant baseball-related decision in American jurisprudence, a far cry from how it was viewed contemporaneously or even into the mid-1940’s. Contrary to the *Toolson* Court’s assertion, Congressional silence in fact meant little in the aftermath of the *Federal Baseball* decision. As noted above, Congress was impotent to overrule the explicit ruling given that it was constitutionally-based. And it was likewise powerless to reverse any implied judicial notion therein that baseball was unique and, therefore, should be accorded special treatment under the law for the simple reason that no such notion existed; Pepper asked the Court to rule on this issue specifically and the Court responded with judicial silence.

By the time the *Toolson* case reached the Court, the scholarly as well as popular understanding of *Federal Baseball* had become hopelessly skewed, resulting in an opinion that made sense only if one ignored the realities and circumstances surrounding *Federal Baseball* itself. Ultimately, the *Toolson*

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<sup>177</sup> Petitioner’s Reply Brief on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 11, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>178</sup> *Id.*

<sup>179</sup> *See Toolson*, 346 U.S. at 357.

Court did just this: it looked backwards at the opinion from its 1953 perch and substituted the prevailing contemporary interpretation of the case for the interpretation of it as it was understood at the time it was handed down. Despite the *Toolson* Court's assertion that "Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under [the federal antitrust] laws by legislation,"<sup>180</sup> Congress did indeed broach the issue on numerous occasions. However, beginning in the 1930s, Congressional discussion was premised on the issue of whether to *exempt* Organized Baseball from the federal antitrust laws, not on removing an already existing exemption.<sup>181</sup> This distinction is significant: given the limited scope of *Federal Baseball*, Organized Baseball was presumed to have been subject to the federal antitrust laws once the Court expanded its definition of Congressional reach pursuant to the Commerce Clause. Congress's failure to speak definitively on this issue in the three decades since *Federal Baseball* signaled, if anything, its belief that Organized Baseball should remain subject to the federal antitrust laws rather than a belief that Baseball should remain exempt, for it was not exempt and had never been made exempt. The *Toolson* Court failed to recognize this distinction and, as a consequence, cemented the revisionist interpretation of *Federal Baseball* in perpetuity.

*Toolson*, in effect, declared the revisionists the victors in the battle over the meaning of *Federal Baseball*. In its wake drifted barges of commentary reintroducing the newly-imagined meaning of Holmes's decision to the American public. Upon the Court's denial of Toolson's petition for rehearing, the *New York Times* wrote that "The Supreme Court refused today to reconsider its ruling of Nov. 9 that organized baseball is exempt from the anti-trust laws . . . . The opinion handed down by the Supreme Court on Nov. 9 left standing a previous ruling by the late Oliver Wendell Holmes in 1922 . . . ." <sup>182</sup> Implicit in these words was the notion that no new law was made in *Toolson*, that it merely reaffirmed *Federal Baseball*. But if so, where did the exemption come from? As discussed above, it did not originate with *Federal Baseball* and was not explicitly created within *Toolson* either. Reports in newspapers across the nation contained similar language, implying an exemption within *Federal Baseball* that did not in fact exist.<sup>183</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> See, e.g., *Baseball Inquiry Is Urged on House*, N.Y. TIMES, Apr. 6, 1949, at 11.

<sup>182</sup> *Rehearing Denied in Baseball Suits*, N.Y. TIMES, Dec. 15, 1953, at 57.

<sup>183</sup> See, e.g., *High Court Rules Baseball Exempt From Trust Laws*, PHILADELPHIA INQUIRER, Nov. 9, 1953, at 1; *Baseball a Sport, and Not Business, High Court Rules*, N.Y. TIMES, Nov. 10, 1953, at 1.

*Toolson's* mischaracterization of Congressional inaction likewise became embedded within the public consciousness in the decision's aftermath. Speaking to the baseball-loving multitudes, *The Sporting News* repeated the fiction that by failing to act, Congress intended to exempt Organized Baseball from the federal antitrust laws.<sup>184</sup> In an opinion piece that ran alongside the reporting of the decision itself, columnist Shirley Povich offered a more nuanced view of Congress's role, however:

From time to time, members of Congress friendly to baseball have attempted to enact special legislation exempting the game from application of the anti-trust laws. None of their bills even reached committee. The latest was Senator Edwin Johnson of Colorado, who apparently believed the game needed the special legislation that the Supreme Court now has said it doesn't need, except in the discretion of Congress. If the fears of baseball men were unfounded, they never truly knew it until November 9.<sup>185</sup>

His voice was one of an increasingly small minority, however.

The scholarly discussion of the state of baseball and the law, post-*Toolson*, largely tracked that of the popular one. A 1955 article, "Baseball and the Anti-Trust Laws," plainly announced, without further analysis, that "[t]he *Federal Baseball* decision gave organized baseball an exemption so broad that it was not challenged until 1947 . . . ."<sup>186</sup> Although the article detailed the numerous congressional bills introduced since *Federal Baseball*, including four in 1951 alone, which attempted to provide Organized Baseball with an antitrust exemption,<sup>187</sup> it did not go further and question the relevance of these bills if indeed the article's premise was correct: that Organized Baseball already had an exemption pursuant to *Federal Baseball*. Notably, the article's author clearly read the *Federal Baseball* briefs and made much of them in his discussion of how the *Federal Baseball* ruling might have served as an effective barometer for how the *Toolson* Court would eventually rule. Speaking on the possible outcomes of the *Toolson* case as it

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<sup>184</sup> Jack Walsh, *O.B. Wins the 'Big One' in Court 7-2*, THE SPORTING NEWS, Nov. 18, 1953, at 5. ("The brief opinion, less than 200 words long, pointed out that Congress has had the 1922 ruling under consideration all this time but has not seen fit to act. The majority emphasized, too, they were not re-examining the underlying issues but affirming the 1922 decision so far as it determined that Congress had no intention of including baseball within the scope of the anti-trust laws.")

<sup>185</sup> Shirley Povich, *Game Gets 'Safe' Ruling From High Court*, THE SPORTING NEWS, Nov. 18, 1953, at 5.

<sup>186</sup> Charles Gromley, *Baseball and the Anti-Trust Laws*, 34 NEB. L. REV. 597, 601 (1955).

<sup>187</sup> See *id.* at 604-05.

careened toward the Court, the article acknowledged that the expanded definition of the Commerce Clause did not bode well for Organized Baseball on legal grounds.<sup>188</sup> However, the article recognized that Organized Baseball's case was far from hopeless:

On the other hand, there was the possibility that the Supreme Court might reaffirm the *Federal Baseball* decision on other policy considerations. Senator George W. Pepper (Fla.), who represented organized baseball in its fight for antitrust immunity in the *Federal* case, had used essentially a policy approach. The defenders of baseball followed the same line of argument in their efforts to obtain continued antitrust immunity. They contended that baseball, like other team sports, faced problems unique in the realm of business; that the sport demanded restraints on economic competition if it was to survive as an amusement industry; and implicitly that the industry merited special consideration under the antitrust laws.<sup>189</sup>

True enough — except that the *Federal Baseball* Court remained silent as to Pepper's policy approach. Misunderstandings such as this would only become more common and ingrained as time marched on. By the time St. Louis Cardinals' outfielder Curt Flood brought his case to the Court in 1972, any understanding of the limitations and nuances of *Federal Baseball* was gone for good.

## V. *FLOOD V. KUHN*

### A. *The Opinion*

Although considered little more than a useless appendage to the baseball trilogy by most, and considered to add little to what had already been said in *Federal Baseball* and *Toolson*, *Flood* in fact is the case where Organized Baseball's antitrust exemption shows itself most explicitly. Here, the Court, for the first time, grounded its decision in policy and held that Organized Baseball was exempt from the federal antitrust laws due to reasons related to its unique qualities. Although the Court finally acknowledged that “[p]rofessional baseball is a business and it is engaged in interstate commerce,”<sup>190</sup> this was not the end of the analysis (as it was for the *Federal Baseball* Court when it concluded to the contrary). Rather, because of the Court's “recognition and acceptance of baseball's unique characteristics and needs,” it declined to hold Organized Baseball to the strictures of the Sher-

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<sup>188</sup> *Id.* at 606.

<sup>189</sup> *Id.*

<sup>190</sup> 407 U.S. at 282.

man Act.<sup>191</sup> Here at last was a decision that grounded its holding in the type of policy concerns of which Pepper advocated in his *Federal Baseball* brief a half-century earlier. Here at last was a decision that did everything most people by then had assumed *Federal Baseball* had already done.

Unfortunately, by now, even the Court itself had become entwined in the suppositions and assumptions surrounding *Federal Baseball*. Justice Blackmun, the author of the *Flood* opinion, did not believe that he was making new law within it. Instead, he believed that he was merely reaffirming *Federal Baseball* and *Toolson*. Implicit within the opinion was the assumption that Organized Baseball had been exempt ever since Justice Holmes's ruling: "With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball."<sup>192</sup> As a result, the otherwise plainly acknowledged pronouncement, at last, of Organized Baseball's antitrust exemption became muddled once again, this time by the Court's confusion over the nature and scope of its own precedent.

#### B. *Petitioner (Curt Flood's) Brief*

Although he would prove to be unsuccessful in doing so, Flood hoped to draw the Court's attention, most importantly, to what the *Federal Baseball* Court did not decide. As he noted, the Court did not hold that Organized Baseball was exempt from the Sherman Act. Rather, "this Court held that it need not reach the validity under the federal antitrust laws of Organized Baseball's reserve system as it then existed . . . Mr. Justice Holmes, writing for the Court, made no analysis of the reserve clause or of the antitrust laws . . ." <sup>193</sup> Instead, he "simply relied upon then current doctrine which declared 'personal efforts, not related to production' not to be a 'subject of commerce' and which disregarded 'interstate' aspects of multistate businesses when they related only to 'transportation.'" <sup>194</sup> Turning to *Toolson*, Flood alleged that that case was, in effect, as antiquated and irrelevant as *Federal Baseball's* understanding of the Commerce Clause, given the expansion of the business of baseball in the two-decades since that decision was handed down:

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Brief for Petitioner at 19, *Flood v. Kuhn*, 407 U.S. 258 (1971) (No. 71-32).

<sup>194</sup> *Id.*

Whatever justification there was for regarding Baseball as a “sport” deeply rooted in the loyalties of particular groups of fans ceased to exist after 1953. The major leagues have grown from sixteen to twenty-four teams, expanding to every city which seems able to pay the freight, and abandoning communities with long baseball histories . . . . There have been other, perhaps more important, changes. The reserve system itself has been made drastically more restrictive since it was before the Court in 1953. It was possible in 1953, as in 1922, for a talented young man to select his first employer from among those teams interested in bidding for his services; it was only after the signing of his first contract that he became enmeshed in the reserve system. But in 1965 this one remaining player freedom was eradicated. The institution of the semi-annual draft meant that a drafted player could negotiate only with the team that drafted him. All other teams are forbidden-by threat of boycott-from approaching him. *Toolson* declined to reconsider the validity of the old reserve system. But this Court has never been called upon to make that decision with respect to the present reserve system, with its involuntary draft of players. By its own hand, Baseball has substantially diminished whatever precedential value *Toolson* had.<sup>195</sup>

With regard to *Toolson’s* pronouncement that Congressional silence in the wake of *Federal Baseball* spoke volumes, Flood pointed to the fact that, shortly after *Federal Baseball*, a series of Supreme Court decisions “quickly stripped *Federal Baseball Club* of precedential force, removing the impetus for legislative tinkering with the Sherman Act.”<sup>196</sup> Consequently, there was nothing for Congress to consider, given that the Court itself had subsequently rendered *Federal Baseball* impotent. Regardless, even were that not the case, Flood highlighted Supreme Court precedent stating that “[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.”<sup>197</sup> No matter how one chose to look at it, Congressional silence meant nothing.

### C. Respondent’s (*Bowie Kuhn, et. al.’s*) Brief

Organized Baseball, through the vessel of Commissioner Bowie Kuhn, responded to Flood’s assertions with a brief ladled thick with the assumptions many by then had come to accept with regard to the meaning of *Federal Baseball*. The tone of its brief was set in its first Question Presented, wherein it framed the issue as whether the Court should overturn Organized Baseball’s longstanding federal exemption:

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<sup>195</sup> *Id.* at 23.

<sup>196</sup> *Id.* at 29.

<sup>197</sup> *Id.* (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)).



Should this Court abandon its long, unbroken line of decisions holding that baseball's reserve system is not subject to the federal antitrust laws, when the record in this action and the history of Congressional consideration of baseball both provide compelling support for continued adherence to such precedents?<sup>198</sup>

Drawing on this theme, Kuhn presented to the Court an issue that, in his opinion, had already been decided: "All of these facts and circumstances, plus the important policy represented by the doctrine of *stare decisis*, compellingly indicate that this Court should reaffirm its precise and well-confined rulings that the fundamental structure and rules of baseball are not subject to the antitrust laws."<sup>199</sup> Moreover, as to the nature of the decision itself:

It was clear from the outset that the Court's opinion in *Federal Baseball* was a limited decision, grounded on a realistic perception of the unique characteristics and needs of professional baseball in contrast to other business activities . . . . In subsequent decisions, this Court has reaffirmed and reiterated the special factual considerations which support continued adherence to *Federal Baseball*, while at the same time ensuring that enforcement of the antitrust laws in other areas is not affected.<sup>200</sup>

Addressing the role of the federal legislature, Kuhn asserted that the *Federal Baseball* rule "was plainly intended to stand unless and until disturbed by Congress."<sup>201</sup> Accordingly, Congressional inaction clearly signaled "affirmative support for that rule."<sup>202</sup> As for the nature and specifics of the "*Federal Baseball* rule" to which he was referring, Kuhn left no doubt as the word "exemption" appeared repeatedly throughout his brief, within the context of his discussions of both *Federal Baseball* and *Toolson*.<sup>203</sup> Indeed, Kuhn characterized Flood's suit as an attempt to impel a "radical and abrupt change in baseball's antitrust status . . . *from exemption to per se violation* . . . ." <sup>204</sup> According to Kuhn, "the policy of the federal government has been consistently to exempt baseball from the operation of the antitrust laws."<sup>205</sup> Drawing on Pepper's assertion decades earlier, he concluded that had Congress desired to bring Organized Baseball under the jurisdiction of the fed-

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<sup>198</sup> Brief for Respondents at 1–2, *Flood v. Kuhn*, 407 U.S. 258 (1971) (No. 71-32).

<sup>199</sup> *Id.* at 21.

<sup>200</sup> *Id.* at 24, 26.

<sup>201</sup> *Id.* at 33.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* at 37, 43.

<sup>204</sup> *Id.* at 43.

<sup>205</sup> *Id.* at 57–58.

eral antitrust laws, it would have specifically done so.<sup>206</sup> That it did not could only indicate Congressional intent to exempt Organized Baseball.<sup>207</sup> A half-century later, as the issuance of the *Flood* opinion would confirm, what was once conjecture had by now somehow become fact.

#### D. *Reaction to the Flood Decision*

Upon the Court's announcement of the *Flood* decision, the by-now ingrained assumptions concerning *Federal Baseball* were only further confirmed within the media. Arthur Daley reminded his readers in *The New York Times* that "[s]ince precedent generally has considerable weight with most decisions, the noble jurists scrutinized the 1922 landmark opinion of Oliver Wendell Holmes when baseball was ruled exempt from antitrust in a case involving the deceased Federal League."<sup>208</sup> Another article brought *Toolson* into the mix when it wrote that in ruling against *Flood*, the Court "pointed to two previous Supreme Court decisions — in 1922 and 1953 — granting baseball exemption from antitrust laws."<sup>209</sup> Leonard Koppett likewise wrote in the *Times* that "[t]he 1922 ruling, referred to as Federal Baseball, stated that baseball was not the sort of business that the antitrust laws were intended to cover."<sup>210</sup> Moreover, in his view, the *Toolson* Court ruled "that the exemption should be continued."<sup>211</sup> In its editorial, *The Sporting News* likewise asserted that *Federal Baseball* "grant[ed] baseball[ ] special antitrust immunity."<sup>212</sup> Although these articles were, despite themselves, correct in announcing that, in the wake of *Flood*, baseball was indeed unique (at least to the Court) and certainly the bearers of an antitrust exemption, they were inaccurate to the extent that they alleged that this had always been the case. Therefore, contrary to Koppett's assertion within the *Times* that the Court held that baseball *remained* exempt from antitrust for reasons of precedent,<sup>213</sup> the implications of *Flood* were quite different. For now, for the first time,

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<sup>206</sup> *Id.* at 57.

<sup>207</sup> *Id.*

<sup>208</sup> Arthur Daley, *The Sad Story of the Leaky Umbrella*, N.Y. TIMES, June 22, 1972, at 31.

<sup>209</sup> *The Chance of a Called Strike*, N.Y. TIMES, June 25, 1972, at E3.

<sup>210</sup> Leonard Koppett, *Baseball's Exempt Status Upheld by Supreme Court*, N.Y. TIMES, June 20, 1972, at 45 [hereinafter *Baseball's Exempt Status*].

<sup>211</sup> *Id.* Koppett wrote that the *Toolson* court ruled "that the exemption should be continued, even though the legal philosophy had changed, because the industry had been allowed to develop for 30 years on the assumption of its immunity."

<sup>212</sup> *Flood's Loss Is Baseball's Gain*, THE SPORTING NEWS, July 8, 1972, at 14.

<sup>213</sup> See *Baseball's Exempt Status*, at 45.

baseball was indeed exempt, but not for precedential reasons. The lineage of Organized Baseball's antitrust exemption was by now hopelessly muddled.

As a historical matter, Red Smith of the *Times* was one of the few reporters to accurately gauge the development of baseball's status under the federal antitrust laws. Honing in on both the *Toolson* and *Flood* Court's assertions that Congressional silence signaled acquiescence to Organized Baseball's special status, Smith wrote that such an argument was:

[A] disappointment because none of the nine Justices except William Douglas will admit that the Supreme Court has been in error. Eight of them duck responsibility and say that if there is an error, Congress should rectify it. But it was not Congress that exempted baseball from antitrust regulation; nothing in the Sherman or Clayton Act says "except professional baseball."<sup>214</sup>

Players Association executive director Marvin Miller echoed Smith in *The Sporting News*: "Why leave remedial action to Congress? . . . Congress didn't make the original error. The Supreme Court did."<sup>215</sup> The *New York Times*' June 23, 1972 editorial was likewise largely on point:

It is perfectly evident that no judge on either side of the 5-to-3 decision believes that there is any statutory justification for reading into the antitrust laws an exemption which Congress did not create and which the Court has specifically refused to uphold for professional football, basketball or other sports.

The only basis for the judge-made monopoly status of baseball is that the Supreme Court made a mistake the first time it considered the subject fifty years ago and now feels obliged to keep on making the same mistake because Congress does not act to repeal the exclusion it never ordered.<sup>216</sup>

Although closer to the mark, Smith, Miller and the *Times* still missed it, however, as the "mistake" or "error" they were referring to was one they believed to have been committed by the *Federal Baseball* Court, when in fact, the miscue occurred in *Toolson*. No matter. For irrespective of these dissenting voices, the crowd had already spoken, even if the Court, prior to *Flood*, and Congress never did.

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<sup>214</sup> Red Smith, *The Buck Passes*, N.Y. TIMES, June 21, 1972, at 33.

<sup>215</sup> Ralph Ray, *Catalyst for Bargaining, Says Miller of Decision*, THE SPORTING NEWS, July 8, 1972, at 8.

<sup>216</sup> *Judge-Made Monopoly*, N.Y. TIMES, June 23, 1972, at 36.

## VI. CONCLUSION

Perhaps not surprisingly, given the muddled history of Organized Baseball and the antitrust laws, when Congress finally did speak affirmatively, its intent and actions once again were hazy, resulting in public misperceptions concerning just what it had accomplished, if anything. In the aftermath of *Flood*, wherein the Court, at last, issued a ruling based on policy rather than its interpretation of the Commerce Clause, Congress was finally empowered to act, if it so chose, to modify or overturn the decision. In 1998, through the Curt Flood Act,<sup>217</sup> it purported to do so, at least in theory. As stated within: “It is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players) . . . .”<sup>218</sup> Regardless, the Act was perceived to be largely ceremonial and, in fact, that has been the case — to date, no MLB player has ever filed suit under the Act.<sup>219</sup> Although the Act’s supporters claim that its mere presence nevertheless has a deterrent effect and may be at least partly responsible for MLB’s relatively long stretch of labor peace since 1995,<sup>220</sup> it is difficult to quantify its value in this regard. Moreover, the Act carved out so many exclusions that it ironically serves as the first affirmative Congressional statement that Organized Baseball is, in so many ways, officially exempt from the federal antitrust laws in almost every conceivable situation. Specifically, the following list of “conduct, acts, practices or agreements”<sup>221</sup> are not subject to review under the Sherman Act: any agreements “relating to the operation of employment in the minor leagues,” any “agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues,” any agreements between “professional major league baseball” and minor league teams, along with “any other matter relating to organized professional baseball’s minor leagues . . . .”<sup>222</sup> In addition, “franchise expansion, location or relocation,

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<sup>217</sup> Curt Flood Act of 1998, 15 U.S.C. § 27a (1998) (current version at 15 U.S.C. § 26b (2002))

<sup>218</sup> Curt Flood Act of 1998, §2, 15 U.S.C.A. §27a note (Purpose).

<sup>219</sup> See Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 752 (2008)

<sup>220</sup> See *id.* at 751, 754–56.

<sup>221</sup> Curt Flood Act of 1998, §3 (Application of the Antitrust Laws To Professional Major League Baseball).

<sup>222</sup> See Philip R. Bautista, Note, *Congress Says “Yooou’re Out!!! To the Antitrust Exemption of Professional Baseball: A Discussion of the Current State of Player-Owner Col-*

franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners,” is outside of the Act.<sup>223</sup> “[C]onduct, acts, practices, or agreements’ protected by the Sports Broadcasting Act of 1961” are likewise outside of the Act as are agreements between organized professional baseball and umpires.<sup>224</sup> Finally, and most importantly, the Act does not apply to any issue “covered under the current collective bargaining agreement” between the Major League Baseball Players Association and the owners.<sup>225</sup>

The ironic twist of the Curt Flood Act makes perfect sense when viewed through the lens of the baseball trilogy. Just as *Federal Baseball* is now considered to be the case that gave baseball its antitrust exemption even though it did anything but, the Curt Flood Act is considered to have stripped the game of this exemption, even though, it in fact, cemented it. Indeed, through its elongated litany of exceptions, the Curt Flood Act created numerous, delineable exclusions for Organized Baseball that were never contemplated by the *Federal Baseball* Court and, in many aspects, does more to officially exempt Organized Baseball from the federal antitrust laws than *Federal Baseball* and *Toolson* combined. Pursuant to the Curt Flood Act, Organized Baseball, at last, received concrete acknowledgement that the Sherman Act was of little matter to it. That the Act is widely believed to have accomplished something else altogether is, to borrow a phrase from a sport with a much smaller ball, par for the course.

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*lective Bargaining and the Impact of the Curt Flood Act of 1998*, 15 OHIO ST. J. ON DISP. RESOL. 445, 473–74 (discussing the limitations of and exceptions to the Curt Flood Act).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 475.



## Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players

Garrett R. Broshuis\*

### ABSTRACT

Collective bargaining has significantly altered the landscape of labor relations in organized baseball. While its impact on the life of the major league player has garnered much discussion, its impact on the majority of professional baseball players—those toiling in the minor leagues—has received scant attention. Yet an examination of every collective bargaining agreement between players and owners since the original 1968 Basic Agreement reveals that collective bargaining has greatly impacted minor league players, even though the Major League Baseball Players Association does not represent them. While a few of the effects of collective bargaining on the minor league player have been positive, the last two agreements have established a dangerous trend in which the Players Association consciously concedes an issue with negative implications for minor leaguers in order to receive something positive for major leaguers.

Armed with a court-awarded antitrust exemption solidified by legislation, Major League Baseball has continually and systematically exploited mi-

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\* Prior to law school, the author played six years as a pitcher in the San Francisco Giants' minor league system and wrote about life in the minors for *The Sporting News* and *Baseball America*. He has represented players as an agent and is a J.D. Candidate, 2013, at Saint Louis University School of Law. The author would like to thank Professor Susan A. FitzGibbon, Director, William C. Wefel Center for Employment Law at Saint Louis University, for her help and guidance. He would also like to thank the numerous individuals in the baseball industry who provided assistance. Most importantly, thanks to his wife for her patience and never-ceasing encouragement.

nor leaguers. This has resulted in limited player mobility, limited bargaining power, and salaries placing many players below the federal individual poverty level. Unless minor leaguers gain true and real representation at the bargaining table, the exploitation will continue.

*“Maybe I’m wrong for thinking this, but it makes me wonder why there is such a huge gap between the guys up here and the guys in the minors. I mean, if you just spread out the smallest portion of all this to the guys below it would make their lives so much easier, don’t you think?”*

*“That’s a terrible idea,” said Bentley.<sup>1</sup>*

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<sup>1</sup> DIRK HAYHURST, *OUT OF MY LEAGUE: A ROOKIE’S SURVIVAL IN THE BIGS* 302 (2012). As depicted in his book, during one of his first days in the major leagues Hayhurst decided to share his sympathy for minor leaguers with Bentley, one of his major league teammates. Like most major leaguers, Bentley did not share Hayhurst’s sympathy.

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## I. INTRODUCTION

Throughout most of its history, organized baseball has operated as a classic cartel.<sup>2</sup> Since the birth of the National League of Professional Baseball Clubs in 1876, the major powers in organized baseball have ruthlessly quashed rival leagues and fiercely protected their most prized territories.<sup>3</sup> In the process, they have also routinely exploited their chief commodity: baseball players.<sup>4</sup> Armed with a court-awarded antitrust exemption in the early twentieth century,<sup>5</sup> the National League and its sister circuit, the American League, have operated with little restraint on their powers.

The arrival of the Major League Baseball Players Association (MLBPA) as a legitimate union in 1966 finally provided a check on organized baseball's powers.<sup>6</sup> Within a few decades, major league players would reap great benefits, as collective bargaining assured baseball's prosperity rained down upon the players.<sup>7</sup> However, this prosperity did not extend to all professional baseball players. In fact, it extended to only a small minority.

The vast majority of professional players under contract with major league teams toil in the minor leagues,<sup>8</sup> and they are not represented by the

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<sup>2</sup> See JOHN D. KELLY, *THE AMERICAN GAME: CAPITALISM, DECOLONIZATION, WORLD DOMINATION, AND BASEBALL* 59 (2006) (stating that baseball is organized "into profit seeking corporations in a legally powerful cartel"); cf. ROBERT C. BERRY, WILLIAM B. GOULD & PAUL D. STAUDOHAR, *LABOR RELATIONS IN PROFESSIONAL SPORTS* 220 (1986) (stating that multiple sports operate as a cartel).

<sup>3</sup> See NEIL J. SULLIVAN, *THE MINORS: THE STRUGGLES AND THE TRIUMPH OF BASEBALL'S POOR RELATION FROM 1876 TO THE PRESENT* 5–6 (1990).

<sup>4</sup> See KELLY, *supra* note 2, at 91–92 (discussing baseball's choice to oppose free labor).

<sup>5</sup> See *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922).

<sup>6</sup> See, e.g., CHARLES P. KORR, *THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION, 1960–81* 36–53 (2002).

<sup>7</sup> See discussion *infra* Part I.B.iii.

<sup>8</sup> In fact, Major League Baseball (MLB) teams typically employ 150 or more minor league players. Conversely, MLB teams only employ around forty players on major league contracts.



MLBPA.<sup>9</sup> Without representation at the bargaining table, minor leaguers have become baseball's untouchables. Their salaries have barely budged in the last forty years,<sup>10</sup> and, with the exception of minor league stadiums, the travel and working conditions have changed little since Willie Mays and Mickey Mantle roamed the minors.<sup>11</sup> The bus remains the nearly exclusive mode of transportation, with players often passing entire nights in bus seats instead of beds.<sup>12</sup> When not sleeping on buses, players sleep in dismal road hotels, and are provided with mediocre food before games.<sup>13</sup> Life during home games frequently proves no better, with teammates often electing either to cram six players into a dingy two-bedroom apartment or to live in the futon-clad basement of a host family.<sup>14</sup>

One would think that major league players would recognize the need to improve the conditions in the minor leagues since virtually all major leaguers played several seasons in the minors before arriving at the majors.<sup>15</sup> However, as the opening quote from a pair of major leaguers demonstrates,

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<sup>9</sup> Lily Rothman, *Emancipation of the Minors*, SLATE, Apr. 3, 2012, [http://www.slate.com/articles/sports/sports\\_nut/2012/04/minor\\_league\\_union\\_thousands\\_of\\_pro\\_baseball\\_players\\_make\\_just\\_1\\_100\\_per\\_month\\_where\\_is\\_their\\_cash.html](http://www.slate.com/articles/sports/sports_nut/2012/04/minor_league_union_thousands_of_pro_baseball_players_make_just_1_100_per_month_where_is_their_cash.html); see also discussion *infra* Part II.A.i.

<sup>10</sup> See Table 1, *infra* Part II.B.

<sup>11</sup> Compare DIRK HAYHURST, *THE BULLPEN GOSPELS: MAJOR LEAGUE DREAMS OF A MINOR LEAGUE VETERAN* (2010) (describing one minor leaguer's recent, arduous journey in the minor leagues), and Garrett Broshuis, *Postcards from the Bushes*, THE SPORTING NEWS, July 21, 2006, at 68–69 (describing conditions in today's minor leagues), with PAT JORDAN, *A FALSE SPRING* (1973) (describing a minor leaguer's journey during the 1950s and 1960s).

<sup>12</sup> See Broshuis, *supra* note 11, at 69 (describing the feeling of sleeping on a bus like a contortionist).

<sup>13</sup> For a description of the typical foods available to minor leaguers, see Garrett Broshuis, *Pizza and Fried Chicken: Minor League Staples*, LIFE IN THE MINORS (Nov. 17, 2009, 7:48 AM), <http://minorleaguelifelife.blogspot.com/2009/11/pizza-and-fried-chicken-minor-league.html>.

<sup>14</sup> Garrett Broshuis, *Playing For Peanuts*, BASEBALL AMERICA, March 31, 2010, available at <http://www.baseballamerica.com/today/minors/season-preview/2010/269689.html>. When electing to live in an apartment, the air mattress is usually the bed of choice due to its portability and low cost. See *id.*

<sup>15</sup> Very few players go directly to the major leagues, especially today. In fact, of all players drafted since 1965, only twenty-one went directly to the major leagues. *Straight to the Major Leagues*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/feats/feats9.shtml> (last visited Nov. 8, 2012). Only one player, Mike Leake, has done so in the past twelve years. *Id.*

once a player reaches the major leagues, he generally forgets minor leaguers.<sup>16</sup>

Despite the apathy towards minor leaguers, baseball's collective bargaining process does affect them. Almost every collective bargaining agreement (CBA) signed between the MLBPA and MLB has affected minor leaguers in some way.<sup>17</sup> While collective bargaining since the original 1968 Basic Agreement has yielded some positive benefits for minor leaguers, negative effects abound.<sup>18</sup> In fact, the two most recent CBAs have established a disturbing trend in which the MLBPA concedes a bargaining chip with negative effects for minor leaguers in order to achieve something positive for major leaguers.<sup>19</sup>

The MLBPA and major leaguers are not entirely to blame for this troubling trend. After all, the MLBPA does not represent minor leaguers and owes no allegiance to them.<sup>20</sup> Moreover, without the MLBPA providing at least some check on the powers of organized baseball, MLB could unilaterally institute virtually any minor league policy without giving any thought to minor league players.<sup>21</sup> Consequently, more must be done to ensure minor leaguers have a voice at the bargaining table. Otherwise, MLB

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<sup>16</sup> During my playing years, I heard many major leaguers make statements similar to the conversation found in Hayhurst's book. Further evidence of this attitude stems from the fact that there is a nonprofit organization set up to help minor leaguers with families, but it has struggled to gain funding and is currently dormant. See Garrett Broshuis, *Non-profit for Minor Leaguers*, LIFE IN THE MINORS (Apr. 30, 2010), <http://minorleaguelifelife.blogspot.com/2010/04/non-profit-for-minor-leaguers.html>. Some major leaguers think of the minors as a rite of passage; others simply seek to hoard all the game's prosperity at the highest level.

<sup>17</sup> See discussion *infra* Parts II.A., II.B.

<sup>18</sup> See *id.*

<sup>19</sup> See, e.g., Rothman, *supra* note 9; discussion *infra* Parts II.A., II.B.

<sup>20</sup> See, e.g., DONALD H. WOLLETT, GETTING ON BASE: UNIONISM IN BASEBALL 96 (2008) ("The [bargaining] unit consists exclusively of major leaguers."); Rothman, *supra* note 9 (quoting the recently retired second-in-command at the MLBPA, Gene Orza, as saying "[w]e don't represent them . . . and have no obligation").

<sup>21</sup> See Garrett Broshuis, *Deterring Opportunism Through Clawbacks: Lessons for Executive Compensation from Minor League Baseball*, 57 ST. LOUIS U. L.J. 185, 200–03 (describing the unilateral implementation of clawback provisions into minor league contracts); see also James T. Masteralexis & Lisa P. Masteralexis, *If You're Hurt, Where is Home? Recently Drafted Minor League Baseball Players are Compelled to Bring Workers' Compensation Action in Team's Home State or in Jurisdiction More Favorable to Employers*, 21 MARQ. SPORTS L. REV. 575, 575–76 (2011) (describing the unilateral implementation of workers' compensation clauses into minor league uniform player contracts (UPCs)).

will continue to exploit young men with dreams in a nearly unchecked fashion, as they have done throughout their history.<sup>22</sup>

Part II of this Article briefly provides an overview of labor and baseball. It includes a discussion of both the development of the minor leagues and of the major league labor wars. Part III then examines the effect of each CBA and the collective bargaining process on minor leaguers, who are not beyond the reach of collective bargaining despite lacking representation. Lastly, Part IV demonstrates that, since the current pattern of bargaining is not an unfair labor practice and Congressional relief is both undesirable and unlikely, the unionization of minor leaguers is the sole fruitful—though improbable—solution. Consequently, needed change for minor leaguers remains unlikely.

## II. A BRIEF HISTORY OF LABOR AND BASEBALL

America's national pastime juxtaposes athletic and mental challenges<sup>23</sup> against a backdrop that defies physics.<sup>24</sup> The simple graces and intricacies of the game have transfixed both artists<sup>25</sup> and mathematicians.<sup>26</sup> Yet organized baseball has carefully cultivated and magnified this simple beauty to achieve a sort of sanctity for the sport that attaches to the essence of being American.<sup>27</sup> As the national pastime, baseball has become not merely a game but

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<sup>22</sup> Cf. KELLY, *supra* note 2, at 92 (comparing organized baseball's Latin American baseball academies used to develop Latino minor leaguers to plantations); Rothman, *supra* note 9 (stating that minor leaguers are "subject to territorial monopolies, restrictions on labor movement, and caps on salaries that are illegal in other businesses").

<sup>23</sup> See generally MIKE STADLER, *THE PSYCHOLOGY OF BASEBALL* (2007).

<sup>24</sup> See generally ROBERT K. ADAIR, *THE PHYSICS OF BASEBALL* (3d ed. 2002).

<sup>25</sup> The National Baseball Hall of Fame and Museum devotes much space to art and baseball. Also, while certainly not alone in using baseball as his muse, Norman Rockwell is perhaps the most famous artist to capture baseball's scenes. See *Norman Rockwell Museum Digital Collections*, NORMAN ROCKWELL MUSEUM, <http://collections.nrm.org/search.do?highlight=4> (last visited Nov. 10, 2012).

<sup>26</sup> Baseball has inspired an entire language and field of statistics known as sabermetrics. For an overview of the various statistical terms, see *Glossary: Sabermetric*, BASEBALL PROSPECTUS, <http://www.baseballprospectus.com/glossary/index.php?context=2&category=true> (last visited Nov. 10, 2012). Of course, the use of statistics recently revolutionized the game. See, e.g., MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003).

<sup>27</sup> See KELLY, *supra* note 2, at 42–56.

an indelible fixture in Americana. Often, it has cleverly used this contrived sanctity not only to conceal but also to excuse labor abuses.<sup>28</sup>

The labor abuses have extended to both minor league and major league baseball since the inception of the game. While an in-depth discussion of these labor abuses is beyond the scope of this Article, some exploration of labor relations in both the minor and major leagues is necessary to provide a backdrop for later discussion of collective bargaining in the sport. Each will be addressed below.

### A. *Labor and the Minor Leagues*

#### i. The Development of the Minor Leagues

The early years of America's pastime might best be described as a chaotic big bang. Throughout the second half of the nineteenth century, the coming and going of new leagues seemed to abide by the tides, as teams and leagues arrived and dissolved abruptly, with new waves ever ready to replace those that failed before them.<sup>29</sup> It was during this chaotic era, however, that organized baseball—including the minor leagues—was born.

The minor leagues originated when the National League of Professional Baseball Clubs (National League) elevated itself to the lofty status of a "major" league after its 1876 inception.<sup>30</sup> Although some questioned whether the level of play was actually better than other leagues, the National League benefited from better organization than its rivals, and it instituted the monopolistic control over players and franchises that would become one of the

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<sup>28</sup> Professor Neil J. Sullivan succinctly states the following:

By posing as a romantic diversion instead of a profitable business, organized baseball has been able to intimidate competing leagues and has denied players the freedom to choose their employers; the major leagues have raided the best players of minor league teams and compensated those clubs with a pittance. These abuses are permitted because baseball operates outside antitrust law; left to their own devices, the major league owners have historically followed a strategy of bullying weaker rivals without regard for the game's ultimate health.

SULLIVAN, *supra* note 3, at 5–6.

<sup>29</sup> See SULLIVAN, *supra* note 3, at 5. The first of two Northwestern Leagues was formed in 1879 and lasted all of two months. BOB HOIE, *The Minor Leagues, in TOTAL BASEBALL* 502, 502 (John Thorn & Pet Palmer eds., 3d. ed., 1993). In fact, an average of forty percent of leagues beginning a season during the 1890s failed to finish it. *Id.* With no league-appointed umpires, forfeits in the Northwestern League were also frequently attributed to "hometown" umpiring. *Id.*

<sup>30</sup> SULLIVAN, *supra* note 3, at 5–6.

signature aspects of the business.<sup>31</sup> Thus, the National League owners “rejected a market of several competitive leagues in favor of a monopoly that stifled every other association of clubs.”<sup>32</sup>

As the National League centralized power and raided rival minor leagues of their best players, it and two other leagues signed the first formal agreement recognizing the National League’s status as the sole major league on October 27, 1882.<sup>33</sup> The agreement “bound the clubs to honor the contracts on reserve lists, assured mutual recognition of expulsions and suspensions, established territorial rights,” and set higher minimum salaries in the major National League than the other two minor leagues.<sup>34</sup> Within two years, other leagues joined the arrangement, eventually forming the National Agreement.<sup>35</sup> In 1892, another National Agreement classified the minors into different levels for the first time and gave the National League the right to draft minor league players at fixed prices.<sup>36</sup>

Dissatisfied with the National League’s arrogation of power, the still minor American League withdrew from the agreement in 1900. It decided not to allow its players to be drafted, nor did it respect the National League’s monopolistic territorial rights.<sup>37</sup> In reaction, seven minor leagues in 1901 formed the National Association of Professional Baseball Leagues (National Association) as its governing body, a body that continues to govern the minors today.<sup>38</sup>

By 1902, fifteen leagues had joined the National Association.<sup>39</sup> Their new National Agreement established league classifications and a draft for the majors, and it respected the National League’s rights to players.<sup>40</sup> Soon thereafter, the National League and American League ended their standoff

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<sup>31</sup> *Id.* at 7.

<sup>32</sup> *Id.* at 11.

<sup>33</sup> HOIE, *supra* note 29, at 502.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 503. The American League boldly expanded into eastern cities reserved for the National League. STAUDOHAR, *supra* note 2, at 50. The American League also pirated National League players, with seventy-four players joining the American League after abandoning the National League between 1901 and 1902. *Id.*

<sup>38</sup> HOIE, *supra* note 29, at 502. Although its name was changed to Minor League Baseball in 1999, it continues to operate most of the minor leagues today. *Minor League Baseball Timeline—1901-2002*, MiLB.COM, <http://www.milb.com/milb/history/timeline.jsp> (last visited Nov. 10, 2012).

<sup>39</sup> HOIE, *supra* note 29, at 503.

<sup>40</sup> *Id.*

by agreeing to play the first World Series in 1903, and the precursor to Major League Baseball was born.<sup>41</sup>

Following this arrangement, the majors continued to exploit minor league teams and players through the draft, options, and reserve lists.<sup>42</sup> Once young players performed at high levels in the minors, the majors drafted these players at fixed rates.<sup>43</sup> If a player failed to perform at a high level in the majors, he could be optioned down to a minor league team for more seasoning while the major league team still retained the property rights to the player.<sup>44</sup>

Eventually, top minor leagues, such as the International League, Pacific Coast League, and American Association, resisted the arrangement.<sup>45</sup> They succeeded in temporarily exempting themselves from the draft, causing prices paid by the majors to the minors for players to skyrocket in the 1920s.<sup>46</sup> Perhaps due to the sudden increase in the price of top players, Branch Rickey, the General Manager of the budget-strained St. Louis Cardinals, sought a new method of acquiring cheap labor. In the early 1920s, Rickey began acquiring minor league teams at different classifications.<sup>47</sup> This enabled Rickey, who has been called the “Pharaoh who developed the bonds that held the minor leagues in their subordinate state,”<sup>48</sup> to sign amateur players at a cheap rate and continuously maintain their property rights as they developed at different levels of the minor leagues.<sup>49</sup> Talented players advanced up the system’s developmental ladder, and

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<sup>41</sup> BERRY, GOULD & STAUDOHAR, *supra* note 2, at 50. The American League and National League would continue as separate legal entities until a formal merger in 2000, though the usage of Major League Baseball began long before this date. *Year in Review: 2000*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/yearly/yr2000n.shtml> (last visited Nov. 10, 2012).

<sup>42</sup> See discussion *infra* Part I.B.i (discussing the development of the reserve clause in baseball).

<sup>43</sup> See, e.g., HOIE, *supra* note 29, at 503–04.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.* at 504.

<sup>46</sup> *Id.* Although the 1921 National Agreement stated that a maximum of \$5000 could be spent on a player drafted from the minors, the majors often were forced to spend more than \$75,000 on top players from the minor leagues who declared themselves exempt from the draft. *Id.*

<sup>47</sup> *Id.* at 511.

<sup>48</sup> SULLIVAN, *supra* note 3, at 94.

<sup>49</sup> See HOIE, *supra* note 29, at 511.

ultimately the Cardinals either promoted the best players to their own major league team or sold them to another club for a profit.<sup>50</sup>

The Cardinals had never finished higher than third in their league prior to Rickey's vision, but won the World Series in 1926 thanks to top talent produced from their "farm system."<sup>51</sup> Buoyed by success,<sup>52</sup> Rickey began collecting teams at an alarming rate. By 1940, the Cardinals owned *thirty-two minor league teams* and over *600 players*.<sup>53</sup> In fact, Rickey controlled entire minor leagues.<sup>54</sup> At first, other major league clubs operated as they had by buying players from other minor league teams, and teams with significant resources, such as the New York Yankees, continued to have success.<sup>55</sup> However, others began to recognize the value of the farm system model and began purchasing minor league teams.<sup>56</sup> Soon, even the mighty Yankees developed a farm system.<sup>57</sup>

As the farm system proliferated, baseball's commissioner, Kennesaw Landis, resisted the movement as bad for baseball. In 1931, he ordered Phil Ball, the owner of the St. Louis Browns, either to promote minor leaguer Herschel Bennett or to release him.<sup>58</sup> Ball refused and filed suit in federal court.<sup>59</sup> In *Milwaukee American Ass'n v. Landis*, Judge Walter Lindley sided with Landis, stating that "St. Louis was at work to keep Bennett out of the Major Leagues in the Minors; to keep control of Bennett's services; and to prevent any Major club from securing his services. If the plaintiffs' position were to prevail, this situation might continue indefinitely."<sup>60</sup> Moreover, "such conduct is detrimental to the national game of baseball."<sup>61</sup> Yet, de-

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<sup>50</sup> SULLIVAN, *supra* note 3, at 99.

<sup>51</sup> HOIE, *supra* note 29, at 511.

<sup>52</sup> The Cardinals won pennants in 1928 and 1930 and the World Series in 1926, 1931, and 1934. *Cardinals Timeline*, CARDINALS.COM, <http://stlouis.cardinals.mlb.com/stl/history/timeline3.jsp> (last visited Oct. 15, 2012).

<sup>53</sup> SULLIVAN, *supra* note 3, at 99–100.

<sup>54</sup> *Id.* at 111. For instance, the Class D Nebraska State League consisted entirely of teams owned by the Cardinals. *Id.*

<sup>55</sup> HOIE, *supra* note 29, at 511.

<sup>56</sup> *Id.* at 512.

<sup>57</sup> *Id.*

<sup>58</sup> SULLIVAN, *supra* note 3, at 111.

<sup>59</sup> *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

<sup>60</sup> *Id.* at 302.

<sup>61</sup> *Id.*

spite Landis' victory, the decision represented a mere speed bump to farm system development.<sup>62</sup>

During the 1950s, major league teams began culling their farm systems of perceived excesses.<sup>63</sup> During a congressional inquiry into the state of the minor leagues, Commissioner Ford Frick recognized that "the majors cannot exist without the minor leagues."<sup>64</sup> Consequently, the majors established a temporary stabilization fund to aid the lower minor leagues.<sup>65</sup> In 1962, the majors and minors agreed to a Player Development Plan requiring each major league team to operate at least five farm teams.<sup>66</sup> It also mandated that major league clubs would be responsible for salaries and spring training costs of minor league players, coaches, and managers, even if the major league club did not own the minor league team.<sup>67</sup> This embedded a vertically integrated system that remains largely unchanged today.

## ii. The Minor Leagues Today

Every major league team today retains an expansive farm system with at least one team at every classification of the minor leagues—Triple-A, Double-A, A Advanced, A, Short-Season A, and Rookie.<sup>68</sup> Major league teams all go beyond minimum requirements and currently maintain player

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<sup>62</sup> In 1948, six major league teams possessed farm systems of twenty or more minor league teams. HOIE, *supra* note 29, at 513.

<sup>63</sup> See *id.* In the post-World War II era, attendance at minor league games had plummeted, resulting in large operating losses for major league teams owning numerous minor league teams. SULLIVAN, *supra* note 3, at 235. Forty-two million people attended minor league games in 1949 compared to only 12 million in 1959, *id.*, as the advent of television and major league franchise relocation affected the popularity of the minors. *Id.* at 237–51. Consequently, minor leagues rapidly folded. See HOIE, *supra* note 29, at 513.

<sup>64</sup> SULLIVAN, *supra* note 3, at 239.

<sup>65</sup> HOIE, *supra* note 29, at 513.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> For a list of classifications and affiliates, see *MiLB Clubs by MLB Affiliation*, MiLB.COM, <http://www.milb.com/milb/info/affiliations.jsp> (last visited Oct. 15, 2012). The current rules require major league teams to have player development contracts with one team at each of the first four levels, but this is not required at the Short-Season A and Rookie levels. See *Here Are 10 Ways to Improve Minor League Baseball*, BASEBALL AMERICA, Mar. 28, 2012, available at <http://www.baseballamerica.com/today/minors/season-preview/2012/2613181.html>.



development contracts with either seven or eight minor league clubs.<sup>69</sup> Teams typically have over 200 players under contract.<sup>70</sup>

Most minor league clubs today are independently owned.<sup>71</sup> While some costs have been shifted to minor league teams since the 1962 Player Development Plan,<sup>72</sup> the majors continue to pay the salaries and meal money of players, coaches, and managers.<sup>73</sup> The minor league owner typically assembles “a front office and staff to manage all business aspects,” such as the ticket sales for the minor league team, while the major league team “makes all decisions related to player development,” including assignments, promotions, and releases.<sup>74</sup> With this arrangement, the business of minor league baseball has thrived, with franchise values appreciating at high rates even during recessions.<sup>75</sup>

With major league owners paying salaries of players not immediately contributing to their chief product, there is an incentive to keep wages at a minimum while still maximizing the number of prospects under contract in their organizations. Consequently, salaries remain strikingly low and off-

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<sup>69</sup> See *MiLB Clubs by MLB Affiliation*, *supra* note 68.

<sup>70</sup> Major League Rule 2(b)(1) permits a club to reserve forty players on a major league roster, thirty-eight on a Triple-A roster, thirty-seven on a Double-A roster, and thirty-five on each class A and rookie roster.

<sup>71</sup> Major league teams own less than one-fifth of their minor league affiliates. See Josh Leventhal, *2010 Player Development Contract Chart*, BASEBALL AMERICA (Oct. 6, 2010), available at <http://www.baseballamerica.com/today/minors/business-beat/2010/2610422.html>.

<sup>72</sup> Broshuis, *supra* note 14 (“Tremendous amounts of cost have already been shifted to the minor league system in the past 10 to 15 years . . .”).

<sup>73</sup> HOIE, *supra* note 29, at 513.

<sup>74</sup> *MiLB.com Frequently Asked Questions*, MiLB.COM, <http://www.milb.com/milb/info/faq.jsp?mc=business#3> (last visited Oct. 15, 2012). In addition to these affiliated minor league teams, there has been an expansion of independent minor league teams over the last twenty years. These teams have no relationship to a major league team, and the players sign contracts directly with the minor league team. Independent teams, however, operate in flux, with many teams and leagues folding from year to year. For a current list of independent leagues, see *Independent League (IND)*, BASEBALL AMERICA, available at [http://www.baseballamerica.com/statistics/classifications/?cl\\_id=20&y=2006](http://www.baseballamerica.com/statistics/classifications/?cl_id=20&y=2006) (last visited Nov. 8, 2012).

<sup>75</sup> Broshuis, *supra* note 14; Michael K. Ozanian, *Minor Leagues, Major Profits*, FORBES.COM (Aug. 6, 2008), [http://www.forbes.com/2008/08/06/baseball-minors-sacramento-biz-sports-cz\\_mo\\_0806minors.html](http://www.forbes.com/2008/08/06/baseball-minors-sacramento-biz-sports-cz_mo_0806minors.html). As Professor Sullivan states, “Freed from significant expenses, the new owners can concentrate on having fun for a few years before realizing a handsome profit. Whether the team makes money each year or not, the owner can be confident that the value of the franchise is appreciating.” Sullivan, *supra* note 3, at 255.

the-field working conditions poor.<sup>76</sup> Entry-level wages consist of \$1100 per month, and they are only paid over the course of the five-month season.<sup>77</sup> Most players therefore earn less than \$10,000 per year,<sup>78</sup> placing them below federal poverty guidelines.<sup>79</sup> Yet players consistently work more than fifty hours per week, as teams typically require players to spend eight hours per day at their workplace for six or seven days per week, and additional “optional” work is encouraged.<sup>80</sup> The job also entails long hours of travel,<sup>81</sup> and deplorable living conditions contribute to minor leaguers’ difficult situations.<sup>82</sup>

MLB’s Rule 4 draft provides the chief avenue for entry into the minor leagues for the majority of players.<sup>83</sup> Held annually in June, teams select players from the United States, Canada, and Puerto Rico in up to fifty rounds.<sup>84</sup> The most talented players often receive large signing bonuses to incentivize them to forgo college and sign with MLB teams.<sup>85</sup> However, players drafted beyond the tenth round usually only obtain a signing bonus

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<sup>76</sup> See Broshuis, *supra* note 14; Rothman, *supra* note 9.

<sup>77</sup> Rothman, *supra* note 9.

<sup>78</sup> *Id.*

<sup>79</sup> Masteralexis, *supra* note 21, at 594. The poverty threshold for an individual not living with their family in 2010 was \$11,137. *Table 1. Weighted Average Poverty Thresholds for Families of Specified Sizes, Historical Poverty Tables-People*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/historical/people.html> (last visited Nov 10, 2012).

<sup>80</sup> Players only enjoy a day off every couple of weeks. In what is a typical schedule, the aptly named Arkansas Travelers, the Double-A affiliate of the Los Angeles Angels of Anaheim, played 154 games in 165 days in 2012. *Schedule*, TRAVS.COM, <http://www.milb.com/schedule/index.jsp?sid=t574&m=08&y=2012> (last visited Nov. 8, 2012). They had two days off the entire month of April, three days off in May and June, just one day off in July, and two days off in August. *Id.* Additionally, many of these days will not be true off days, as no doubt some of these off days will be spent traveling with the team from one destination to another.

<sup>81</sup> The Northwest League has a moderate travel schedule, yet most trips between cities are still between 250 and 400 miles. *Distance between NWL cities*, NWL.COM, [http://www.milb.com/league3/page.jsp?ymd=20061214&content\\_id=148667&vkey=league3\\_1126&fext=.jsp&sid=1126](http://www.milb.com/league3/page.jsp?ymd=20061214&content_id=148667&vkey=league3_1126&fext=.jsp&sid=1126) (last visited Nov. 8, 2012). One trip, from Boise to Vancouver, is 605 miles. *Id.* Except in Triple-A, almost every trip is done by bus, often overnight after games conclude. See Broshuis, *Postcards from the Bushes*, *supra* note 11.

<sup>82</sup> Broshuis, *supra* note 14.

<sup>83</sup> See Major League Rule 4.

<sup>84</sup> *Id.*

<sup>85</sup> *Baseball Signing Bonus*, BASEBALL ALMANAC, [http://www.baseball-almanac.com/players/baseball\\_signing\\_bonus.shtml](http://www.baseball-almanac.com/players/baseball_signing_bonus.shtml) (last visited Nov. 8, 2012).

of \$1000 to \$2500.<sup>86</sup> The draft therefore creates a minor league system consisting of a few rich, young “bonus babies,” as they are called in the industry, enmeshed amongst a plethora of penniless players.<sup>87</sup>

Major League Rules require all players drafted to sign initial contracts spanning seven years.<sup>88</sup> Over the course of the seven-year period, a club may trade, promote, or demote a player at will.<sup>89</sup> Organizations can also fire a player any time for any reason without severance pay.<sup>90</sup> A player may retire at any time, but, upon retiring, he cannot sign with another team—even internationally—for the duration of the contract.<sup>91</sup> Thus, “the players are free to go, just not free to play elsewhere in Organized Baseball.”<sup>92</sup>

In sum, baseball is awash with “many thousands of minor leaguers most of whom have no freedom of contract, are stuck where they are, did not receive large signing bonuses, [and] work for modest seasonal salaries.”<sup>93</sup> Indeed, the words of Judge Lindley in *Landis* have proved prescient, as the situation *has* continued indefinitely, often to the detriment of players.

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<sup>86</sup> See *id.*; see also Broshuis, *supra* note 14 (describing a player who received only a \$2,500 signing bonus and, after deducting taxes and mandatory clubhouse dues, received a check for only \$308 every two weeks).

<sup>87</sup> Since identifying future major leaguers at a young age remains difficult, however, the young bonus babies often fail to develop into productive major league players. See Marty Dobrow, *MLB Draft Can Be Risky Business*, ESPNBOSTON.COM (June 6, 2012), <http://sports.espn.go.com/boston/columns/story?id=6628930> (finding that of the 917 first-round draft picks from the twenty-five year period between 1981 and 2005, 32.7 percent never played in the major leagues).

<sup>88</sup> Major League Rule 3(b)(2).

<sup>89</sup> See Minor League Uniform Player Contract, Major League Rules Attachment 3, Art. XVIII; see also Garrett Broshuis, *Suitcase Chronicles: Keep Your Bags Packed*, BASEBALL AMERICA (July 14, 2009), available at <http://www.baseballamerica.com/today/prospects/prospect-diary/2009/268555.html> (describing the feeling of playing for three different minor league teams in one week).

<sup>90</sup> Minor League Uniform Player Contract, Major League Rules Attachment 3, Art. XIX.

<sup>91</sup> See Major League Rule 14(b) (“If a voluntarily retired player, during the player’s retirement, shall desire to play baseball for hire, otherwise than for the Major or Minor League Club entitled to the player’s services, the player shall first obtain written consent of the player’s Club” and must also file an application with the Commissioner’s Office).

<sup>92</sup> KELLY, *supra* note 2, at 92.

<sup>93</sup> WOLLETT, *supra* note 20, at xv-xvi.

## B. Labor and Major League Baseball

### i. The Early Years: The Reserve Clause Forms

In the earliest years of professional baseball, contract “jumping” was a frequent occurrence among players.<sup>94</sup> Moving from team-to-team increased competition for services, which raised salaries.<sup>95</sup> The competition, however, led to the collapse of several teams, and owners searched for ways to halt the practice.<sup>96</sup> The situation reached a boiling point in 1879 when Hall of Famer James “Orator” O’Rourke, incensed by an owner’s refusal to pay for his uniform, left the Boston Red Caps for the Providence Grays.<sup>97</sup> His addition helped Providence recapture the National League championship.<sup>98</sup>

Boston’s owner, Arthur Soden, responded by calling a meeting of owners.<sup>99</sup> He convinced each team to secretly remove five of its players from the open market.<sup>100</sup> Teams recognized the utility of the arrangement, and the number of removed players grew to fourteen per team by 1887.<sup>101</sup> The same year, the owners decided to make the arrangement contractual, and the reserve clause was born.<sup>102</sup>

At first, players did not resist the restraint on mobility; instead, they welcomed the job security.<sup>103</sup> Within a few years, however, the reserve clause was written into every player’s contract.<sup>104</sup> Unless a team decided to

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<sup>94</sup> Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 55–56 (1997).

<sup>95</sup> *Id.* at 56.

<sup>96</sup> *Id.*

<sup>97</sup> Ed Edmonds, *At the Brink of Free Agency: Creating the Foundation for the Messersmith-McNally Decision—1968-1975*, 34 S. ILL. U. L.J. 565, 568 (2010). “Orator” O’Rourke later earned his name by giving an impassioned speech pleading for players to play in an alternative league, saying, “Our ascension from thralldom is positive, uncoupled from all doubts, notwithstanding the warning of the master magnates and the snapping of their ship, which has no more terror for the players as they stand today shorn of all physical strength to use them.” LEE LOWENFISH, *THE IMPERFECT DIAMOND: A HISTORY OF BASEBALL’S LABOR WARS* 41 (1980).

<sup>98</sup> Edmonds, *supra* note 97, at 568.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 569.

<sup>102</sup> *Id.* A reserved player could not sign with another team but could instead only re-sign with his prior team. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Moorad, *supra* note 94, at 56.

trade or cut a player, all players were perpetually bound to their original teams.<sup>105</sup> As one commentator has remarked, the arrangement resulted “in a contractual hall of mirrors, with endlessly repeating obligations and no reasonable way out.”<sup>106</sup> Players soon resisted the restraints, but the owners successfully withstood all challenges, including the formation of alternate leagues.<sup>107</sup> The reserve clause was firmly in place, and it restrained mobility for the next seventy-five years.<sup>108</sup>

## ii. Antitrust Challenges Lead to an Antitrust Exemption

Power grabs by the major leagues led to many court challenges in the early twentieth century. The first challenge resulted from the quashing of the Federal League.<sup>109</sup> The National League had absorbed some of the Federal League’s teams and bought others,<sup>110</sup> but the Baltimore Terrapins resisted and brought an antitrust suit.<sup>111</sup> In 1922, *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs* reached the United States Supreme Court.<sup>112</sup>

The suit alleged a conspiracy among the leagues to destroy the Federal League.<sup>113</sup> It described the elaborate business of professional baseball and the incessant interstate travel required.<sup>114</sup> Despite this, Justice Oliver Wendell Holmes famously wrote that “[t]he business is giving exhibitions of base ball, which are purely state affairs.”<sup>115</sup> Moreover, the transportation of play-

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<sup>105</sup> *Id.* at 56–57.

<sup>106</sup> *Id.* at 56.

<sup>107</sup> Edmonds, *supra* note 97, at 569–71. The alternative leagues, which included the American Association, the Union Association, and the Players League, abolished the reserve clause in an attempt to attract players. Moorad, *supra* note 94, at 58. However, they were short-lived, as the National League partially absorbed all three leagues upon their failures. *Id.* One league that did gain traction, the American League, soon emerged as an equal to the National League in attendance, but in 1903 the two leagues quickly formed an agreement to merge the two leagues into a single bicameral system of Major League Baseball. *Id.*

<sup>108</sup> *Id.* at 571.

<sup>109</sup> Moorad, *supra* note 94, at 58. The Federal League represented the last alternative league to be formed in the pre-World War II era. *Id.*

<sup>110</sup> *Id.* at 59.

<sup>111</sup> *Id.*

<sup>112</sup> 259 U.S. 200 (1922).

<sup>113</sup> *Id.* at 207.

<sup>114</sup> *Id.* at 208.

<sup>115</sup> *Id.*

ers was “mere incident,” and, although the exhibitions were “made for money,” they “would not be called trade of commerce in the commonly accepted use of those words.”<sup>116</sup> Baseball was “not related to production,” but instead depended on “personal effort.”<sup>117</sup> Consequently, the business of baseball was outside the reach of the antitrust laws.<sup>118</sup>

The antitrust exemption established by *Federal Baseball* legitimized and facilitated the majors’ control and constraint on the business of baseball. Recognizing this, the owners carefully guarded the exemption. In 1946, Danny Gardella brought suit after being “blacklisted” from baseball for playing in the Mexican League for a season.<sup>119</sup> Following *Federal Baseball*, the district court dismissed the suit.<sup>120</sup> On appeal, Judge Learned Hand reversed, finding that the advent of radio and television broadcasts of baseball games since *Federal Baseball* placed baseball within the confines of interstate commerce.<sup>121</sup> With the antitrust exemption—and the coveted reserve clause—under assault, the owners settled Gardella’s case for \$60,000 to avoid a final judicial resolution.<sup>122</sup>

Perhaps seeing an opportunity after *Gardella*, another player, George Toolson,<sup>123</sup> challenged the exemption two years later. As in the *Gardella*

<sup>116</sup> *Id.* at 209.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Gardella v. Chandler*, 79 F. Supp. 260, 261–62 (S.D.N.Y. 1948). Gardella had played for the New York Giants in 1944 and 1945, but, sensing that he would not make the team in 1946 with players returning from World War II, he signed a contract to play for professional team in Mexico. John T. Wolohan, *The Curt Flood Act of 1998 and Major League Baseball’s Antitrust Exemption*, 9 MARQ. SPORTS L.J. 347, 354 (1998-1999).

<sup>120</sup> *Gardella*, 79 F. Supp. at 263.

<sup>121</sup> *Gardella v. Chandler*, 172 F.2d 402, 407–08 (2d. Cir. 1949). Writing separately, Judge Frank found the relationship amongst teams to be a monopoly, and the effect on players “possesses characteristics shockingly repugnant to moral principles. . .condemning ‘involuntary servitude.’” *Id.* at 409. Moreover, their relative high pay did not excuse the behavior, as “only the totalitarian-minded will believe high pay excuses virtual slavery.” *Id.* To say the least, Judge Frank believed the reserve clause should be struck down, as “no court should strive ingeniously to legalize a private (even if benevolent) dictatorship.” *Id.* at 415.

<sup>122</sup> Moorad, *supra* note 94, at 60. According to one historian, Gardella wished to keep fighting the reserve clause, but “economic necessity won out over an ideal of justice.” LOWENFISH, *supra* note 97, at 166.

<sup>123</sup> Interestingly, Toolson was not a major league player but was a minor league player who refused to report from one minor league assignment to another after receiving a demotion. Wolohan, *supra* note 119, at 356.

case, the district court dismissed the suit.<sup>124</sup> Unlike *Gardella*, the appellate court affirmed.<sup>125</sup> With other players also challenging the *Federal Baseball* exemption,<sup>126</sup> the Supreme Court reviewed the case, writing in a single paragraph that “if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.”<sup>127</sup> Twenty years would pass before the Court would again consider baseball’s antitrust exemption, where it would be re-affirmed in *Flood v. Kuhn*.<sup>128</sup> The antitrust exemption

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<sup>124</sup> *Toolson v. N.Y. Yankees*, 101 F. Supp. 93, 95 (S.D. Cal. 1951). In taking a critical view of Judge Frank’s position in *Gardella*, the court stated that they were “bound by the decision of the Supreme Court” and that “[s]tability in law requires respect for the decision of controlling courts . . .” *Id.* at 94–95. The court further stated that if *Federal Baseball* “is, as Judge Frank intimates an ‘impotent zombi’, I feel it is not my duty to so find but that the Supreme Court should so declare.” *Id.* at 95.

<sup>125</sup> *Toolson v. N.Y. Yankees*, 200 F.2d 198, 198 (9th Cir. 1952). The court said simply that, “for the reasons stated in” the district court’s opinion, “the order of the District Court is affirmed.” *Id.*

<sup>126</sup> See *Kowalski v. Chandler*, 202 F.2d 413, 413 (6th Cir. 1953). Like in *Toolson*, the district court dismissed the action and the Sixth Circuit affirmed due to the precedent established in *Federal Baseball*. *Id.*

<sup>127</sup> *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953). In fact, Congress had considered acting in 1952 but took no action. *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, H.R. No. 2002, 82d Cong. 2d Sess. 229 (1952). Yet, part of the reason Congress took no action was because they found it unnecessary “until the reasonableness of the reserve rule has been tested by the courts.” *Id.* Consequently, the Court found Congressional inaction to be evidence of intent, yet the Congressional inaction resulted from a desire to allow the Court time for further review. See *id.*; see also Moorad, *supra* note 95, at n. 51. Though the Court affirmed by a 9-2 decision, Justice Burton filed a strong dissent, saying that given the economics of baseball and the international aspect of the game, “it is a contradiction in terms to say that the defendants . . . are not engaged in interstate trade or commerce . . .” *Toolson*, 346 U.S. at 358.

<sup>128</sup> 407 U.S. 258 (1972). Curt Flood was a three-time All-Star and seven-time Gold Glove Award winner with the St. Louis Cardinals. *Id.* at 264. When the Cardinals traded Flood to the Philadelphia Phillies, he asked to instead be made a free agent. *Id.* at 265. His request was denied, so he filed suit to challenge the reserve clause. *Id.* The Court in 1972 attempted to clarify the status of baseball’s antitrust exemption, saying that “[p]rofessional baseball is a business and it is engaged in interstate commerce” yet “its reserve system” and “exemption from the federal antitrust laws” makes baseball “an exception and an anomaly.” *Id.* at 282. Due to the numerous decisions citing approvingly of *Toolson* and *Federal Baseball*, and due to congressional inaction, the Court found that the exemption should be upheld unless “remedied by the Congress.” *Id.* at 283-284. The exemption remained firmly in place, though it did not end the challenges. See, e.g., *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978); *Prof'l Baseball Sch. & Clubs*,

had been firmly established, as courts would not overturn decades of precedent.

### iii. The Formation of the Players' Union

While antitrust challenges and alternative leagues failed, players began looking to unionization as a solution. As early as 1885, John Montgomery Ward, a shortstop for the New York Giants, formed the Brotherhood of Professional Baseball Players.<sup>129</sup> Like the alternative leagues, however, the Brotherhood was short-lived and ceased in 1891.<sup>130</sup> Players next attempted to organize in 1914.<sup>131</sup> Like the Brotherhood, the Players Fraternity relied on an alternative league—this time the Federal League—for its leverage.<sup>132</sup> The effort ceased alongside the dissolution of the Federal League in 1915.<sup>133</sup> The next attempt came in 1946, when a Boston attorney formed the American Baseball Guild.<sup>134</sup> Like its predecessors, it too quickly failed.<sup>135</sup>

The MLBPA finally emerged in 1954.<sup>136</sup> Ironically, the Association did not initially aspire to union status.<sup>137</sup> Perhaps more ironically, the first president, Judge Robert Cannon, was a non-player who held deep pro-owner sympathies.<sup>138</sup> This and other management difficulties hindered the MLBPA's success for over a decade.<sup>139</sup>

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*Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982); *Piazza v. Major League Baseball*, 831 F. Supp. 420 (1993). Eventually, Congress did take action in passing the Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824, which amended the Clayton Act. As will be discussed below, the Act only applied to major league players. *See infra* Part III.B.

<sup>129</sup> Moorad, *supra* note 94, at 62. The goal of the Brotherhood “was to fight the reserve clause and the salary cap imposed by owners.” *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> BERRY, GOULD & STAUDOHAR, *supra* note 2, at 52. Bob Friend, the second player-president of the MLBPA stated at the time, “I firmly believe a union . . . simply would not fit the situation in baseball.” *Id.*

<sup>138</sup> Moorad, *supra* note 94, at 63.

<sup>139</sup> *Id.*



Eventually, the MLBPA became more organized. In 1960, players formed a central office for the organization.<sup>140</sup> Yet with Judge Cannon at the helm, progress arrived slowly.<sup>141</sup> The Association began searching for a full-time executive director in 1965.<sup>142</sup> On July 1, 1966, Marvin Miller became head of the MLBPA,<sup>143</sup> a move that transformed the association into a union that would soon dramatically tilt the balance of power.

Within a year, Miller secured a pension plan and “virtually doubled players’ benefits.”<sup>144</sup> More incredibly, in 1968—just two years after Miller’s hiring—the suddenly energized MLBPA negotiated the first collective bargaining agreement in the history of professional sports.<sup>145</sup> This 1968 CBA included a grievance process, minimum salaries, and pension payments.<sup>146</sup>

In 1972, the MLBPA took another significant step in the history of baseball labor relations: it called a strike during spring training that delayed the start of the regular season.<sup>147</sup> It was baseball’s first league-wide work stoppage, and it led to the 1972 CBA, which further refined the arbitration process for grievances.<sup>148</sup>

Included in the grievance process was the addition of a neutral arbitrator to settle disputes in a binding manner, which later proved to be one of

<sup>140</sup> KORR, *supra* note 6, at 21–22.

<sup>141</sup> *See id.* at 23–24. Cannon apparently repeatedly reminded players they were lucky “to have a job ‘that 10,000 men making a lot more money would give anything to do.’” *Id.* at 27.

<sup>142</sup> *Id.* at 28.

<sup>143</sup> Edmonds, *supra* note 97, at 572. Judge Cannon and others warned players about selecting Miller, who was known as a staunch union man. LOWENFISH, *supra* note 97, at 197. However, Miller toured spring training complexes and won the resounding support of players by a 489-136 vote. *Id.* at 199. The players would not be disappointed, as few figures in baseball have had a greater impact on the game than Miller. His many accomplishments as head of the union have led many to call for his entry into the Hall of Fame, yet, thus far, he has not been admitted. He recently passed away at the age of ninety-five. *See* Richard Goldstein, *The Bargainer Who Remade the Old Ball Game*, N.Y. TIMES, Nov. 28, 2012, at A1.

<sup>144</sup> Moorad, *supra* note 94, at 63.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* According to Professor Moorad, the “grievance process gave the players the ability to enforce the rights for which they had fought at the bargaining table.” *Id.* Also, the grievance procedure provided that an arbitrator would settle disputes, which would lay the groundwork for subsequent challenges to the reserve clause. Edmonds, *supra* note 97, at 573. Two years later, the parties agreed to another CBA that raised salaries and refined the grievance process. Moorad, *supra* note 94, at 64.

<sup>147</sup> *See* Moorad, *supra* note 94, at 64.

<sup>148</sup> *Id.*

the most significant mechanisms ever secured by the MLBPA. With the Supreme Court upholding the reserve clause in *Flood*,<sup>149</sup> Miller and the players viewed the grievance process as an alternative mode of challenging the reserve clause.<sup>150</sup> In 1975, two players, Andy Messersmith and Dave McNally,<sup>151</sup> challenged the perpetuity of contractual rights, arguing that the contractual plain language allowed for the reserve clause to expire after a single renewal.<sup>152</sup> Peter Seitz, the tie-breaking, neutral arbitrator on baseball's three-person Arbitration Panel, agreed.<sup>153</sup> Seitz released his decision on December 23, 1975, finding that the reserve clause allowed a team to unilaterally renew a contract for only a single season—not for perpetual, unilateral renewal as believed by owners and as practiced by owners up to that point.<sup>154</sup> McNally and Messersmith were thus declared free agents.<sup>155</sup>

In response to the decision, the owners not only fired Seitz<sup>156</sup> but also appealed the decision in federal court.<sup>157</sup> Yet when the Eighth Circuit upheld the Seitz decision,<sup>158</sup> the owners were forced to address the reserve system through collective bargaining.<sup>159</sup> On July 11, 1976, they reached a

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<sup>149</sup> 407 U.S. 258 (1972).

<sup>150</sup> See Moorad, *supra* note 92, at 64.

<sup>151</sup> Messersmith was a star pitcher who had been traded the prior year against his wishes. KORR, *supra* note 6, at 148. McNally, on the other hand, was a great player but not a star. *Id.* at 149. In fact, being a part of the case “cost him a great deal of money.” *Id.* McNally became involved out of principle, “to help break a system that he thought was wrong.” *Id.*

<sup>152</sup> See Moorad, *supra* note 94, at 64.

<sup>153</sup> KORR, *supra* note 6, at 157. Seitz had been appointed in 1974 to be the permanent chairman of baseball's Arbitration Panel. *Id.* at 141–42.

<sup>154</sup> *Id.* at 157. Seitz found that the reserve clause, found in clause 10(a) of the uniform player's contracts, allowed clubs to renew a contract for one year. *Id.* This power to renew a contract, however, did not also include a renewal on the right to renew. *Id.*

<sup>155</sup> *Id.* at 158.

<sup>156</sup> Moorad, *supra* note 94, at 65.

<sup>157</sup> *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F. Supp. 233 (W.D. Mo. 1976). Officials reportedly chose Kansas City as the venue for challenging the Seitz decision in the hopes that a Midwest judge would be more conservative. KORR, *supra* note 6, at 159.

<sup>158</sup> *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615, 632 (8th Cir. 1976). The court stated that “[t]he 1968 agreement clearly permitted grievances relating to the reserve system.” *Id.* at 629. The court also suggested that “the time for obfuscation has passed and that the time for plain talk and clear language has arrived.” *Id.* at 632.

<sup>159</sup> KORR, *supra* note 6, at 176.

tentative agreement that overhauled the reserve system and awarded free agency to a player after six years of service time.<sup>160</sup> In only eight years of collective bargaining, the players shattered a system that had withstood over a half century of court challenges.

### III. MINOR LEAGUERS AND COLLECTIVE BARGAINING

The Seitz decision of 1975 resulted in perhaps the greatest shift in relative bargaining power in the history of baseball. With one precipitous decision from an arbitrator, one of the great pillars of baseball's cartel came crashing down.<sup>161</sup> In the coming decades, concessions from owners would continue. Minimum salaries for major league players skyrocketed, from \$7000 under the 1968 Agreement<sup>162</sup> to \$480,000 in 2012,<sup>163</sup> and contributions to pension plans also increased exponentially.<sup>164</sup>

#### A. *The Effect of Collective Bargaining on Minor Leaguers*

The great impact of collective bargaining on major leaguers is well-established. The effect of collective bargaining on minor league players, by stark contrast, has garnered scant attention. As will become apparent, many of baseball's CBAs have impacted minor leaguers, sometimes with detrimental results.

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<sup>160</sup> See 1976 Basic Agreement, art. XVII § (B). Miller recognized that granting free agency to all players would flood the market with talent and reduce competition for labor. See KORR, *supra* note 6, at 182–85. Consequently, he fought to find the appropriate balance that would grant players the mobility they desired while simultaneously preserving the necessary competition for services that would increase wages. *Id.*

<sup>161</sup> See KORR, *supra* note 6, at 184 (saying “[f]or decades, the owners had enjoyed the advantages of being part of a cartel.”)

<sup>162</sup> 1968 Basic Agreement, Schedule A.

<sup>163</sup> *Summary of Major League Baseball Players Association-Major League Baseball Labor Agreement*, MLB.COM, [http://mlb.mlb.com/mlb/downloads/2011\\_CBA.pdf](http://mlb.mlb.com/mlb/downloads/2011_CBA.pdf) (last visited Nov. 5, 2012).

<sup>164</sup> Owners in 2012 were required to make a \$184.5 million annual contribution. *Summary of Major League Baseball Players Association—Major League Labor Agreement*, *supra* note 163.

### i. The Early Agreements

For minor leaguers, the 1968 Agreement contained arguably the most important clause of all the subsequent agreements. In the introductory section, the Agreement stipulated the following:

In making this Agreement the Association represents that it contracts for and on behalf of the *major league baseball players* and individuals who may become major league baseball players during the term of this Agreement and the Clubs represent that they contract for and on behalf of themselves, any additional Clubs which may become members of the Major Leagues and the successors thereof.<sup>165</sup>

While the phrase “individuals who may become major league baseball players” might be broadly interpreted to include minor league players, the phrase has been interpreted narrowly both within the industry and by courts.<sup>166</sup> Indeed, the 1968 Agreement further stated that “[t]he intent and purpose of the parties in entering into this Agreement is to set forth . . . certain terms and conditions of employment of all *major league baseball players* . . . .”<sup>167</sup> The Agreement’s plain language therefore stated that its stipulated grievance procedure, minimum salaries, and pension contributions, as well as its parking space and uniform provisions, did not apply to minor leaguers.

Subsequent agreements contained the same language, and the 1970 Agreement provided further clarification. First, it stated for the first time that “[t]he Clubs recognize the Association as the sole and exclusive collective bargaining agent for all Major League Players, and individuals who may become Major League Players . . . .”<sup>168</sup> Second, under a section of definitions

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<sup>165</sup> 1968 Basic Agreement (emphasis added).

<sup>166</sup> See *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 250 (S.D. N.Y. 1995) (saying that the MLBPA “is the collective bargaining unit for the forty-person rosters of each of the Major League Clubs”). According to Professor Donald Wollett, “[t]here’s never been an election among major league baseball players” and “[t]he unit has been fixed by agreement which is based on the consent of the governed, that is, the members of the bargaining unit and the employer.” WOLLETT, *supra* note 20, at 102. One might question whether this bargaining unit is proper since it excluded minor leaguers. However, section 9(a) of the N.L.R.A. merely requires “a unit appropriate” for collective bargaining, which does not require *the* most appropriate unit. See, e.g., *Cmty. Hosp. of Cent. Cal. v. N.L.R.B.*, 335 F.3d 1079, 1084–85 (D.C. Cir. 2003). Moreover, “a group of employees with a significant history of representation by a particular union presumptively constitute an appropriate bargaining unit.” *Id.* at 1085.

<sup>167</sup> 1968 Basic Agreement, art. I (emphasis added).

<sup>168</sup> 1970 Basic Agreement, art. II.

for the revised grievance procedures, it stated that a “‘Player’ or ‘Players’ shall mean a Player or Players on the active roster of a Major League Club or on a disabled, restricted, disqualified, ineligible, suspended or military list of a Major League Club.”<sup>169</sup>

This firmly established that the MLBPA did not bargain on behalf of minor league players. Consequently, the MLBPA—the association that finally provided a check on the owners’ monopolistic power—is not required to provide a check on owners’ powers over minor leaguers.

## ii. The 1976 Basic Agreement

Signed in the wake of the Seitz decision, the 1976 Basic Agreement altered the landscape of MLB labor relations. While most of the Agreement pertains to major leaguers—such as the requirement for first-class travel and first-class meals—some of the provisions did have an effect on minor league players. For instance, the College Scholarship Plan was altered.<sup>170</sup> Also, the 1976 Basic Agreement contained the details of free agency for the first time.<sup>171</sup>

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<sup>169</sup> 1970 Basic Agreement, art. X, § (A)(4).

<sup>170</sup> 1976 Basic Agreement, art. XIII, § (D). Originating in the early 1960s, the College Scholarship Plan (CSP) allows teams to offer a college scholarship to amateur players as an incentive for foregoing college. *College Scholarship Program: A Guide for Players*, MLB.COM, [http://mlb.mlb.com/mlb/official\\_info/scholarship.jsp?content=guide](http://mlb.mlb.com/mlb/official_info/scholarship.jsp?content=guide) (last visited Nov. 7, 2012).

While still amateurs, players negotiated for the inclusion of the CSP into their initial minor league UPCs, yet the 1976 Basic Agreement changed the terms of the CSP by stating the following:

A Major League Player for whom there is in effect. . . a valid and unexpired scholarship under the College Scholarship Plan may commence or resume his studies under the Plan at any time within two years after his last day of Major League service. If his college studies have not commenced under the Plan by that date, his scholarship shall terminate.

1976 Basic Agreement, art. XIII, § (4).

During this time period, MLB had unilaterally implemented many programs and policies designed to curtail signing bonuses while still incentivizing professional baseball. See Allan Simpson, *Bonus Concerns Created Draft; Yet Still Exist*, BASEBALL AMERICA, June 4, 2005, available at <http://www.baseballamerica.com/today/2005draft/050604bonus.html>. Early attempts included a 1946 bonus rule that required teams to place players signed to high bonuses on the major league roster and a 1959 first-year draft rule that required teams to place their top prospects on the equivalent of an expanded major league roster. *Id.* The effort capitulated with the unilateral institution of the amateur draft, which is still in place today. *Id.*

<sup>171</sup> See 1976 Basic Agreement, art. XVII, § (B).

While nearly all provisions related only to major leaguers, one provision indirectly impacted minor leaguers. Section (C)(2)(e) of the free agency portion of the Agreement stipulated that compensation would be awarded to a free agent's former team if the free agent signed with a new team.<sup>172</sup> The new team would be required to "compensate the Player's former Club by assigning to it a draft choice in the Regular Phase of the next Major League Rule 4 Amateur Player Draft."<sup>173</sup>

The effect of these provisions when analyzed in isolation seems marginal. Yet these modifications established a precedent, as, for the first time, the MLBPA and the owners negotiated over terms that modified the draft and affected amateur players. This seemingly innocuous step of bargaining over terms relating to amateur players would later become commonplace. Moreover, since nearly all amateur players become minor leaguers prior to ever playing in the major leagues, and since the vast majority of players drafted never reach the major leagues, the impact—though indirect—would come to affect minor league players greatly. Only a small stone had been cast into the water, yet minor leaguers would feel the unforeseen effects of that stone's ripples generations later.

#### iv. Agreements in the 1980s

Agreements in the 1980s largely tracked the 1976 Basic Agreement. Labor relations were often contentious, with a mid-season strike occurring in 1981,<sup>174</sup> and owners actively colluded to suppress the free agent market dur-

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<sup>172</sup> 1976 Basic Agreement, art. XVII, § (C)(2)(e).

<sup>173</sup> *Id.* Depending on the circumstances, the signing team would be forced to assign either their first or second choice in the draft for the top free agent that they signed. *Id.* The Agreement set forth a system that allowed teams finishing at the bottom of the previous year's baseball standings to have priority negotiation rights with free agents. *Id.* Also, the compensation clause required teams in the first half of selecting clubs—those with priority negotiation rights—to forfeit their second choice in the draft whereas those teams in the bottom half of selecting clubs—those teams who finished higher in the standings the previous year—were required to forfeit their first pick in the draft. *Id.*

<sup>174</sup> See KORR, *supra* note 6, at 210–30. The players nearly went on strike in 1980, as, on May 22, players refused to go to airports to travel to their next games. . *Id.* at 201–02. A strike was averted through an all-night bargaining session that resulted in a Joint Study Committee to look at possible changes in the free agency system. *Id.* at 201–02. Since the 1976 Basic Agreement, baseball had prospered, with salaries and attendance increasing. *Id.* at 207. Yet owners claimed they were operating at a loss due to free agency, so they sought changes to the system. *Id.* at 208. Owners pushed for direct monetary compensation for teams losing players to free

ing several off-seasons.<sup>175</sup> These combative events shaped negotiations, but the agreements were of little significance to minor league players.

The 1981 Basic Agreement, which altered the compensation structure for teams losing top players through free agency, affected minor leaguers the most.<sup>176</sup> The Agreement set forth a classification system for free agents, and teams were compensated with draft picks when they lost higher-level free agents.<sup>177</sup> A similar system still exists today.

#### v. The 1990 Basic Agreement

Baseball was prospering as the sides entered negotiations for the 1990 Basic Agreement. Annual revenue had surpassed \$1,000,000,000, and huge new television broadcasting contracts promised further monetary infusions.<sup>178</sup> However, the labor setting remained tense, and the parties reached an agreement only after a thirty-two day lockout during spring training.<sup>179</sup>

In addition to including terms for minimum salaries for major leaguers, the 1990 Agreement also delineated salaries for players with major league service time depending on whether they played the subsequent season in the major or minor leagues. The Agreement required minimum salaries for major league service to be “at a rate not less than the Major League minimum salary” of \$100,000,<sup>180</sup> and for minor leaguers with previous major league service time the Agreement required salaries of at least \$26,500

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agency, and the players fervently opposed the proposal. *Id.* at 212. The strike began in June. *Id.* at 214. As the strike neared two months, a settlement was finally reached. *Id.* at 221.

<sup>175</sup> See Moorad, *supra* note 94, at 68–70. In 1985, even the reigning American League Most Valuable Player, Kirk Gibson, received no offers in the free agent market. *Id.* at 69. Despite successfully depressing the free agent market, the tactics ultimately backfired. Grievances were filed in several years, and the arbitrator sided with players in all instances, awarding a total of \$280,000,000 to the players. *Id.* at 70.

<sup>176</sup> See 1981 Memorandum of Agreement (on file with the author).

<sup>177</sup> 1981 Memorandum of Agreement, art. 1. Depending on a player’s level of performance, Type A free agents consisted of players in the top twenty percent at their position and Type B free agents consisted of players ranked between twenty and thirty percent. *Id.*

<sup>178</sup> Moorad, *supra* note 94, at 70–71.

<sup>179</sup> *Id.* at 71. The major obstacle was salary arbitration, as players desired a return to allowing arbitration eligibility after two years instead of three while owners wanted to completely eliminate arbitration. *Id.*

<sup>180</sup> 1991 Basic Agreement, art. VI, § (B)(1).

per season.<sup>181</sup> Thus, a player with only a single day of major league service found his subsequent minor league salary regulated and increased by the Agreement.<sup>182</sup>

Since the parties planned to expand the National League at the time of the Agreement, they also set forth procedures for selecting players in an expansion draft.<sup>183</sup> The provision, found in Attachment 10 to the Agreement, required every club to provide a list of all major league and minor league players under their control. Each team could then submit a list of fifteen “withdrawn players”—major or minor leaguers to be protected from an expansion draft.<sup>184</sup> Additionally, “National Association player contracts not subject to selection at the next Rule 5” draft were not eligible for the expansion draft.<sup>185</sup>

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<sup>181</sup> 1991 Basic Agreement, art. VI, § (B)(2)(i). The Agreement referred to the minor leagues as the “National Association.” *Id.* § (B)(3). The National Association of Professional Baseball Leagues has served as the governing entity for minor league baseball teams since its inception in 1901. *The History & Function of Minor League Baseball*, MiLB.COM, [http://www.milb.com/milb/history/general\\_history.jsp](http://www.milb.com/milb/history/general_history.jsp) (last visited Nov. 5, 2012). The body was commonly referred to as the National Association until being renamed Minor League Baseball in 1999. *Minor League Baseball Timeline—1901-2001*, MiLB.COM, <http://www.milb.com/milb/history/timeline.jsp> (last visited Nov. 5, 2012).

<sup>182</sup> The 1990 Basic Agreement also contained a provision requiring reimbursement of reasonable moving expenses not only if a player was assigned from one major league club to another but also if a player was assigned from a major league club to a minor league club. 1991 Basic Agreement, art. VIII. Additionally, severance pay was delineated for players signing “split contracts,” requiring severance pay even if these players were playing in the minor leagues. *Id.* at art. IX. The Agreement stipulated that a player on a split contract would receive severance pay calculated at the major league rate if the player was in the major leagues at the time of termination but would receive severance pay at the minor league rate if in the minor leagues at the time of termination. *Id.*

<sup>183</sup> 1991 Basic Agreement, Attachment 10.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* The Rule 5 draft is held annually at baseball’s Winter Meetings pursuant to Rule 5 of the Major League Rules. It allows for the selection of minor leaguers by other teams if the player is placed on a Minor League Reserve List. Major League Rule 5. In essence, for a minor leaguer to be eligible for the Rule 5 draft, the player must have played several seasons in the minor leagues and must not be on a major league roster. *See id.*; Kary Booher, *Explaining the Rule 5 Draft*, BASEBALL AMERICA, Nov. 20, 2008, available at <http://www.baseballamerica.com/today/majors/news/2008/267230.html>; *infra* Part II.A.viii. Consequently, only a portion of minor leaguers were eligible for the expansion draft, as only those players who had played in the minors for several years and were subject to the Rule 5 draft were also subject to the expansion draft.



When expansion actually occurred,<sup>186</sup> this provision greatly affected minor league players, as it placed severe limitations on player mobility for minor league players hoping to be chosen in the expansion draft. It clearly allowed for highly talented minor league players to be protected from the expansion draft by allowing teams to place minor leaguers on their list of fifteen protected players. It also placed a severe limitation on eligibility for the draft by only allowing those players eligible for the Rule 5 draft to be eligible for the expansion draft. Therefore, the pool of eligible minor leaguers was confined without any input from minor leaguers during negotiations. Since a player chosen in the draft would be required to be placed on the expansion club's major league roster,<sup>187</sup> this represented a significant limitation on player mobility and cost minor leaguers potential opportunities and potential monetary gains.

#### vi. The 1994–1995 Strike

While the 1981 season had been salvaged despite a mid-season strike, 1994 would prove different. The 1990 Basic Agreement expired in 1993, and, after negotiations failed, the parties entered the 1994 season operating under the key terms of the old agreement, as required by law.<sup>188</sup> Neither side made concessions, and the players set a strike deadline for August 12, 1994.<sup>189</sup> On August 1, the owners responded by failing to make a \$7.8

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<sup>186</sup> MLB added two teams, the Florida Marlins and Colorado Rockies in 1993, and an expansion draft was held on November 17, 1992. Murray Chass, *Baseball; Rockies and Marlins Dive Into a 26-Team Pool*, N.Y. TIMES, Nov. 17, 1992, at B17. MLB next added the Arizona Diamondbacks and Tampa Bay Devil Rays in 1998, with the expansion draft held November 18, 1997. Murray Chass, *Baseball Sets Expansion Draft*, N.Y. TIMES, Aug. 16, 1997, at 31.

<sup>187</sup> 1991 Basic Agreement, Attachment 10. Specifically, if a minor leaguer were selected, the Attachment required the assignor club to assign the minor league contract "to the Major League Club, which shall then assign the contract to the Expansion Club." *Id.* To add insult to the injury, the Attachment required "[t]he names of all players on the withdrawn lists are to be considered privileged material, and shall not be divulged. . . at any time before or after the meeting." *Id.* Not only was player mobility severely limited for minor leaguers, but the constraint on a player's mobility was to remain a secret. A talented minor leaguer might be at home, waiting to learn that he had been selected by an expansion club, yet, unbeknownst to him, they were not even eligible for the expansion draft since his name had been placed on a secret list of withdrawn players.

<sup>188</sup> Moorad, *supra* note 94, at 76.

<sup>189</sup> *Id.* at 77. Like previous years, owners claimed they were losing money, and they called for a salary cap and an end to arbitration to remedy the situation. *Id.* at

million deposit into the players' pension and benefit fund as required under the previous Basic Agreement.<sup>190</sup> With both sides incensed, a strike ensued.<sup>191</sup> For the first time since 1904, there would be no World Series.<sup>192</sup>

The prolonged strike directly affected minor league players, as owners made plans to enter the 1995 season with replacement players.<sup>193</sup> As spring approached, all players on MLB rosters refused to report to spring camps.<sup>194</sup> When the union also asked agents to advise minor leaguers to not report,<sup>195</sup> Gene Orza, MLBPA's associate general counsel, made a remarkable claim about the best player in baseball: "Dave Winfield isn't doing this for himself. He has nothing to gain from it. He's doing it for the players who are in the minor leagues now."<sup>196</sup> Yet the owners' plan for replacement players offered a salary of \$115,000 for most players.<sup>197</sup> For many minor leaguers, this incentive—and the chance to fulfill a lifelong dream even in a tarnished fashion—proved too tempting.<sup>198</sup> Many signed up to play.<sup>199</sup>

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76–77. The players rejected these plans and instead desired more favorable arbitration and free agency terms. *Id.* at 77.

<sup>190</sup> *Id.* at 77.

<sup>191</sup> *Id.*

<sup>192</sup> Jack Curry, *Lost Games, Lost Dreams*, N.Y. TIMES, Aug. 26, 2002, at D1.

<sup>193</sup> Murray Chass, *Teams and Players Escalate Labor War*, N.Y. TIMES, Jan. 14, 1995, at 31.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* Three players would be permitted salaries of \$275,000. *Id.*

<sup>198</sup> See generally Murray Chass, *Who's on First? In '95, It Could Be Anybody*, N.Y. TIMES, Jan. 22, 1995, at 1 (describing teams' search for replacement players and players agreeing to be replacement players).

<sup>199</sup> For a full list of replacement players reaching the major leagues and the names used as replacement players, see *Replacement Players*, BASEBALL ALMANAC, [http://www.baseball-almanac.com/legendary/replacement\\_players.shtml](http://www.baseball-almanac.com/legendary/replacement_players.shtml) (last visited Nov. 5, 2012). In addition to the monetary incentive, some teams threatened to fire minor leaguers if they refused to be replacement players. Rick Reed, who pitched for the Reds' Triple-A affiliate in 1994, was told by the Reds to cross the line or he'd be fired and blackballed. Tim Kurkjian, *The Replacements*, ESPN THE MAGAZINE, Aug. 29, 2002, available at [http://espn.go.com/magazine/kurkjian\\_20020829.html](http://espn.go.com/magazine/kurkjian_20020829.html). In need of money to pay for a sick mother's medical bills, he agreed. *Id.* A lower level player, Shane Spencer, just wanted to secure a job in the minor leagues, but he was told that if he did not play in a replacement game he would be released. *Id.*

As spring training began with replacement players, the MLBPA filed a complaint with the National Labor Relations Board (NLRB).<sup>200</sup> Earlier in the winter, the owners had declared an impasse and unilaterally implemented their last good faith offer in negotiations.<sup>201</sup> These provisions included salary cap provisions and the elimination of salary arbitration and anti-collusion provisions.<sup>202</sup> The union, however, contended that an impasse had not been reached and sought an injunction to enjoin the owners' unilateral actions.<sup>203</sup>

The NLRB agreed that there was reason to believe owners had violated Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA) by unilaterally implementing terms before an impasse had been reached,<sup>204</sup> and the owners went to federal court.<sup>205</sup> In a March 31, 1995 decision, then-Judge Sotomayor found the NLRB had reasonable cause for believing the owners had not negotiated in good faith in violation of the NLRA, and she issued the injunction.<sup>206</sup> The owners appealed, but the Second Circuit upheld the findings.<sup>207</sup> With the injunction in hand, the players called an end to the longest work stoppage in professional sports history.<sup>208</sup>

When the strike ended, the replacement minor leaguers were no longer needed.<sup>209</sup> For those players who acquiesced to the pressure to play during spring training, however, the strike would have longstanding effects, as

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<sup>200</sup> Moorad, *supra* note 92, at 80.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 80–81.

<sup>204</sup> See *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 250 (S.D. N.Y. 1995). The MLBPA claimed the unilateral implementation resulted in a failure to bargain in good faith. *Id.* at 253.

<sup>205</sup> *Id.* An injunction may be issued under section 10(j) of the NLRA. Judge Sotomayor stated that, due to the public attention the strike had garnered, the “strike has placed the entire concept of collective bargaining on trial.” *Id.* at 259.

<sup>206</sup> *Id.* at 261.

<sup>207</sup> *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995).

<sup>208</sup> Murray Chass, *Backed By Court, Baseball Players Call Strike Over*, N.Y. TIMES, April 1, 1995, at 1.

<sup>209</sup> Most were given severance pay in the order of \$2000 to \$5000 per player, though the St. Louis Cardinals gave each replacement player \$25,000. *Replacement Players*, BASEBALL ALMANAC, *supra* note 199. The Montreal Expos, on the other hand, only gave each player a signed jersey. *Id.* Not to be outdone, the Philadelphia Phillies gave not only a jersey but also a baseball—signed by the team of replacements. *Id.*

many would be branded by teammates for their entire careers.<sup>210</sup> The MLBPA also punished the replacement players. It became the policy of the MLBPA that once a former replacement player later earned a spot on a 40-man roster, he would not be part of the union.<sup>211</sup> The list of players included prominent players such as Cory Lidle, Benny Agbayani, and Kevin Millar.<sup>212</sup> No matter their performance and no matter the length of their career, they would not be allowed to vote on union matters and would not receive licensing money from the union.<sup>213</sup>

Many of these minor leaguers had been pressured with the threat of being released from the pursuit of their dream job.<sup>214</sup> Others had responded to the incentive of money.<sup>215</sup> Some merely wanted to grasp perhaps their only chance to play in the major leagues. Their decisions would haunt them for the rest of their careers.<sup>216</sup>

### vii. The 1997 Basic Agreement

Both the 1995 and 1996 seasons passed before the MLBPA and the owners forged a new agreement.<sup>217</sup> Finally, on December 7, 1996, the par-

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<sup>210</sup> Kurkjian, *supra* note 199. Reed, the Triple-A player who pitched in only a few spring training games as a replacement, would be recalled by the Reds late in the 1995 season. *Id.* When one soon-to-be teammate heard the news, the player stood up in the clubhouse and screamed “he would never be a teammate with a ‘scab.’” *Id.* Similarly, Spencer, the Class A player, received just two spring training at-bats as a replacement player, yet this too was enough to brand him as a scab. *Id.*

<sup>211</sup> *Id.* However, former replacement players would be represented by the union on arbitration matters and grievances and would receive pension benefits. *Id.*

<sup>212</sup> *Id.* As of 2002, the full list of replacement players on 40-man rosters included Benny Agbayani, Brian Daubach, Brendan Donnelly, Angel Echeverria, Charles Gipson, Matt Herges, Cory Lidle, Kerry Ligtenberg, Ron Mahay, Tom Martin, Walt McKeel, Frank Menechino, Lou Merloni, Kevin Millar, Damian Miller, Eddie Oropeso, Keith Osik, Rick Reed, Chuck Smith, Shane Spencer, Pedro Swann, Jeff Tam, Brian Tollberg, Chris Truby, and Jamie Walker. *Id.* For a more thorough list of all replacement players reaching the major leagues, see *Replacement Players*, *BASEBALL ALMANAC*, *supra* note 199.

<sup>213</sup> Kurkjian, *supra* note 199.

<sup>214</sup> See generally Chass, *supra* note 198.

<sup>215</sup> *Id.*

<sup>216</sup> Will Leitch, *The Great Near Fakeout of 1995*, *THE SPORTING NEWS*, Feb. 15, 2010. Millar’s teammate Johnny Damon lobbied for his inclusion in the union after they won the World Series together, but the request was denied. *Id.*

<sup>217</sup> See Moorad, *supra* note 94, at 83.

ties agreed to the 1997 Basic Agreement.<sup>218</sup> The Agreement largely resembled previous agreements in terms of scheduling,<sup>219</sup> grievances, and salaries, although it did increase the major league minimum salary to \$200,000 by the 1999 season.<sup>220</sup> Pertaining to minor leaguers, the Agreement retained the protections put in place in 1990 for split contracts and included a minimum salary for minor league service under split contracts of \$37,000.<sup>221</sup> It also retained severance pay requirements for minor leaguers playing under split contracts.<sup>222</sup>

Article XXVIII of the Agreement perhaps had the largest effect on minor leaguers. This clause stated that “[t]he Clubs and the Association will jointly request and cooperate in lobbying Congress to pass a law that will clarify that *Major League Baseball Players* are covered under the antitrust laws . . . .”<sup>223</sup> In fact, Congress passed a bill that would only apply the antitrust laws to major league players.<sup>224</sup>

#### viii. The 2003 Basic Agreement

Following the 2001 season, Commissioner Bud Selig announced that baseball would be contracting two teams.<sup>225</sup> This would have eliminated many major league jobs, and the union resisted the move.<sup>226</sup> Of course, any contraction of major league teams would have a great impact on minor league jobs as well, as the closing of two major league teams would mean

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<sup>218</sup> 1997 Basic Agreement.

<sup>219</sup> One major change in scheduling instituted interleague play. *Id.* at Attachment 2.

<sup>220</sup> *Id.* at art. VI, § (B)(1). In addition to the change in minimum salaries, the biggest change came in the form of revenue sharing between teams and a competitive balance tax levied against the five richest teams. *Id.* at art. XXIII, § (B)(3)(4).

<sup>221</sup> *Id.* at art. VI, § (B)(2)(ii)-(iii). Split contracts are defined in the Agreement as a contract “which sets out separate rates of pay for service with a minor league club and service with a Major League Club.” *Id.* at art. XXIII, § (A)(3).

<sup>222</sup> *Id.* at art. IX, § (D).

<sup>223</sup> *Id.* at art. XXVIII (emphasis added).

<sup>224</sup> See discussion *infra* Part III.B.

<sup>225</sup> Stanley M. Brand & Andrew J. Giorgione, *The Effect of Baseball's Antitrust Exemption and Contraction on its Minor League Baseball System: A Case Study of the Harrisburg Senators*, 10 VILL. SPORTS & ENT. L.J. 49, 49 (2003).

<sup>226</sup> Michael O’Keeffe, *Lawyer: MLB Woes Union’s Fault*, NY DAILY NEWS, Feb. 14, 2002, available at [http://articles.nydailynews.com/2002-02-14/sports/18192295\\_1\\_union-chief-donald-fehr-major-league-baseball-labor-contract](http://articles.nydailynews.com/2002-02-14/sports/18192295_1_union-chief-donald-fehr-major-league-baseball-labor-contract).

the closing of twelve to fourteen minor league teams.<sup>227</sup> While fifty major league jobs were at stake, hundreds of minor league jobs were at stake. Selig eventually tabled his plan, and the two sides resumed their bargaining towards a new agreement.<sup>228</sup>

On September 30, 2002, the parties agreed to the 2003 Basic Agreement.<sup>229</sup> The Agreement put aside contraction for the length of the Agreement, but allowed MLB to unilaterally contract two teams in 2007 so long as they gave notice by July 1, 2006.<sup>230</sup> The decision likely saved hundreds of minor league jobs.

Other provisions also affected minor leaguers.<sup>231</sup> For example, the parties contemplated a worldwide draft.<sup>232</sup> Although it never materialized, a worldwide draft would have greatly affected amateur Latin American players, as the bargaining limitations imposed by a draft would have artificially constrained signing bonuses.<sup>233</sup> Since amateur Latinos immediately become minor leaguers, any effort to suppress signing bonuses of Latinos would

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<sup>227</sup> See, e.g., Brand & Giorgione, *supra* note 225, at 63–64 (discussing how the contraction of the Montreal Expos would lead to the end of the Harrisburg Senators, the Expos' Double-A affiliate).

<sup>228</sup> See O'Keeffe, *supra* note 226.

<sup>229</sup> 2003 Basic Agreement.

<sup>230</sup> *Id.* at art. XV, § (H)(1)(a).

<sup>231</sup> The previous provisions relating to split contracts were left intact. *Id.* at art. IX, § (D). The parties also agreed for the first time to institute steroid testing. *Id.* at Attachment 18. The policy called for random steroid testing of all players on 40-man rosters in 2003, though players would not be penalized for testing positive. *Id.* If more than 5% of players tested positive for performance enhancers, a testing system with penalties would be implemented in 2004. *Id.* Unlike the minor league testing, players would be tested for drugs of abuse only if there was "reasonable cause" to suspect abuse. *Id.* MLB had already unilaterally instituted a drug testing program in the minor leagues in 2001. *Drug Policy in Baseball: Event Timeline*, MLB.COM, [http://mlb.mlb.com/mlb/news/drug\\_policy.jsp?content=timeline](http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline) (last visited Nov. 8, 2012).

<sup>232</sup> 2003 Basic Agreement, Attachment 24. Attachment 24 stated the parties "agreed that the First-Year Player Draft should be expanded to cover all players who are first entering Major League or Minor League baseball, regardless of a player's residence." *Id.* However, the matter was tabled due to insufficient time for deliberation and negotiation. *Id.* The parties agreed to form a committee to address the issue. *Id.*

<sup>233</sup> As of 2012, a worldwide draft had not been instituted, though Commissioner Selig maintained in early 2012 that it was "inevitable." Josh Leventhal, *Selig Calls International Draft 'Inevitable'*, BASEBALL AMERICA, Feb. 23, 2012, available at <http://www.baseballamerica.com/today/majors/news/2012/2613020.html>. The current rules permit the signing of Latinos at the age of 16, without being subjected to the

limit the amount of money on which minor leaguers have to live. In bargaining over matters related to the draft, the parties continued a tradition beginning with the 1976 Basic Agreement. This tradition would set the stage for the negative implications for minor leaguers that would result from the next two CBAs.

#### ix. The 2007 Basic Agreement

Negotiations for the 2007 Basic Agreement made extensive changes to both the Rule 4 amateur draft and the Rule 5 draft. Interestingly, most of these changes are not found within the four corners of the Agreement, though the parties bargained over the changes.<sup>234</sup>

The Rule 4 modifications lessened amateur draftees' leverage in negotiating initial contract terms. First, a signing period deadline for draftees was set at August 15.<sup>235</sup> This shortened the signing period and eliminated "draft-and-follow" draftees.<sup>236</sup> Second, the parties agreed that if a team failed to sign a first-round pick, it would be compensated with a virtually identical pick in the following year's draft.<sup>237</sup> As one club official stated, the goal was to get teams "as much leverage that they can have."<sup>238</sup> Of course, the increased leverage for clubs signified a relative decrease in leverage for players, which, for players, would have a deleterious effect on signing bonuses. Even MLBPA executive director Donald Fehr conceded that "[i]t will clearly have an effect," but "[y]ou have to find compromises."<sup>239</sup>

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draft. *Id.* The free market competition for players has resulted in an escalation of signing bonuses. *See Id.*

<sup>234</sup> *See* Alan Schwarz, *New Agreement Includes Draft, Rule 5 Changes*, *BASEBALL AMERICA*, Oct. 25, 2006, available at <http://www.baseballamerica.com/today/draft/news/2007/262720.html>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* With a "draft-and-follow" player, a club selected a player in the draft, failed to sign the player during the summer of the same draft, and then followed the player as he played for either a community college or independent team. The club retained the rights to the player and then determined whether the player's performance during the "follow" period merited the desired signing bonus. If the player and club failed to reach an agreement prior to the following draft, the player re-entered the draft process. *See* Jonathan Mayo, *Draft-and-Follow Era Comes to an End*, *MLB.COM* (May 31, 2007), [http://mlb.mlb.com/news/article.jsp?ymd=20070531&content\\_id=1997066&vkey=draft2007&fext=.jsp](http://mlb.mlb.com/news/article.jsp?ymd=20070531&content_id=1997066&vkey=draft2007&fext=.jsp). Since the new CBA set a deadline for signing picks, it ended the draft and follow era. *Id.*

<sup>237</sup> *See* Schwarz, *supra* note 234.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

If these changes had an indirect negative effect on minor leaguers by suppressing signing bonuses, the changes to the Rule 5 draft had a direct negative effect on minor leaguers. Shockingly, the parties agreed to push back the eligibility requirements for the Rule 5 draft by an entire year.<sup>240</sup> Previously, players signed after the age of nineteen were eligible for the Rule 5 draft after three years of minor league service, and players signed before the age of nineteen were eligible after four years.<sup>241</sup> Once eligible, teams were forced either to protect the players on the major league 40-man roster or to risk losing the players to the Rule 5 draft. After the changes, however, players were not eligible until after either four or five years of minor league service (depending on their age at signing).<sup>242</sup> Perhaps most surprising, the change took effect immediately.<sup>243</sup>

The Rule 5 draft represents one of the only avenues for player mobility in minor league baseball. To illustrate the significance of the change, it might be best to use an example. Mark Alexander, one of my best friends in baseball, was drafted by the Los Angeles Dodgers in the twentieth round of the 2004 draft.<sup>244</sup> Drafted in the middle rounds as a college senior, he received a miniscule signing bonus. Despite his draft position, Alexander enjoyed much success during his early minor league career.<sup>245</sup> He posted an incredible 0.96 ERA in forty-seven innings in 2006, spending most of the season at the Dodgers' Double-A affiliate in Jacksonville, Florida.<sup>246</sup> Serving as the closer, he also saved twenty-six games and struck out seventy-two

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Alexander Joins List of Tiger Draftees*, MUTIGERS.COM (June 8, 2004), <http://www.mutigers.com/sports/m-basebl/spec-rel/060804aad.html> (last visited Nov. 8, 2012).

<sup>245</sup> See Mark Alexander, THE BASEBALL CUBE, <http://www.thebaseballcube.com/players/profile.asp?P=Mark-Alexander> (last visited Nov. 9, 2012). In his first two seasons, the reliever had win-loss records of 4-1 and 5-4 respectively and posted ERAs of 2.65 and 3.03 respectively. *Id.* Additionally, he saved twenty-three games while pitching at the advanced Class-A level in 2005, and he struck out ninety-one batters in only sixty-five innings of work. *Id.*

<sup>246</sup> *Id.* He did not allow a single run between May 21 and September 1. Houston Mitchell, *Dodgers' Players of the Year*, L.A. TIMES, Oct. 1, 2006.



batters.<sup>247</sup> The effort led to a well-deserved promotion, and Alexander spent the last month in Triple-A Las Vegas.<sup>248</sup>

The awards rolled in for Alexander, as he was named the Los Angeles Dodgers' Branch Rickey Minor League Pitcher of the Year.<sup>249</sup> Since 2006 had been Alexander's third season in the minors, he was eligible for the Rule 5 draft. The Dodgers would most likely have protected him on their 40-man roster. If not protected, he hoped to be acquired in the Rule 5 draft by another team, which would ensure placement on their active 25-man major league roster.<sup>250</sup> In either case, the future looked bright for Alexander.

At the end of October, a little over a month before the Rule 5 draft, Alexander learned of the changes to the Rule 5 draft. These changes meant that he would not be eligible for the Rule 5 draft for another year. The Dodgers would not be forced to make a decision on Alexander. He would remain an ordinary minor leaguer, and he would never reach the major leagues.<sup>251</sup>

Though it is difficult to ascertain the full effect, the change in the Rule 5 draft at the least cost Alexander monetarily, as his salary would have been several times higher on a major league roster.<sup>252</sup> Also, a new team or the confidence of being placed on a major league roster might have enabled him to continue his success. While Alexander represents a more extreme example, the rule no doubt affected many other minor leaguers as well.<sup>253</sup> Additionally, since the rule is still in place, the change continues to affect the mobility of minor leaguers for the foreseeable future.

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<sup>247</sup> Mark Alexander, *supra* note 245.

<sup>248</sup> *Id.* In the hitter friendly park, his numbers dipped slightly, but he still posted a respectable 3.14 ERA. *See id.*

<sup>249</sup> Mitchell, *supra* note 246; Crystal Fukumoto, *James Loney & Mark Alexander Selected As Dodgers' 2006 Branch Rickey Minor Leaguers of Year*, MILB.COM (Sep. 25, 2006), [http://www.milb.com/gen/articles/printer\\_friendly/clubs/t400/press/y2006/m09/d25/c134681.jsp](http://www.milb.com/gen/articles/printer_friendly/clubs/t400/press/y2006/m09/d25/c134681.jsp) (last visited Nov. 9, 2012).

<sup>250</sup> For an explanation of the Rule 5 draft, *see* Booher, *supra* note 185. If the team took him off the active 25-man roster, it would be forced to offer him back to the Dodgers. *Id.*

<sup>251</sup> *See* Mark Alexander, *supra* note 245. For whatever reason, Alexander never again found the magic that he displayed in 2006. He would never reach the major leagues or even be placed on the 40-man roster.

<sup>252</sup> Moreover, placement on the 40-man roster would have garnered him union protection and he would have enjoyed all the union benefits such as health care and pension benefits.

<sup>253</sup> After all, there is not only a major league phase to the Rule 5 draft but also a minor league phase. *See* Booher, *supra* note 185.

In return for the change in the Rule 5 draft rules, the union secured higher salaries for players on major league 40-man rosters.<sup>254</sup> One player representative, Craig Counsell of the Arizona Diamondbacks, acknowledged that “[s]ome players, especially immediately, are going to be hurt by that—this year. But in the end, you have to give up something to get something.”<sup>255</sup> Indeed, the union had merely given up a bargaining chip primarily affecting minor leaguers, and, in return, they had secured something directly benefiting their unit.

#### x. The 2012 Basic Agreement

The recently finalized 2012 Basic Agreement will once again have a significant effect on minor leaguers due to significant changes in the Rule 4 draft and changes to contract rules. In the years leading up to negotiations, MLB pushed for greater regulations on amateur signing bonuses.<sup>256</sup> The union provided some resistance to MLB—preventing them from making all the changes they desired—but considerable changes still occurred.

For minor leaguers, aggregate signing bonus pools represent the most offensive aspect of the new draft regulations. As the Summary of the 2011 Labor Agreement states,

Each Club will be assigned an aggregate Signing Bonus Pool prior to each draft. For the purpose of calculating the Signing Bonus Pools, each pick in the first 10 rounds of the draft has been assigned a value . . . . A Club’s Signing Bonus Pool equals the sum of the values of that Club’s selection in the first 10 rounds of the draft. Players selected after the 10th round do not count against a Club’s Signing Bonus Pool if they receive bonuses up to \$100,000. Any amounts paid in excess of \$100,000 will count against the Pool.<sup>257</sup>

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<sup>254</sup> Schwarz, *supra* note 234.

<sup>255</sup> *Id.*

<sup>256</sup> For a discussion on amateur signing bonuses and MLB’s desire to regulate them, see Jim Callis, *MLB’s Amateur Attitude is Baffling*, BASEBALL AMERICA, July 13, 2011, available at <http://www.baseballamerica.com/online/prospects/column/2011/2612097.html>.

<sup>257</sup> *Summary of the 2011 Labor Agreement*, *supra* note 163. Curiously, the finalized version of the 2012-2016 Basic Agreement does not actually incorporate this language within the four corners of the document, although the negotiated system clearly remains in place for the Rule 4 draft. See generally 2011 Basic Agreement. In fact, the 2012 Rule 4 draft operated under the system agreed upon during the negotiations for the 2012 Agreement. See Ronald Blum, *Spending Drops 11 Pct in MLB Draft*, SAN FRANCISCO CHRON., July 18, 2012; Bill Brink, *MLB Draft: Record Signing Bonuses a Thing of the Past*, PITTSBURGH POST-GAZETTE, June 3, 2012.

The Agreement also institutes sharp penalties for exceeding bonus pools. For instance, if a team merely exceeds its bonus pool by five to ten percent, it will be taxed at a seventy-five percent rate on the overage *and lose a first round pick* in the following draft.<sup>258</sup> Indeed, the new policy had an immediate effect, as spending on signing bonuses in the 2012 Rule 4 draft decreased by eleven percent compared to the 2011 Rule 4 draft.<sup>259</sup> Super agent Scott Boras claimed that the new system prevented teams from spending “what was needed to sign the best player.”<sup>260</sup> Instead, teams “had to make alternate choices.”<sup>261</sup>

Restrictions were also placed on international amateur negotiations. International amateurs have formerly enjoyed the benefit of bargaining freely since they are not subject to the Rule 4 draft.<sup>262</sup> Beginning in 2012, however, “each Club will be allocated an equal Signing Bonus Pool” for international draftees.<sup>263</sup> The penalties instituted for exceeding the international pools will be similar to the penalties discussed above.<sup>264</sup>

Both of these changes significantly affect minor leaguers. Players will still be able to negotiate individual signing bonuses under the new rules, but they will do so within the confines of a box with few holes. Although a full discussion is beyond the scope of this article, the bargaining power of many amateurs is already significantly limited since the Rule 4 draft limits a player’s negotiations to a single team instead of the open market, and since NCAA rules prohibit the open use of agents to assist in negotiations.<sup>265</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> Blum, *supra* note 257.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Summary of the 2011 Labor Agreement*, *supra* note 163; 2012-2016 Basic Agreement, Attachment 46.

<sup>263</sup> *Summary of the 2011 Labor Agreement*, *supra* note 163. Each signing period following 2012 will allocate a pool “based on reverse order of winning percentage the prior championship season.” *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> See Masteralexis, *supra* note 21, at 588–89; Jeff Reese, *MLB Draft and International Free Agency Reformation*, MLB BONUS BABY (Nov. 22, 2011, 4:03 pm), <http://www.mlbbonusbaby.com/2011/11/22/2580154/mlb-draft-reformation> (“The entire concept of a draft . . . is . . . a cartel by the owners of 30 organizations to restrict the income of the incoming players”). While the highest drafted players still retain some leverage within the draft system due to their immense talent and threat to either go or return to college, most players possess far less leverage. See, e.g., Masteralexis, *supra* note 21, at 588–89. Even for the most highly talented players though, the draft still artificially reduces signing bonus levels since the players do not bargain within a free market system but can instead only bargain with a single team.

Moreover, due to the length of minor league contracts and the lack of player mobility, the ability to negotiate the first contract for many players represents the only opportunity to ever bargain over an entire career.<sup>266</sup> After all, most minor leaguers never reach major league free agency or even minor league free agency.<sup>267</sup> Diluting amateur bargaining power strips future minor leaguers of one of the only checks on the nearly limitless power of the MLB cartel.<sup>268</sup>

The bargaining process also resulted in changes to contract rules for amateurs. Buried in the Summary is a single sentence stating “[d]rafted players may only sign Minor League contracts.”<sup>269</sup> While a rare occurrence, highly talented amateurs in the past have been able to negotiate a major league contract instead of a minor league contract upon being drafted.<sup>270</sup> The new Agreement now prohibits this type of contracting.

Like in 2007, the union traded these bargaining chips in order to secure benefits for the players they represent. Specifically, the Agreement increases minimum major league salaries to \$500,000 by 2014.<sup>271</sup> Moreover,

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*See* Broshuis, *supra* note 20 (describing MLB’s efforts to suppress signing bonuses and the occurrence in 1996 of four minor leaguers using a loophole in the draft process to bypass the draft, resulting in significantly higher signing bonuses through free agency).

<sup>266</sup> *See* Garrett Broshuis, *Voiceless: The CBA’s negative impact on minor leaguers*, LIFE IN THE MINORS (Dec. 3, 2011), <http://minorleaguelife.blogspot.com/2011/12/voiceless-cbas-negative-impact-on-minor.html>; *see also* WOLLETT, *supra* note 20, at 105–06 (stating that the length of minor leaguer contracts cause them to give up their freedom of contract since most minor leaguers never reach the major leagues, and even those who reach the majors often fail to reach salary arbitration).

<sup>267</sup> *Cf.* Marty Dobrow, *MLB Draft Can Be Risky Business*, ESPNBOSTON.COM (June 6, 2011), <http://sports.espn.go.com/boston/columns/story?id=6628930> (discussing the difficulties of even making the major leagues—much less reaching free agency—for draft picks).

<sup>268</sup> *See* Reese, *supra* note 265.

<sup>269</sup> *Summary of 2011 Labor Agreement*, *supra* note 163, at 4.

<sup>270</sup> *See* Reese, *supra* note 265; *see also* Nats, *Strasburg Beat Deadline*, ESPN.COM (Aug. 18, 2009), <http://sports.espn.go.com/mlb/news/story?id=4403920> (discussing the record major league contract signed by Stephen Strasburg and other major league contracts signed by talented draftees). These players enter the minor leagues like all other amateur signees, but they enjoy the benefits of being in the union and on the 40-man roster: a significantly higher salary than their colleagues, astonishingly better benefits, and access to a grievance process. Also, being on the 40-man roster at this stage of their career places them on a more aggressive development path. *See* Reese, *supra* note 265.

<sup>271</sup> *See Summary of 2011 Labor Agreement*, *supra* note 163, at 4. The head of the union, Michael Weiner denied the tradeoff, saying, “The way we view the econom-

the tax derived from teams exceeding bonus pools will be distributed amongst teams not exceeding their bonus pools.<sup>272</sup> This money will not be allotted for spending on amateurs or minor leaguers, but will be spent on major league salaries. After all, any effort to suppress signing bonuses will result in a greater operating budget for clubs, and the most pressing and competitive expense for clubs comes in the form of major league salaries.<sup>273</sup>

*B. Minor Leaguers Are Left Behind: A Summary and a Comparison*

As demonstrated, collective bargaining in baseball has affected minor leaguers in numerous ways. The process began with the original 1968 Basic Agreement, which established the duty of the MLBPA to represent only major league players—not minor league players. Some subsequent negotiations did have positive effects on minor leaguers. The Agreements increased salaries for minor leaguers signing split contracts and for minor leaguers on the 40-man roster. Also, the prevention of the contraction of MLB teams following the 2001 season most likely saved hundreds of minor league jobs.

Despite these positive benefits, collective bargaining in baseball has resulted in substantially more negatives for minor leaguers, especially in recent years. The 1990 Basic Agreement restricted player mobility by severely limiting the number of minor leaguers eligible for the expansion draft. The strike of 1994 forced minor leaguers to choose between conflicting loyalties: support the union or follow their dreams and obey their employers' wishes by becoming replacements. Those who chose to follow their dreams and obey their employers would wear a scarlet letter for the rest of their career and would never be part of the union. The 2007 Basic Agreement brought forth perhaps the most egregious and immediate blow to minor leaguers, as it pushed back minor leaguers' eligibility for the Rule 5 draft. Not to be outdone, the 2012 Basic Agreement proves almost as offensive, strictly regulating amateur signing bonuses and eliminating amateurs'

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ics is that what you're going to pay for a draft choice is independent of what you're going to pay for a major league player. So they never tried to justify this by saying, 'The major league guys will get more money.'" Jayson Stark, *Michael Weiner Details MLB's New CBA*, ESPN.COM (Nov. 29, 2011), [http://espn.go.com/mlb/story/\\_/id/7293543/qa-michael-weiner](http://espn.go.com/mlb/story/_/id/7293543/qa-michael-weiner) (last visited Oct. 19 2012).

<sup>272</sup> *Summary of 2011 Labor Agreement*, *supra* note 163.

<sup>273</sup> See Joe Posnanski, *When It Comes to Revenue, the Yanks Are in a League of their Own*, SPORTS ILLUSTRATED, Apr. 20, 2010, available at [http://sportsillustrated.cnn.com/2010/writers/joe\\_posnanski/04/19/baseball.revenue/index.html](http://sportsillustrated.cnn.com/2010/writers/joe_posnanski/04/19/baseball.revenue/index.html). According to Posnanski, the percentage of the baseball operation's budget spent on payroll "tends to be just a touch more than half" with the Cubs spending 62.1% of their budget on payroll. *Id.*

ability to negotiate major league contracts prior to entering the minor leagues.

As discussed in the Introduction, even though the MLBPA has, at times, used issues affecting minor leaguers as bargaining chips, the MLBPA is not entirely to blame for the negative impact on minor leaguers. After all, the baseball cartel could unilaterally institute even more egregious policies if the MLBPA did not provide a check on their powers. Armed with an anti-trust exemption, the power of the owners over minor leaguers is almost limitless.<sup>274</sup> Yet this behavior is not entirely excusable, as it represents a choice on the part of the major league players and the MLBPA. As Professor J. Gordon Hylton recently remarked, there is a “growing awareness on the part of established baseball players that we don’t want to make the entry-level arrangement too good, because that’s money that might be going to mid-level or low-level [major-league] players.”<sup>275</sup> The choice resulting from this growing awareness is not encouraging for minor leaguers.

Collective bargaining has clearly resulted in more negatives for minor leaguers than positives, and these negatives become more apparent when minor league working conditions and wages are compared to those in the major leagues. Beginning in 1976, first-class travel and first-class meals were required for major leaguers.<sup>276</sup> Recent agreements have required a single person per hotel room for major leaguers.<sup>277</sup> Per diem rates for road meals are included in each Agreement, with the 2007 Basic Agreement mandating \$85.00 per day plus a cost of living adjustment.<sup>278</sup> Restrictions are placed on doubleheaders and day games following night games when travel is involved.<sup>279</sup>

Minor leaguers, meanwhile, have made very little progress in working conditions over this time period. Instead of first-class air travel, the typical minor league trip involves a six- to eight-hour bus ride. Per diem has scarcely increased and currently stands at \$25.00 per day—much lower even

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<sup>274</sup> For instance, the league unilaterally imposes drug testing, HGH testing, clawbacks in contracts, worker’s compensation clauses in contracts, and changes to pension plans. See, e.g., Masteralexis, *supra* note 21, at 575–76; Broshuis, *Detering Opportunism Through Clawbacks*, *supra* note 21, at 200–03.

<sup>275</sup> Rothman, *supra* note 9.

<sup>276</sup> 1976 Basic Agreement, art. VI § (A)(1).

<sup>277</sup> See, e.g., 2003 Basic Agreement, art. VII § (D); 2007 Basic Agreement, art. VII § (D).

<sup>278</sup> 2007 Basic Agreement, art. VII § (B)(3).

<sup>279</sup> See, e.g., 2003 Basic Agreement, art. V § (C); 2007 Basic Agreement, art. V § (C).

than what amateur athletes receive on college road trips.<sup>280</sup> Few restrictions exist on scheduling, and games are often played following nights spent entirely on a bus.

Minor leaguers also do not enjoy the benefit of a bargained-for grievance procedure. The recent drug testing controversy involving Ryan Braun, the 2011 National League MVP, illustrates the importance of this benefit. After Braun tested positive for a performance-enhancing drug, he appealed the result.<sup>281</sup> The formal procedure allowed him to argue in front of a three-person panel of arbitrators.<sup>282</sup> By a two-to-one vote, the panel decided that proper procedures had not been followed during the testing process.<sup>283</sup> Consequently, Braun won the appeal and avoided a fifty-game suspension.<sup>284</sup> On the contrary, minor leaguers do not enjoy the benefit of such a grievance procedure. If they test positive for a performance-enhancing drug, the only thing they can do is ask for the second half of the already tested sample to be tested again. There is no process in place to appeal whether or not the procedure for testing was adequately followed, and no grievance process in place to settle any disputes with their employer other than appealing to the Commissioner.<sup>285</sup>

A comparison of wage growth is even more alarming. As seen in Table 1, major league minimum salaries have increased exponentially since the monumental 1976 Basic Agreement. By 2010, the major league minimum had increased 2400% since 1976.<sup>286</sup> Minor league salaries failed to even keep up with inflation, with the minimum—averaged across each level of the minors—scarcely budging 74% from 1976 to 2010.<sup>287</sup>

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<sup>280</sup> David Biderman, *A Minor-League Boost in Players' Meal Money*, WALL ST. J., Jan. 20, 2010; Garrett Broshuis, *Minor Leaguers Per Diem Gets A Bump*, BASEBALL AMERICA, Jan. 26, 2010, available at <http://www.baseballamerica.com/today/minors/business-beat/2010/269438.html>.

<sup>281</sup> Ken Belson & Michael S. Schmidt, *Star Player First To Win Appeal On a Drug Test*, N.Y. TIMES, Feb. 24, 2012, at A1.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> Art. XX.B, Minor League Uniform Player Contract, Major League Rules Attachment 3 (“the sole exclusive forum available to Player and Club to resolve such dispute shall be arbitration by the Commissioner”).

<sup>286</sup> The minimum salary in the 1976 Basic Agreement was \$19,000 per season. 1976 Basic Agreement, art. V § (A). The minimum salary in 2010 was \$400,000 per season. 2007 Basic Agreement, art. VI § (B)(1).

<sup>287</sup> See Garrett Broshuis, *More on “Playing for Peanuts,”* LIFE IN THE MINORS (Mar. 31, 2010), <http://minorleaguelifelife.blogspot.com/2010/03/more-on-playing->

TABLE 1: MINOR LEAGUE AND MAJOR LEAGUE MINIMUM SALARIES SINCE 1976

	Major League Minimum <sup>288</sup>	Minor League Average Minimum <sup>289</sup>	National Median Household Income <sup>290</sup>	Poverty Level for an Individual <sup>291</sup>
1976	\$ 16,000	\$4,375	\$11,360	\$ 2,884
2010	\$400,000	\$7,375	\$49,445	\$11,139
Percent Increase	2400%	69%	335%	286%

Nearly all stakeholders in baseball have prospered as the overall game has flourished. Major league owners and minor league owners have seen profits increase and franchise values skyrocket. Major league players have reaped many riches. Yet with lingering issues such as wages, working conditions, pension plans, and severance pay, among others, minor leaguers have not shared in this prosperity. They have been forgotten and they have been left behind.

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for-pennies.html; *see also* Broshuis, *supra* note 14. Past minor league salaries are very difficult to obtain. The Hall of Fame does not have old minor league contracts in their records, and both the Office of the Commissioner of Baseball and Minor League Baseball state that they have no such records either. Numbers for 1976 were obtained by talking to ex-minor leaguers who played during this time period. The numbers they gave for this period were confirmed by multiple players, increasing their reliability.

<sup>288</sup> 1976 Basic Agreement, art. V § (A); 2007 Basic Agreement, art. VI § (B)(1).

<sup>289</sup> Minor league average minimums were calculated by adding the minimum salaries per month for each level, dividing them by the number of levels, and multiplying by a five-month season. This method differed slightly from the method that resulted in a 74% increase. *See* Broshuis, *supra* note 287. However, since significantly more minor leaguers play at the lower levels than the upper levels of the minors, this admittedly results in an upwardly skewed number. Also, it should again be noted that exact salaries for minor leaguers playing in past decades are difficult to obtain. *Id.*

<sup>290</sup> *See Income*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/income/data/historical/household/> (follow "All Races" hyperlink under "Table H-6. Regions-by Median and Mean Income" heading) (last visited Nov. 7, 2012) (with charts detailing median household incomes from 1975 to 2011).

<sup>291</sup> *Table 1. Weighted Average Poverty Thresholds for Families of Specified Sizes, Historical Poverty Tables-People*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/historical/people.html> (last visited Nov. 7, 2012).



#### IV. POSSIBLE SOLUTIONS

Previous sections of this Article described organized baseball's continuous exploitation of minor league players. Such exploitation should no longer be permitted. Whether by appealing to the NLRB, lobbying Congress, or unionizing the workforce, a solution must be sought. However, a solution will not be easy, as numerous obstacles will be encountered.

##### A. *Alleging an Unfair Labor Practice*

While minor leaguers might attempt to allege an unfair labor practice, such an effort will likely not offer a viable solution since neither MLB nor the MLBPA have committed unfair labor practices in violation of the NLRA. First, it might be argued that by bargaining over matters relating to minor leaguers, MLB is recognizing a union that does not represent minor leaguers. Section 9(a) of the NLRA guarantees employees freedom of choice in selecting a bargaining representative.<sup>292</sup> However, this section applies to "representatives designated or selected" for a bargaining unit, which typically involves recognition of a union.<sup>293</sup> Here, MLB has not recognized the MLBPA as the bargaining representative of minor leaguers, as every Basic Agreement since 1970 states that the union is "the sole and exclusive collective bargaining agent for all Major League Players"<sup>294</sup>—not minor league players. With no recognition occurring, MLB has not "designated or selected" the MLBPA as the bargaining agent for minor leaguers, so no violation has occurred.

Section 8(a)(2) of the NLRA also makes it an unfair labor practice to dominate or interfere with the formation of a labor organization.<sup>295</sup> It might be argued that MLB, by bargaining with the MLBPA over matters affecting minor leaguers, makes it less likely that minor leaguers will unionize since they are already represented on some matters. However, cases implicating 8(a)(2) typically involve a company independently initiating or organizing a representative for its employees.<sup>296</sup> Here, no such initiation has occurred, as MLB is not encouraging the MLBPA to represent minor leaguers.

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<sup>292</sup> National Labor Relations Act, 29 U.S.C. § 159; *Int'l Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 737 (1961) (*Bernhard-Altman*).

<sup>293</sup> See *Bernhard-Altman*, 366 U.S. at 737.

<sup>294</sup> E.g., 1970 Basic Agreement, art. II; 2007 Basic Agreement, art. II.

<sup>295</sup> 29 U.S.C. § 158 (2012).

<sup>296</sup> See, e.g., *NLRB v. Post Pub. Co.*, 311 F.2d 565 (7th Cir. 1962); *NLRB v. Pepsi Cola Bottling Co.*, 454 F.2d 5 (6th Cir. 1972).

Ultimately, it is probable that neither party has violated any section of the NLRA. After all, nearly all the aspects of bargaining that have affected minor leaguers also affect major leaguers in some way. For instance, the changes to the Rule 5 draft instituted in the winter of 2006 impacted minor leaguers, but players selected in the Rule 5 draft are immediately placed on 40-man major league rosters. Consequently, this rule change had a tangential affect on major leaguers. Similarly, the Rule 4 draft, although further removed from major leaguers than the Rule 5 draft, also affects major leaguers. The early agreements established a precedent of bargaining over the draft because draft selections are awarded as compensation to teams losing high-level major league free agents. Consequently, changes in the draft also affect changes to major league free agency.

In the end, these aspects of bargaining would be deemed permissive subjects of bargaining. Section 8(d) of the NLRA requires subjects relating to “wages, hours, and other conditions of employment” to be mandatory bargaining subjects, but subjects outside of 8(d) are permissive.<sup>297</sup> As the District of Columbia Circuit has stated, “[p]ermissive subjects fall outside the scope of Section 8(d), but may nevertheless touch and concern the relationship of the employer to the union or to the employees the union represents.”<sup>298</sup> Importantly, permissive subjects of bargaining cannot be insisted upon until impasse, as only mandatory subjects of bargaining can be insisted upon until impasse.<sup>299</sup> For baseball, courts have found mandatory subjects to include free agency, the reserve system, and salary arbitration.<sup>300</sup> The bargaining done relating to minor leaguers would not be considered mandatory, but it permissively “touch[es] and concern[s] the relationship of” MLB to the players. Consequently, this permissive bargaining does not constitute an unfair labor practice, especially in light of the fact that collective bargaining often has spillover effects on non-unionized workers.<sup>301</sup>

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<sup>297</sup> 29 U.S.C. § 158 (2012).

<sup>298</sup> *The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988).

<sup>299</sup> *Id.*

<sup>300</sup> *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1061–62 (2d Cir. 1995).

<sup>301</sup> *Cf. ANTONI ZABALZA ET AL., THE ECONOMICS OF TEACHER SUPPLY* 216 (1979) (describing spillover effects of collective bargaining on non-unionized teachers).

### B. Ask for Help from Congress

Since no unfair labor practice has taken place, minor leaguers might appeal to Congress for relief from the antitrust exemption. However, this is neither likely to occur nor is it optimal.

The Supreme Court has repeatedly recognized that Congress has the power to eliminate baseball's antitrust exemption.<sup>302</sup> If the exemption were overturned, both the Rule 4 draft and the minor league reserve clause could be challenged under Section 1 of the Sherman Act as illegal restraints of trade.<sup>303</sup> Section 1 prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."<sup>304</sup> The Supreme Court narrowed this broad language, which seemingly encompasses every commercial endeavor, in *Standard Oil Co. of New Jersey v. United States*.<sup>305</sup> But even under this more narrow analysis, the draft and certainly the reserve clause could be struck down.<sup>306</sup>

The effect would immediately increase competition for minor league players' services. Instead of forcing players to bargain with only a single team after being drafted, players would freely bargain with all teams on the open market.<sup>307</sup> In the absence of a reserve clause and uniform minor league player contracts, player mobility would accelerate, as the length of contracts would decrease.

<sup>302</sup> See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 284 (1972); *United States v. Shubert*, 348 U.S. 222, 229 (1955).

<sup>303</sup> See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978) (finding the NFL draft to be an illegal restraint on trade); see also *Brand & Giorgione*, *supra* note 225, at 51–52 (discussing how the draft and reserve clause would be challenged if the antitrust exemption were lifted).

<sup>304</sup> Sherman Act, 15 U.S.C. § 1 (2012).

<sup>305</sup> 221 U.S. 1 (1911). The narrower "rule of reason" analysis allows courts to engage in a balancing test. If the analysis demonstrates the restraint has a legitimate business purpose that serves to promote competition, "the 'anticompetitive evils. . . must be carefully balanced against its 'procompetitive virtues'" to see if the restraint impedes competition. *Smith*, 593 F.2d at 1183.

<sup>306</sup> See *id.* at 1183–84; see also Michael Jay Kaplan, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. FED. 489, 515 (1974) ("The so-called 'reserve clause' . . . has been held to perpetually operate to remove from a player his free choice of teams, thereby having a restraining effect . . . [w]hether the player was initially cultivated through the 'farm system' of league-affiliated minor teams, or 'drafted' . . ."). Importantly, the nonstatutory labor exemption that serves to promote collective bargaining would also not apply since minor leaguers would not have a union. *Brand & Giorgione*, *supra* note 225, at 53.

<sup>307</sup> Reese, *supra* note 265.

However, Congress has already passed a bill relating to baseball's anti-trust exemption in the form of the Curt Flood Act of 1998,<sup>308</sup> and, due to lobbying by the minor league industry, it does not apply to minor leaguers.<sup>309</sup> The Act states that the antitrust laws are to apply to matters "directly relating to or affecting employment of major league baseball players."<sup>310</sup> Subsection (b) of the Act expressly states the Act does not apply to "any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of . . . baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players."<sup>311</sup>

Prior to the passage of the Curt Flood Act, former minor leaguer Dan Peltier testified that he had "no idea how some of [his] friends who were married and had kids were able to make ends meet," and that owners should not be given a "legal blank check."<sup>312</sup> Despite Peltier's poignant testimony, the minor leagues remained exempt from antitrust laws.

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<sup>308</sup> 15 U.S.C. § 26b (2012).

<sup>309</sup> Wolohan, *supra* note 119, at 368; Edmund P. Edmonds, *The Curt Flood Act of 1998: A Congressional Response to Baseball's Antitrust Exemption*, in *BASEBALL AND ANTITRUST: THE LEGISLATIVE HISTORY OF THE CURT FLOOD ACT OF 1998* PUBLIC LAW NO. 105-297, 112 STAT. 2824 1, 5 (Edmund P. Edmonds & William H. Manz eds. 2001).

<sup>310</sup> Wolohan, *supra* note 119, at 368.

<sup>311</sup> 15 U.S.C. § 26b (2012).

<sup>312</sup> *Testimony of Dan Peltier, Former Baseball Player, Before the S. Comm. on the Judiciary*, 105th Congress (June 17, 1997). He also stated the following about the minor league existence:

[It is] very much like the indentured servitude of the 1700's. When you first sign, you are owned by that team for basically 7 seasons. A team can buy you, sell you, send you to another country, or fire you whenever they want. They can cut you if you get hurt. A player, on the other hand, cannot try to play for someone else. He can't try out for his home team. You have to play for the team that drafted you even if they are loaded at your position. . . .

Given these facts, I think you can understand my surprise that some want to stack the deck even further and create a new Federal law exempting the owners' actions in the minors from the antitrust laws. Quite frankly, what else do the owners need than what they have already? What are the laws they must be able to break in order to run minor league teams? How much more power do they need when bargaining with an 18-year-old kid whom they own for 7 years, and what minor league player is going to jeopardize his career by challenging the system? If you believe a player would do that, then you really don't understand the mindset of a minor league player. . . .

Of course, just because Congress has passed one bill does not preclude it from passing another that would apply the antitrust laws to the minor leagues. In fact, a subsequent bill introduced in 2001 by Senator Paul Wellstone of Minnesota would have amended the Curt Flood Act.<sup>313</sup> Although the antitrust exemption relating to the minor leagues would have remained largely intact, those within baseball still worried that some changes in language would apply the antitrust laws to the minor leagues, as Commissioner Selig's testimony demonstrates:

In 1998, we worked closely with the union and with Congress to craft a carefully worded change to our exemption in the area of labor relations. All parties at the time believed that the change created the right balance for the exemption. The wording of this bill could be read to shed doubt on the exemption's applicability to such areas as Minor League players, the amateur draft, expansion and others.<sup>314</sup>

Ultimately Senator Wellstone's bill failed, and the Curt Flood Act remains unchanged. As Peltier feared, Congress has given the owners a blank check. Owners have continued to exploit minor leaguers chasing their boyhood dreams, and a subsequent act in Congress to correct its mistake remains unlikely. The minor leaguers simply have too little power to lobby Congress and effect real and meaningful change.

### *C. Unionize the Minor Leagues*

Even if minor leaguers could somehow appeal to Congress, this would not be the optimal solution. Suddenly lifting the antitrust exemption would cause much chaos and uncertainty in the minor leagues.<sup>315</sup> MLB's vertical integration of the minor leagues might quickly collapse, and minor leaguers would find themselves in a great unknown.

Unionization offers a much better solution, as it would force the owners to engage in collective bargaining over "wages, hours, and other terms

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[T]his obsession with making the majors should not be a justification for the current treatment of minor league players, and I certainly hope it would not be used as an excuse to give major league and minor league owners a legal blank check.

*Id.*

<sup>313</sup> Fairness in Antitrust in National Sports (FANS) Act, S. 1704, 107th Cong. (2001).

<sup>314</sup> *Testimony of Allan H. (Bud) Selig, Commissioner of Baseball, Before the H. Comm. on the Judiciary*, 107th Congress (Dec. 6, 2001).

<sup>315</sup> Brand & Giorgione, *supra* note 225, at 55.

and conditions of employment.”<sup>316</sup> Unionization would also allow for incremental change. Following the Seitz decision’s introduction of free agency into baseball, Marvin Miller worried about the implications of effecting too sudden and too great a change.<sup>317</sup> He worried that granting all players free agency would flood the market with an overabundant supply of talent and suppress wages.<sup>318</sup> He instead negotiated a tiered system that awarded free agency in a controlled manner once players played for a club for several years.<sup>319</sup> The genius of this agreement was that it not only increased player mobility and salaries, but it also afforded teams needed protections on their talent.<sup>320</sup>

The situation is similar for minor leaguers. Minor leaguers deserve higher wages, better working conditions, and greater mobility. But destroying the entire system and allowing all players to flood the market might not only *further* depress already artificially depressed wages, but it also might result in an even worse system.<sup>321</sup> It might mark a return to the minor leagues of the turn of the twentieth century; a system infested with back-door gentlemen’s agreements, awful playing conditions, and leagues folding without even finishing seasons.<sup>322</sup> Instead, an agreement could be reached through collective bargaining that allows a MLB team to continue to develop talent in the minor leagues while affording minor leaguers higher wages. For instance, MLB owners and a minor league union could reach an agreement requiring contracts for players signed out of colleges to be four years instead of seven years, and the restrictions on the Rule 5 draft could be eased. Also, the parties might negotiate a modest increase in wages of thirty percent over a five-year period,<sup>323</sup> and revenue from minor league baseball’s

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<sup>316</sup> Section 8(d), NLRA, 29 U.S.C. § 158. Being mandatory subjects of bargaining, minor league players could even demand better pay and working conditions to the point of an impasse. *Id.*

<sup>317</sup> See generally KORR, *supra* note 6, at 183–85.

<sup>318</sup> *Id.* This position was advocated by one of the owners, Charlie Finley, who “understood the dynamics of free-market capitalism.” *Id.* at 183.

<sup>319</sup> *Id.* at 184–85.

<sup>320</sup> As Korrr stated, “The negotiations . . . showed that the classic attributes of free bargaining, compromise, concessions, self-interest, and a recognition that the other side had interests could work even in baseball.” *Id.* at 184.

<sup>321</sup> See Brand & Giorgione, *supra* note 225, at 55 (discussing the debilitating effects that application of antitrust laws would have on minor league teams).

<sup>322</sup> See discussion *supra* Part I.A.

<sup>323</sup> Based on a quick calculation, such an increase, for roughly 150 minor leaguers, would cost less than the major league minimum for a single major league player.

\$45 million in annual merchandise sales could be shared.<sup>324</sup> The parties might also include requirements for such things as subsidized apartments for players during the season and better food before and after games.

Of course, steep impediments exist on the road to minor league unionization. First, the transience of players creates a problem, as each year more than a thousand minor leaguers are drafted into the system and a thousand more released.<sup>325</sup> Second, the geographic dispersion of minor leaguers is a problem since minor leaguers play in small units of thirty or fewer players spread throughout the country in different leagues.<sup>326</sup> Third, the low salaries also present a problem, as there is little monetary incentive for an existing union to provide seed money to assist in unionization with little prospect of a return on the investment.<sup>327</sup> Moreover, outside of baseball, general union membership and power has weakened substantially over recent decades,<sup>328</sup> lessening the likelihood of assistance despite the low salaries.

Perhaps the greatest impediment to unionization comes from the minor league players themselves. As Peltier stated before Congress, “[W]hat minor league player is going to jeopardize his career by challenging the system?”<sup>329</sup> The minor league player is chasing a dream. Given a short window of opportunity and facing long odds, he is hesitant to do anything that will upset the status quo.<sup>330</sup> The NLRA, of course, would prevent minor leaguers from being fired or discriminated against for any concerted actions,<sup>331</sup> yet even when told of such protections, the minor league player would likely remain hesitant to act.

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<sup>324</sup> See *General History*, MiLB.COM, [http://www.milb.com/milb/history/general\\_history.jsp](http://www.milb.com/milb/history/general_history.jsp) (last visited Nov. 8, 2012) (stating that “merchandise sales have averaged about \$45-million since 2000”).

<sup>325</sup> See generally *Testimony of Dan Peltier*, *supra* note 312; *Masteralexis*, *supra* note 21, at 591 (discussing potential obstacles to minor league unionization).

<sup>326</sup> See *Masteralexis*, *supra* note 21, at 591.

<sup>327</sup> See *Rothman*, *supra* note 9.

<sup>328</sup> In 2011, the Bureau of Labor reported a union membership rate of 11.8 percent, as opposed to a membership rate of 20.1 percent in 1983. Economic News Release, BUREAU OF LABOR STATISTICS, *Union Members Summary* (Jan. 27, 2012), <http://www.bls.gov/news.release/union2.nr0.htm>.

<sup>329</sup> *Testimony of Dan Peltier*, *supra* note 312.

<sup>330</sup> Gene Orza, former number two at the MLBPA, expressed this thought recently, saying that minor leaguers “don’t want to tick off [the club] by being the person who forms the union.” *Rothman*, *supra* note 9.

<sup>331</sup> See Section 8(a)(1), NLRA, 29 U.S.C. § 158 (making it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title”).

Major league players no doubt faced similar challenges prior to their unionization, and yet they were able to overcome this paralysis of the status quo. As former player and current broadcaster Tim McCarver later stated, “We were naïve. We had no idea about unions . . . . More than that, we had no idea of how powerful we were.”<sup>332</sup> Yet with the proper leadership, the players found their collective power and changed the system.

Other sports groups have also overcome this fear-filled paralysis. Minor league hockey players, for instance, have a union.<sup>333</sup> Despite the fact that the National Hockey League (NHL) gains far lower revenue than MLB,<sup>334</sup> minor league hockey players earn much higher salaries than minor league baseball players. The latest CBA for the American Hockey League (AHL)—a top hockey minor league—requires a minimum salary of \$40,500 for the 2012-2013 season and per diem of \$67.<sup>335</sup> By contrast, minimum Triple-A baseball requires salaries of \$2150 per month for the five-month season (\$10,750 per season)<sup>336</sup> and only a \$25 per diem.<sup>337</sup>

Minor league baseball umpires also have a union, and they too make far more money than minor league baseball players. While the minimum salary of a minor league player in Double-A is \$1500 per month, the minor league umpire at the same level receives a minimum of \$2300 per month.<sup>338</sup> Addi-

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<sup>332</sup> KORR, *supra* note 6, at 38.

<sup>333</sup> The Professional Hockey Players Association represents players in the AHL, ECHL, and CHL, the top developmental leagues of the NHL. *About the PHPA*, PHPA.COM, <http://www.phpa.com/en/content/home/about/index/> (last visited Nov. 7, 2012).

<sup>334</sup> *Compare Best-Ever Business Year Highlighted by Record Revenue*, NHL.COM (Apr. 13, 2011, 6:54 PM), <http://www.nhl.com/ice/news.htm?id=559630> (stating that the 2010-2011 season yielded \$2.9 billion for the NHL), *with* Barry M. Bloom, *MLB Revenue Expected to Approach \$7 billion for First Time*, MLB.COM (Oct. 4, 2010, 5:00 PM), [http://mlb.mlb.com/news/article.jsp?ymd=20101004&content\\_id=15410876&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20101004&content_id=15410876&vkey=news_mlb&c_id=mlb) (stating that 2010 revenue for MLB was expected to reach \$7 billion).

<sup>335</sup> *AHL-PHPA Collective Bargaining Agreement*, PHPA.COM, <http://www.phpa.com/en/content/home/about/ahl-collective-bargaining-agreement/> (last visited Nov. 8, 2012).

<sup>336</sup> *See Pay Structure of Minor League Baseball Players*, NATIONAL SPORTS AND ENTERTAINMENT LAW SOCIETY (Mar. 17, 2010), <http://nationalsportsandentertainment.wordpress.com/2010/03/17/pay-structure-of-minor-league-baseball-players/>.

<sup>337</sup> David Biderman, *A Minor-League Boost in Players' Meal Money*, WALL ST. J., Jan. 20, 2010, at B18.

<sup>338</sup> *Umpire Salaries*, MiLB.COM, [http://www.milb.com/milb/info/umpires.jsp?mc=\\_ump\\_salaries](http://www.milb.com/milb/info/umpires.jsp?mc=_ump_salaries) (last visited Nov. 21, 2012).



tionally, minor league umpires do not have to pay for housing over the course of the season,<sup>339</sup> unlike minor league baseball players.

The minor league hockey union, founded in 1967, emerged during a different era more favorable to unionization.<sup>340</sup> However, the minor league umpires managed to unionize in 1999<sup>341</sup> in an environment more akin to today. While some differences exist between the groups, the similarities are extensive.<sup>342</sup> Their similarities evince that the steep obstacles facing minor league unionization can be overcome. As Professor Wollett recently pointed out in his call for minor league unionization, the bargaining unit might be limited initially to certain teams, levels, or leagues,<sup>343</sup> as a smaller group and smaller geographic area might facilitate organizing. The newly formed union could then seek to represent other clubs and leagues, and players

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<sup>339</sup> *Umpire History*, MILB.COM, [http://www.milb.com/milb/info/umpires.jsp?mc=\\_ump\\_history](http://www.milb.com/milb/info/umpires.jsp?mc=_ump_history) (last visited Nov. 21, 2012) (“Hotel lodging is provided free through the league offices for each umpire while on assignment within the league.”).

<sup>340</sup> *About the PHPA*, PHPA.COM, <http://www.phpa.com/en/content/home/about/index/> (last visited Nov. 8, 2012).

<sup>341</sup> *About AMLU*, AMLU.COM, [http://www.amlu.org/about\\_amlu.php](http://www.amlu.org/about_amlu.php) (last visited Apr. 18, 2012).

<sup>342</sup> Minor league umpires, like minor league baseball players, start at the bottom rungs of the minor leagues in the hopes of eventually advancing to the major leagues. See *Umpires*, MILB.COM, <http://www.milb.com/milb/info/umpires.jsp> (last visited Nov. 21, 2012). Other similarities include the low pay, the high turnover rate, and the geographic dispersion. Tom Fitzgerald, *Feeling Blue: Striking Minor-League Umps Want More Money, Appreciation*, SAN FRANCISCO CHRON., May 25, 2006.

<sup>343</sup> WOLLETT, *supra* note 20, at 107–11. Establishing the appropriate bargaining unit is always difficult in the sports industry. STAUDOHR, *supra* note 2, at 233–34. The decision to group players according to club or league repeatedly presents problems. *Id.* at 234. Of course, the NLRB is granted much discretion in determining the appropriate bargaining unit. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491–92 (1947). The test for appropriateness “is whether the employees comprising the unit share a ‘community of interest.’” *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 575 (1st Cir. 1983). Initially seeking recognition of a single team as a bargaining unit would most likely be appropriate, as it could be analogized to the Board’s presumption that a single store within a multi-store operation is appropriate. See *id.* at 576. Moreover, it would be in line with the “policy of assuring employees the fullest freedom in exercising their right to bargain collectively.” *Id.* at 575. Of course, this same policy and the discretion that the Act gives would also allow for a broader unit consisting of an entire league or all of minor league baseball to be appropriate as well. See David M. Szuchman, *Step Up to the Bargaining Table: A Call for the Unionization of Minor League Baseball*, 14 HOFSTRA LAB. & EMP. L.J. 265, 295 (1996–1997).

would no doubt view a union more favorably if other players had already joined it.

The MLBPA can also teach a lesson. As discussed above, the Association began as just that: an association of ballplayers.<sup>344</sup> It formed on more informal terms, which lessened the players' weariness towards it. The Association gradually developed over its first decade, and suddenly, with a new office and new leadership under Marvin Miller, morphed into a powerful union that changed the landscape of the entire sports industry. One can only hope that a similar transformation might eventually take place in minor league baseball.

### CONCLUSION

The great union leader Marvin Miller recently stated that he considered bringing minor leaguers into the union during its inception in the 1960s.<sup>345</sup> However, "[t]he appeal of unionizing every pro baseball player . . . was always outweighed by a lack of resources, the geographic decentralization of the minors, and the dreamy idealism of the players."<sup>346</sup> In the end, minor leaguers were left behind.

Despite their exclusion from the union, almost every CBA since the original 1968 Basic Agreement has touched minor leaguers in some way. Often, and especially during recent agreements, the effects have been negative. The lives of major leaguers have improved exponentially as the entire game has prospered. Yet the minor league baseball player today makes little more money than the minor league baseball player of forty years ago, and the working conditions remain nearly as deplorable. In fact, most minor leaguers earn annual salaries placing them below the individual poverty threshold.

More than eighty years have passed since Judge Lindley issued his opinion in *Landis*. Unfortunately, Judge Lindley's prescient fears of owners endlessly exerting nearly omnipotent control over minor leaguers have come true. The exploitation of minor leaguers has continued indefinitely, and the current system of collective bargaining has offered no relief for baseball's untouchables.

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<sup>344</sup> See discussion *supra* Part I.B.iii.

<sup>345</sup> Rothman, *supra* note 9.

<sup>346</sup> *Id.*





## Baseball Arbitration: An ADR Success

Jeff Monhait\*

### ABSTRACT

Major League Baseball's salary arbitration system strikes a unique balance during a player's first six major league seasons between teams completely controlling players and players earning their fair market value. Critically, the system resolves the issue of player salaries prior to, or, at the latest, early in spring training. This system developed somewhat serendipitously over more than a century of court battles, labor negotiations, and back room deals. Despite this ad hoc history, Major League Baseball's salary arbitration system successfully handles and resolves these salary disputes.

Scholars who specialize in dispute resolution have developed a wealth of research on the processes designed to handle a recurring group of disputes. A survey of seminal literature in this field allows for a distillation of the key traits that contribute to the success of a given system. Baseball's salary arbitration system comports with many of the recommended traits found in an effective dispute resolution system. While there remains an open debate as to whether the players should receive more or less of the revenues the sport generates, baseball's salary arbitration system promotes the resolution of salary disputes without substantial disruption, and does so in a way that participants view as fair.

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\* Jeff Monhait is an associate in the commercial litigation group at Cozen O'Connor in Philadelphia. He received his J.D. *cum laude* from Harvard Law School in 2012 and his B.A. *magna cum laude* from Haverford College in 2009. He wishes to thank Professor Bob Bordone for the hours spent discussing this article from inception through final product, Damon Jones for his invaluable mentoring and insights, and Professors William Rubenstein and Peter Carfagna for their contributions to this piece. He also wishes to thank his father (and favorite ballgame companion) for sharing a lifelong love of baseball, as well as his mother and sister for their endless support.

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## I. INTRODUCTION

Major League Baseball (“MLB” or “baseball”) is a big business that generates enormous revenues.<sup>1</sup> Players and team owners constantly struggle over the distribution of these revenues. In individual salary negotiations, players fall into one of three categories. The first category consists of pre-arbitration players, those who lack the requisite Major League Service Time (“MLST” or “service time”)<sup>2</sup> to attain salary arbitration eligibility. These players are bound to their teams, and thus must either accept the team’s offer, hold out, or find a different occupation.<sup>3</sup> The second category includes players with at least six years of MLST that become eligible for free agency upon the expiration of their contracts.<sup>4</sup> Free agents may negotiate with any team and sign with the one that makes the most appealing offer.<sup>5</sup> The third category of players is arbitration eligible, and players in this category generally have between three and six years of MLST.<sup>6</sup> These players, like the pre-arbitration players, remain bound to their teams.<sup>7</sup> When an arbitration eligible player and his team fail to reach an agreement, the two sides submit the dispute to an arbitrator to set the player’s salary for the upcoming year.<sup>8</sup>

This Article focuses on the system under which the players in this middle group must either successfully negotiate their salary with their team, or submit the issue to a third party for a final and binding decision. This structure is part of the collective bargaining agreement (“CBA” or “Basic Agreement”) between the league and the players’ union. Baseball and other professional sports have unusual labor agreements in the sense that individ-

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<sup>1</sup> \$7 billion in 2010. Maury Brown, *MLB Revenues Grown From \$1.4 Billion in 1995 to \$7 Billion in 2010*, THE BIZ OF BASEBALL, [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=5167:mlb-revenues-grown-from-14-billion-in-1995-to-7-billion-in-2010&catid=30:mlb-news&Itemid=42](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=5167:mlb-revenues-grown-from-14-billion-in-1995-to-7-billion-in-2010&catid=30:mlb-news&Itemid=42).

<sup>2</sup> One year of MLST is defined as 172 days on an MLB roster. 2012–2016 Basic Agreement, art. XXI(A)(1) (2012). [hereinafter 2012 Basic Agreement]. Players are credited one day of MLST for “each day of the championship season a Player is on a Major League Club’s Active List,” and a player may not accumulate more than 172 days MLST in a single championship season. *Id.*

<sup>3</sup> ROGER I. ABRAMS, *THE MONEY PITCH* 31 (2000).

<sup>4</sup> *Id.* at 32.

<sup>5</sup> *See id.*

<sup>6</sup> *Id.* at 31.

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* at 146–47.

ual players are left to negotiate salaries above a collectively bargained minimum salary, at least within the context of the CBA's rules and structures.<sup>9</sup>

This Article aims to provide an overview of dispute systems design ("DSD"), a body of research within the larger framework of alternative dispute resolution and use it to evaluate MLB salary arbitration. MLB salary arbitration developed over a century of mostly antagonistic interactions between players and owners. Despite that ominous history, it is successful because it lowers the costs of resolving disputes, provides a process that the parties perceive as fair, and strikes a balance between the interests of players and owners. Few cases ever reach an arbitrator and there are no holdouts. Salary disputes are resolved before spring training, minimizing the distraction for player and team. Nevertheless, many authors have critiqued the system. However, a holistic view of this system shows that its purported shortfalls function to incentivize negotiated settlements between the parties, with arbitration as a fallback option to guarantee resolution prior to the season's start. This system, the product of an organic evolution, serves the interests of players, teams, and the business of baseball.

Part II of this Article discusses the history of baseball that produced today's salary arbitration system. Part III introduces DSD and three complementary frameworks for analyzing a given dispute system. Part IV uses this DSD research to evaluate MLB salary arbitration. Part V offers a response to the critiques that other authors have levied against various aspects of the system.

## II. THE DEVELOPMENT OF MLB ARBITRATION

### A. History

MLB's labor market began as a free market system.<sup>10</sup> A player's contract lasted only a year, at which point he could market his services to other teams.<sup>11</sup> Teams competing to sign players contributed to rising salaries.<sup>12</sup> Owners worried that player movement, particularly that of star players, would undermine fan allegiances and negatively affect revenues.<sup>13</sup> Owners

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<sup>9</sup> Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORT L. 301, 306-07 (1992).

<sup>10</sup> Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW. J. 183-84 (1994).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

also wanted to limit player salaries, and eliminating the competition for a player's services served as an effective means to that end.<sup>14</sup>

The owners' solution to these concerns came out of a secret meeting in 1879, where they agreed to establish the "reserve rule."<sup>15</sup> This rule stated that each team could name five players that other owners agreed not to pursue, even if the player's contract with his current team had expired.<sup>16</sup> Subsequently, the owners expanded the agreement to cover each team's entire roster.<sup>17</sup> Over time the owners moved away from secret pacts and began inserting a reserve clause into each player's contract.<sup>18</sup> This clause bound a player to one team for as long as that team wished to retain his services,<sup>19</sup> and allowed the team, upon the contract's expiration, unilaterally to renew the contract for a one-year term<sup>20</sup> at any figure the team selected.<sup>21</sup> A player could accept the renewal offer, refuse to play in the hope that the owner would pay more, or leave baseball entirely.<sup>22</sup> Thus, owners exerted nearly complete control over player movement and salaries, essentially making the players chattel.

Antitrust challenges to the reserve system found their way to the Supreme Court on three separate occasions. The Court first considered the issue in 1922.<sup>23</sup> The Federal Baseball Club of Baltimore, a team from a rival league, argued that MLB was monopolizing the business of baseball.<sup>24</sup> Justice Oliver Wendell Holmes, writing for the Court, described the business at issue as "giving exhibitions of baseball, which are purely state affairs."<sup>25</sup> In that sense, the Court dismissed the fact that teams and fans traveled across state lines, whether to receive payment for participation or to pay to

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<sup>14</sup> ABRAMS, *supra* note 3, at 10.

<sup>15</sup> Donegan, *supra* note 10, at 184; *see also* Hopkins, *supra* note 9, at 303.

<sup>16</sup> ABRAMS, *supra* note 3, at 10.

<sup>17</sup> Hopkins, *supra* note 9, at 303–04.

<sup>18</sup> *Id.* at 304.

<sup>19</sup> *See* Donegan, *supra* note 10, at 184.

<sup>20</sup> *See id.*; Hopkins, *supra* note 9, at 304.

<sup>21</sup> Hopkins, *supra* note 9, at 304.

<sup>22</sup> *See id.*; Mark L. Goldstein, *Arbitration of Grievance and Salary Disputes in Professional Baseball: Evolution of a System of Private Law*, 60 CORNELL L. REV. 1049, 1065–66 (1975).

<sup>23</sup> *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

<sup>24</sup> *See id.* at 207.

<sup>25</sup> *Id.* at 208.



view the exhibitions, as “a mere incident, not the essential thing.”<sup>26</sup> The Court concluded that MLB’s business was not interstate commerce, and therefore was outside the reach of the antitrust laws.<sup>27</sup> This antitrust exemption allowed the owners to restrict the market for baseball and baseball players.<sup>28</sup> It preserved this system in which clubs controlled players for the duration of players’ careers and did not compete for players in an open market.<sup>29</sup>

The Supreme Court subsequently rejected challenges to the reserve system in 1953 and 1972.<sup>30</sup> In the face of this precedent, the players began looking for alternative avenues to increase their bargaining power. The owners refused all player overtures for increased rights.<sup>31</sup>

In 1954, after prior unionization attempts had fizzled,<sup>32</sup> the players organized the Major League Baseball Players Association (“MLBPA” or “Players Association”).<sup>33</sup> Twelve years later, in 1966, the MLBPA appointed

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<sup>26</sup> *Id.* at 209.

<sup>27</sup> *Id.*

<sup>28</sup> See Jacob F. Lamme, *The Twelve Year Rain Delay: Why a Change in Leadership Will Benefit the Game of Baseball*, 68 ALB. L. REV. 155, 168 (2004).

<sup>29</sup> See *id.*

<sup>30</sup> In *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953), the Court, in a per curiam opinion, declined to overturn *Federal Baseball* in light of Congressional inaction on the matter in the thirty years since that decision, and because baseball had developed “on the understanding that it was not subject to existing antitrust legislation.” *Id.* at 357. The Court decided that any change was more appropriately accomplished through legislation. *Id.* The Court upheld the exemption once more in *Flood v. Kuhn*, 407 U.S. 258 (1972). The Court explicitly found that “[p]rofessional baseball is a business and it is engaged in interstate commerce.” *Id.* at 282. It further described *Federal Baseball* and *Toolson* as “an aberration.” *Id.* However, it was an “aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis* . . . .” *Id.* Again finding that legislation was the more appropriate route to changing the exemption, the Court declined to overturn *Federal Baseball* and *Toolson*. *Id.* at 284. Congress finally did act in 1998, eliminating the antitrust exemption at least as it applied to major league players. 15 U.S.C. § 26(b) (2011). See generally Michael J. Mozes & Ben Glicksman, *Adjusting the Stream? Analyzing Major League Baseball’s Antitrust Exemption After American Needle*, 2 HARV. J. SPORTS & ENT. L. 265 (2011) (full history of baseball’s antitrust exemption). Also note that salary arbitration, as a subject of collective bargaining, is exempt from antitrust scrutiny under the non-statutory labor exemption. *Id.* at 286 n.138.

<sup>31</sup> See Goldstein, *supra* note 22, at 1065.

<sup>32</sup> See, e.g., Hopkins, *supra* note 9, at 305.

<sup>33</sup> Goldstein, *supra* note 22, at 1053.

Marvin Miller as its president.<sup>34</sup> Under Miller's leadership, collective bargaining produced modest gains for the players. In negotiations with the league in 1968, the MLBPA achieved a breakthrough when it secured grievance arbitration.<sup>35</sup> Up to that point, "grievance disputes were 'resolved' when the player paid his fine or sat out his period of suspension . . . ."<sup>36</sup> Grievance arbitration was a marked improvement over the previous system, under which MLB could unilaterally impose disciplinary fines and suspensions on players. However, the players' gain was limited because the MLB commissioner served as sole arbitrator.<sup>37</sup> Players found this system problematic because the commissioner, as the owners' employee, was far from impartial.<sup>38</sup>

The MLBPA gained additional legitimacy and bargaining power when the National Labor Relations Board ("NLRB") asserted jurisdiction over the business of baseball.<sup>39</sup> This decision confirmed that MLB's antitrust exemption would not similarly insulate MLB from labor regulation.<sup>40</sup> Shortly thereafter, during the 1970 collective bargaining negotiations, the players secured an independent arbitrator for grievances.<sup>41</sup> The new system called for a tripartite panel to hear grievances; the panel would be composed of one player representative, one league representative, and one neutral arbitrator.<sup>42</sup>

During the negotiations leading to the 1973 agreement, the owners made their first proposal for salary arbitration.<sup>43</sup> These negotiations came shortly after the Supreme Court in *Flood v. Kuhn* rejected for a third time an antitrust challenge against the reserve system.<sup>44</sup> The owners hoped that salary arbitration would quell the players' demands for a total demolition of

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<sup>34</sup> Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 226 (1998).

<sup>35</sup> Goldstein, *supra* note 22, at 1054.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; see also Hopkins, *supra* note 9, at 307; Jason M. Pollack, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1661 (1999).

<sup>38</sup> Goldstein, *supra* note 22, at 1054–55.

<sup>39</sup> See Am. League of Prof'l Baseball Clubs, 180 NLRB 190, 192 (1969–1970).

<sup>40</sup> William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61, 66 (2004).

<sup>41</sup> Pollack, *supra* note 37, at 1662. Note that the commissioner retained full control over matters implicating "baseball's integrity or public confidence in the game." *Id.*

<sup>42</sup> Goldstein, *supra* note 22 at 1057 n.35.

<sup>43</sup> *Id.* at 1067.

<sup>44</sup> *Flood v. Kuhn*, 407 U.S. 258, 284 (1972).

the reserve system.<sup>45</sup> After exchanging demands, the two sides finally agreed to implement salary arbitration.<sup>46</sup>

MLB salary arbitration employs a format commonly known as “high-low arbitration” or “final offer arbitration.”<sup>47</sup> The player and team each submit a single number to the arbitrator.<sup>48</sup> After a hearing during which the player and team each have the opportunity to make a presentation,<sup>49</sup> the arbitrator chooses one of the two numbers as the player’s salary for the upcoming season.<sup>50</sup>

Salary arbitration as established in 1973 has remained largely unchanged, save for modifications to player eligibility thresholds and to the number of arbitrators that hear each case.<sup>51</sup> The 2012 Basic Agreement provides that “[a]ny Player” who has accumulated the required MLST “may submit the issue of the Player’s salary to final and binding arbitration . . . .”<sup>52</sup>

Under the 1973 Basic Agreement, any player with two or more years of MLST could utilize salary arbitration.<sup>53</sup> It is important to keep in mind, however, that in 1973 there was still no set procedure for a player to reach free agency.<sup>54</sup> As long as teams complied with contractual terms, they could retain a player’s rights forever. That, however, would change in only a few short years.<sup>55</sup>

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<sup>45</sup> Goldstein, *supra* note 22, at 1067.

<sup>46</sup> See *id.* at 1067–68; see also Ed Edmonds, *A Most Interesting Part of Baseball’s Monetary Structure—Salary Arbitration in its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1, 3 (2009); Gould, *supra* note 40 at 67.

<sup>47</sup> David L. Snyder, *Automatic Outs: Salary Arbitration in Nippon Professional Baseball*, 20 MARQ. SPORTS L. REV. 79, 82 (2009).

<sup>48</sup> 2012 Basic Agreement, art. VI(E)(4).

<sup>49</sup> *Id.* art. VI(E)(7).

<sup>50</sup> *Id.* art. VI(E)(13).

<sup>51</sup> See *infra* Part II.B.

<sup>52</sup> 2012 Basic Agreement, art. VI(E)(1).

<sup>53</sup> Jeff Euston, *CBA Summaries 1973–1975*, THE BIZ OF BASEBALL, [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=682:1973-1975&catid=45:cba-summaries&Itemid=76](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=682:1973-1975&catid=45:cba-summaries&Itemid=76).

<sup>54</sup> Catfish Hunter, a star pitcher in this era, famously reached unrestricted free agency during this period when an arbitrator declared that Charles Finley, the owner of the Oakland Athletics, had caused the team to breach its contract with Hunter, rendering the contract null and void. See Murray Chass, *Owners Worry Over Reserve Clause Suit*, N.Y. TIMES, Jan. 3, 1975; Red Smith, *Portrait of a 6-Foot Millionaire*, N.Y. TIMES, Jan. 10, 1975.

<sup>55</sup> See *infra* notes 61–69 and accompanying text.

Early efforts to use this process negatively impacted player-team relationships. The first hearing was held in February 1974 between the Minnesota Twins and pitcher Dick Woodson.<sup>56</sup> Woodson demanded \$30,000 per year while the Twins offered only \$23,000.<sup>57</sup> Woodson won the \$30,000 salary he requested, but both sides were unhappy with the outcome.<sup>58</sup> Woodson felt that Carl Griffith, the Twins' owner, had treated him poorly throughout the process.<sup>59</sup> Griffith, like all the owners, was frustrated by the diminished control over the players under the new system, and he expressed his displeasure by trading Woodson across the country to the New York Yankees that same season.<sup>60</sup>

Two years later, MLB received a seismic shock when arbitrator Peter Seitz essentially struck down the reserve system.<sup>61</sup> The player's union brought a grievance on behalf of pitchers Andy Messersmith and Dave McNally. Both players had played out the prior year under "renewed" contracts.<sup>62</sup> At that time, the reserve clause in the uniform player contract ("UPC") stated that the team had the right to "renew" the player's contract if the two sides could not reach an agreement on a deal.<sup>63</sup> The owners claimed that the "renewed" deal included the same reserve clause, while the players claimed that the contractual relationship terminated at the end of the option year.<sup>64</sup> Noting that the owners' interpretation of the contract would allow teams to renew the contract in perpetuity,<sup>65</sup> Seitz determined

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<sup>56</sup> Edmonds, *supra* note 46, at 1; ABRAMS, *supra* note 3, at 143.

<sup>57</sup> Edmonds, *supra* note 46, at 1.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2; ABRAMS, *supra* note 3, at 143.

<sup>61</sup> See *Prof'l Baseball Clubs*, 66 Lab. Arb. Rep. (BNA) 101 (1975) (Seitz, Arb.).

<sup>62</sup> *Id.* at 101. McNally had been effectively retired, having sustained injuries that prevented him from pitching. His team, however, had held onto his rights, and Marvin Miller asked him to join the suit. His team then sought to sign McNally to a contract to prevent the challenge to the reserve clause. JOHN HELYAR LORDS OF THE REALM, 167-68 (1994).

<sup>63</sup> *Prof'l Baseball Clubs*, 66 Lab. Arb. Rep. (BNA) at 110.

<sup>64</sup> *Id.* The owners had previously avoided any challenge on this issue because the player had to play the option year without signing a contract in order to bring such a challenge. This hurdle created heavy risk for the player who was playing without a contract. As the UPC contained the reserve clause, if a player signed the deal, the team explicitly gained the option year again. Any time a player threatened to play out the season under the option year, that player's team would offer financial inducements (increased salaries or extra guaranteed contract years) to induce the player to sign a contract. See HELYAR, *supra* note 62 at 130-33.

<sup>65</sup> *Prof'l Baseball Clubs*, 66 Lab. Arb. Rep. (BNA) at 112.

that such a broad power required an explicit grant in the contract.<sup>66</sup> The UPC did not contain such an explicit grant, and thus, in Seitz's view, did not grant a team "the right to renew a contract at the end of a renewal year."<sup>67</sup> Finding no contractual relationship between player and team at the end of the renewal year, Seitz declared Messersmith and McNally free agents.<sup>68</sup> The federal courts upheld Seitz's ruling against the owners' protestations.<sup>69</sup>

Facing the possibility that any player could reach free agency merely by playing out one option year, the owners finally agreed to collectively bargain the issue of the reserve clause.<sup>70</sup> Although *Messersmith* essentially granted the players widespread free agency, Miller knew players would be hurt if free agents flooded the market.<sup>71</sup> He believed it was prudent to constrict the market for free agent players in order to increase competition among teams for those players and thereby produce higher salaries.<sup>72</sup> Of course, Miller could not reveal that fact to the owners, and acted as though he wanted unfettered free agency for the players.<sup>73</sup> The two sides reached a compromise in the 1976 Basic Agreement which stated that a player with six years of MLST would be eligible for free agency.<sup>74</sup> Prior to this agreement, players with two years of MLST could seek salary arbitration; thus the new agreement effectively created three classes of players: (1) those with less than two years of MLST, whose contracts owners could set at any amount at or above the league minimum; (2) players with between two and six years of MLST,

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<sup>66</sup> *Id.* at 113.

<sup>67</sup> *Id.* at 114.

<sup>68</sup> *Id.* at 117.

<sup>69</sup> See *Kan. City Royals Baseball Corp. v. Major League Baseball Players Assoc.*, 532 F.2d 615 (8th Cir. 1976).

<sup>70</sup> Hopkins, *supra* note 9, at 309. This willingness to bargain the reserve system in the aftermath of *Messersmith* demonstrates the extent to which parties always bargain "in the shadow of the law," or "the outcome that the law will impose if no agreement is reached." See Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, YALE L.J. 950, 968-69 (1979). In this instance, *Messersmith* altered the landscape from one in which the reserve clause made free agency essentially unattainable for players to one in which free agency was imminently available.

<sup>71</sup> ABRAMS, *supra* note 3, at 30; HELYAR, *supra* note 62, at 181-84.

<sup>72</sup> ABRAMS, *supra* note 3, at 30; HELYAR, *supra* note 62, at 181-84.

<sup>73</sup> HELYAR, *supra* note 62, at 181-84.

<sup>74</sup> Hopkins, *supra* note 9, at 309; 1976-1979 Basic Agreement, art. XVII(B)(2) (1976).

who could seek salary arbitration; and (3) players with six or more years of MLST who were eligible for free agency.<sup>75</sup>

Free agency and salary arbitration had the joint effect of drastically increasing player salaries.<sup>76</sup> The limits on free agency served Miller's intended effect of reducing the supply of players on the open market, augmenting the competition and resultant salaries for those players.<sup>77</sup> In arbitration, players could compare themselves to players who had received deals on the open market, creating a trickle-down effect from the free agent salaries to arbitration-eligible players.<sup>78</sup> Furthermore, this tie between free agency and salary arbitration forced lower revenue teams to pay players similarly to the higher revenue teams.<sup>79</sup>

In the thirty-six years since the 1976 Basic Agreement, the owners have mounted various attempts to regain the power they had prior to *Messersmith*.<sup>80</sup> These efforts include both legitimate means, such as collective bargaining, and more subversive strategies, such as collusion. As a general matter, the relationship between players as a group and owners as a group has been nothing short of acrimonious before, during, and since *Messersmith*. There have been eight labor stoppages since 1972.<sup>81</sup> There have been, however, signs of substantial improvement in this relationship over the last fifteen years, and there has not been a labor stoppage since the 1994 strike.<sup>82</sup>

In 1980, the owners attempted to eliminate arbitration and institute a fixed salary scheme.<sup>83</sup> Although the players rebuffed these proposals, in 1985 the owners successfully bargained for an increase to the eligibility re-

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<sup>75</sup> See Gould, *supra* note 40, at 69.

<sup>76</sup> *Id.*

<sup>77</sup> John P. Gillard, Jr., *An Analysis of Salary Arbitration in Baseball: Could a Failure to Change the System be Strike Three for Small-Market Franchises?*, 3 SPORTS LAW. J. 125, 133 (1996).

<sup>78</sup> *Id.* at 133–34.

<sup>79</sup> Gould, *supra* note 40, at 69.

<sup>80</sup> Michael J. Cozzillio, *From the Land of Bondage: The Greening of Major League Baseball Players and the Major League Baseball Players Association*, 41 CATH. U. L. REV. 117, 144–46 (1992).

<sup>81</sup> John Helyar, *Fat Lady Sings: How Fear and Loathing In Baseball Standoff Wrecked the Season—Styles of Confrontation Made a Bad Situation Worse*, WALL ST. J., Sep.15, 1994, at A1.

<sup>82</sup> See Peter Gammons, *Baseball Deserves Kudos for Sealing Deal: New CBA Ensures Continued Labor Peace Through 2016*, MLB.COM (Nov. 22, 2011, 3:25 PM), [http://mlb.mlb.com/news/article.jsp?ymd=20111122&content\\_id=26025840&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20111122&content_id=26025840&vkey=news_mlb&c_id=mlb).

<sup>83</sup> Edmonds, *supra* note 46, at 5.

quirement, such that players needed three years of MLST to seek salary arbitration.<sup>84</sup> Additionally, revisions to the language in the 1985 Basic Agreement directed arbitrators to pay “particular” attention to comparable players in the same service class<sup>85</sup> or one service class higher, although arbitrators were still free to look to other comparable players, including free agents, where “appropriate.”<sup>86</sup> Strict adherence to this guideline theoretically would limit the inflationary effect of free agent salaries upon arbitration salaries.

During this period, the owners attempted to achieve through collusion what they failed to gain through bargaining.<sup>87</sup> The owners secretly agreed not to participate in free agency, and not to make offers to other teams’ free agents.<sup>88</sup> This coordinated action violated the 1985 Basic Agreement, which prohibited clubs from colluding amongst themselves.<sup>89</sup> The players eventually brought and won a series of grievances against the owners.<sup>90</sup> During the 1990 labor negotiations, the owners agreed to pay treble damages for future instances of collusion.<sup>91</sup>

The 1990 negotiations also saw the owners renew their efforts to eliminate salary arbitration through collective bargaining. The owners demanded a salary cap and a “pay for performance” scheme for players with less than six years of MLST,<sup>92</sup> and even locked out the players for a month during spring training.<sup>93</sup> Ultimately, these efforts not only failed to secure the own-

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<sup>84</sup> Gould, *supra* note 40, at 71.

<sup>85</sup> A service class includes players with the same number of MLST years.

<sup>86</sup> Gould, *supra* note 40, at 71–72.

<sup>87</sup> See Hopkins, *supra* note 9, at 314.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.* at 315. In an ironic twist, it was the owners who had insisted upon the insertion of this clause during the 1976 collective bargaining to prevent joint player holdouts like the one Los Angeles Dodgers pitchers Sandy Koufax and Don Drysdale executed in 1966. See ABRAMS, *supra* note 3, at 28–29. The owners demanded a bar to such collusive action, and the union insisted that the owners make a similar pledge. *Id.*

<sup>90</sup> Hopkins, *supra* note 9, at 315. Players brought a separate grievance for each year of collusion.

<sup>91</sup> *Id.* at 315–16.

<sup>92</sup> Edmonds, *supra* note 46, at 5. A salary cap typically limits what teams can spend on player salaries in a single year. In this instance, the owners proposed a system that allotted a gross percentage of revenues to the players. See HELYAR, *supra* note 62, at 441. The pay-for-performance proposal “would rank (and pay) younger players according to their stats.” *Id.*

<sup>93</sup> Edmonds, *supra* note 46, at 5.

ers' desired gains, but also enabled the players actually to regain some of the ground they had surrendered in 1985. The 1990 Basic Agreement defined a new category of "Super Two" players (those with more than two years of MLST who were also in the top 17% of service time<sup>94</sup> for players with between two and three years of MLST) who had access to arbitration like players having between three and six years of MLST.<sup>95</sup>

The 1994 negotiations were one of the more damaging encounters between players and owners, even leading to the cancellation of the World Series.<sup>96</sup> After extended in-season negotiations, the players went on strike in August.<sup>97</sup> In December, the owners declared a bargaining impasse and announced that they unilaterally would eliminate arbitration and impose a salary cap.<sup>98</sup> After the NLRB found that salary arbitration and free agency were mandatory bargaining subjects,<sup>99</sup> then-Judge Sonia Sotomayor issued a temporary injunction that restrained the owners from unilaterally imposing those changes,<sup>100</sup> and the Second Circuit affirmed.<sup>101</sup> The players ended their strike shortly after the issuance of Judge Sotomayor's injunction.<sup>102</sup> On November 26, 1996, the two sides finally reached an agreement on a new deal.<sup>103</sup>

The current century thus far has produced only minor clashes over and changes to the system. The 2000 season saw the expansion of panels to three arbitrators, rather than the single arbitrator who previously had decided

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<sup>94</sup> See 1990–1993 Basic Agreement, art. VI(F)(1) (1990).

<sup>95</sup> *Id.* This definition was slightly changed in the 2012 agreement to include players in the top 22% of service time. See 2012 Basic Agreement, art. VI(E)(1)(b).

<sup>96</sup> See generally Edmonds, *supra* note 46, at 5.

<sup>97</sup> *Silverman v. Major League Baseball Player Relations Comm.*, 67 F.3d 1054, 1058 (2d Cir. 1995).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1058–59. The teams and players "filed cross-charges of unfair labor practices" with the NLRB. *Id.* at 1058. The NLRB found that "these matters were related to wages, hours, and other terms and conditions of employment and were therefore mandatory subjects for collective bargaining." *Id.* at 1059. This finding was important because after the expiration of a collective bargaining agreement, "an employer may not alter terms and conditions of employment involving mandatory subjects until it has bargained to an impasse over new terms." *Id.* Thus, the clubs' unilateral changes constituted an unfair labor practice because the teams had not bargained to impasse.

<sup>100</sup> See *id.* at 1059.

<sup>101</sup> *Id.* at 1062.

<sup>102</sup> See Murray Chass, *Baseball Players and Owners Appear Close to New Deal*, N.Y. TIMES, Aug. 11, 1996.

<sup>103</sup> Gould, *supra* note 40, at 77.



cases.<sup>104</sup> In the recently completed 2012 Basic Agreement, the players secured slightly broader eligibility, as the Super Two category was expanded to include the players in the top 22% of service time of those players with between two and three years of MLST.<sup>105</sup>

### B. Salary Arbitration Mechanics

The current CBA provides that any player who has accrued the requisite MLST “may submit the issue of the Player’s salary to final and binding arbitration without the consent of the Club.”<sup>106</sup> Eligible players either have between three and six years of MLST, or fit in the Super Two category.<sup>107</sup> Thus, for either set of eligible players both the athlete and the team unilaterally can subject the other to binding arbitration. For any other player, the team and player jointly may consent to arbitration.<sup>108</sup> In the case of a player with less service time than the eligibility requirement, the owner unilaterally can set the player’s salary, so the owner has no reason to consent to arbitration. In contrast, there are instances where a player with more than six years of MLST and his team would consent to arbitration.<sup>109</sup>

The CBA lays out a timeline for the system.<sup>110</sup> There is a deadline by which the player or team must submit to arbitration,<sup>111</sup> and a slightly later

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<sup>104</sup> See Edmonds, *supra* note 46, at 6. Three-arbitrator panels had been used for some cases beginning in 1995, and the 2000 agreement made tripartite panels a permanent change. See *id.*

<sup>105</sup> See 2012 Basic Agreement, art. VI(E)(1).

<sup>106</sup> *Id.* art. VI(E)(1)(a).

<sup>107</sup> *Id.* art. VI(E)(1)(b). Under the current CBA, a Super Two is “a Player with at least two but less than three years of Major League service . . . [and] at least 86 days of service during the immediately preceding season . . . [who] ranks in the top 22% . . . in total service in the class of Players who have at least two but less than three years of Major League service . . . .” *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> David Ortiz of the Boston Red Sox provides a recent example. Ortiz accepted the team’s arbitration offer following the 2011 season after failing to secure a multi-year deal in free agency. See *David Ortiz, Red Sox Agree to Deal*, ESPN.COM (Feb. 13, 2012, 6:39 PM), [http://espn.go.com/boston/mlb/story/\\_/id/7570133/david-ortiz-boston-red-sox-agree-deal-arbitration](http://espn.go.com/boston/mlb/story/_/id/7570133/david-ortiz-boston-red-sox-agree-deal-arbitration). Ortiz and the Red Sox ultimately agreed to a one-year deal for \$14.575 million just before the arbitration hearing. *Id.*

<sup>110</sup> See 2012 Basic Agreement, art. VI(E)(2–5, 13).

<sup>111</sup> See *id.* art. VI(E)(2).

deadline by which the two sides must exchange their proposed figures.<sup>112</sup> The player and team may continue to negotiate even after these deadlines.<sup>113</sup>

Each side submits to the arbitrators a proposed salary for the upcoming season.<sup>114</sup> Although players and teams can continue negotiating after this exchange of figures, some teams use a “file-and-go” strategy, cutting off negotiations after the exchange of figures and committing to a hearing.<sup>115</sup>

Tripartite panels preside over salary arbitration hearings.<sup>116</sup> Each year, the MLB Labor Relations Department (“LRD”), representing the owners, and MLBPA jointly select the arbitrators.<sup>117</sup> At the hearing, the two sides submit a signed and executed UPC with a blank space left for the salary figure.<sup>118</sup> Each side has one hour to present its case, and a half hour for rebuttal.<sup>119</sup> The arbitrators “make every effort to” issue a decision within twenty-four hours of the hearing.<sup>120</sup> The CBA restricts the arbitrator’s decisions by providing that “the arbitration panel shall be limited to awarding only one or the other of the two figures submitted.”<sup>121</sup> Arbitrators do not issue written opinions.<sup>122</sup> As a practical matter, the dispute’s pivot point is the midpoint between the player’s request and the team’s offer.<sup>123</sup> If the panel finds the player is worth more than the midpoint, the player wins, and if the panel finds the player is worth less than the midpoint, the team

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<sup>112</sup> *See id.*

<sup>113</sup> *See id.* art. VI(E)(3).

<sup>114</sup> *Id.* art. VI(E)(4).

<sup>115</sup> *See* Edmonds, *supra* note 46, at 28–29. The Florida Marlins and Tampa Bay Rays are two teams who typically employ this strategy. *See id.* at 29. Some teams use “file-and-go” as an added incentive to wrap up salary disputes earlier in the off-season. Hearings require substantial preparation, so file-and-go teams treat the exchange date as the point at which they invest fully in preparing for the hearing. Committing to a hearing at that point may serve as an attempt to avoid potential wasted resources in preparing for a hearing only to settle just beforehand. *Id.* at 28–29.

<sup>116</sup> 2012 Basic Agreement, art. VI(E)(5).

<sup>117</sup> *Id.* If the collective bargaining agents fail to agree on a list of arbitrators, they request a list of arbitrators from the American Arbitration Association, then take turns striking names from the list until they are left with the desired number of arbitrators.

<sup>118</sup> *Id.* art. VI(E)(4).

<sup>119</sup> *Id.* art. VI(E)(7).

<sup>120</sup> *Id.* art. VI(E)(13).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Edmonds, *supra* note 46, at 33; ABRAMS, *supra* note 3, at 148.

wins.<sup>124</sup> After filling out the player's contract with the awarded salary, the arbitrators send the contract to the parties.<sup>125</sup> Arbitration awards allow for less creativity than negotiated contracts, in that they consist of a single number and allow neither bonus nor incentive provisions.<sup>126</sup>

The CBA outlines the factors that the panel may consider in making its determination of the player's value.<sup>127</sup> Permissible evidence may include: (1) the player's "contribution to his Club (including but not limited to his overall performance, special qualities of leadership and public appeal)"<sup>128</sup> in the preceding season (often called the platform year); (2) the player's "career contribution"; (3) the player's past compensation; (4) the salaries of comparable players<sup>129</sup>; (5) any "physical or mental defects" of the player; and (6) the Club's recent performance, which can include "[l]eague standing and attendance as an indication of public acceptance."<sup>130</sup> Conversely, the panel is prohibited from considering: (1) "[t]he financial position of the Player and the Club;" (2) commentary from the media, except for "recognized annual Player awards for playing excellence . . . ;" (3) prior offers made by either side; (4) costs of representation; and (5) "[s]alaries in other sports or occupations."<sup>131</sup>

It is worth contemplating how the evidence arbitrators can consider differs from the evidence that teams and players consider during internal negotiations and free agent negotiations. Players and teams can look at anything in deciding on an appropriate salary. For example, teams certainly will consider their own ability to pay a salary, while players often will take into account a team's chances for success, as well as the team's geographical location. In arbitration, a team's ability to pay is irrelevant. With regard to team success, arbitrators consider the player's contribution to the team's past record, but future projections are largely irrelevant in arbitration. Arbitration weighs past performance most heavily, comparing that production against

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<sup>124</sup> Edmonds, *supra* note 46, at 33.

<sup>125</sup> *Id.*; ABRAMS, *supra* note 3, at 164.

<sup>126</sup> Ethan Lock & Allan DeSerpa, *Salary Increases Under Major League Baseball's System of Final Offer Salary Arbitration*, 2 LAB. LAW. 801, 804 (1986); Jeffrey D. Schneider, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. CAL. L. REV. 797, 836 (1991).

<sup>127</sup> 2012 Basic Agreement, art. VI(E)(10).

<sup>128</sup> *Id.* art. VI(E)(10)(a).

<sup>129</sup> *Id.* The CBA requires the player to be compensated with "particular attention . . . to the contracts of Players with [MLST] not exceeding one annual service group" above that of the player. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* art. VI(E)(10)(b).

players with similar amounts of service time. When teams and players negotiate, they can consider any individualized factors. Arbitration limits the scope of information considered in setting a player's salary.

### C. *Impact of Salary Arbitration*

The advent of salary arbitration (in tandem with free agency) has contributed to significant increases in player compensation. Players nearly always receive substantial raises in arbitration.<sup>132</sup> In most cases, however, players still receive less than their "market value" or "marginal revenue product," defined as the extra revenue the player's performance generates for the club.<sup>133</sup>

It is no surprise that arbitration awards players large raises. Those in arbitration fall between the categories of players with little negotiating leverage and free agents who can negotiate with every team. Players eligible for arbitration have negotiating leverage for the first time.<sup>134</sup> As such, arbitration salaries should trend upward, bridging the distance between the reserve system and free agency. However, as mentioned above, this upward trend does not result from arbitration alone; rather, arbitration works in tandem with free agency to increase salaries by limiting the supply of players in free agency.<sup>135</sup> This artificial restriction on player supply increases competition among teams for those players; the higher salaries that result flow to arbitration players, who can draw comparisons to players one class above them in service time.<sup>136</sup> Players with five years of MLST can compare themselves to free agents, those with four years can compare themselves to those with five years, and so on down the line. Therefore, players entering arbitration for the first time typically receive a substantial increase in salary after earning close to the league minimum the prior year.<sup>137</sup>

A comparison of Ryan Howard, first baseman for the Philadelphia Phillies, and Prince Fielder, former first baseman for the Milwaukee Brewers (now with the Detroit Tigers), illustrates salary arbitration's impact.<sup>138</sup> Howard made his major league debut in 2005, winning the Rookie of the

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<sup>132</sup> John L. Fizel, *Play Ball: Baseball Arbitration After 20 Years*, 49 DISP. RESOL. J. 42, 45 (1994).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See *supra* notes 76–79 and accompanying text.

<sup>136</sup> See 2012 Basic Agreement, art. VI(E)(10)(a).

<sup>137</sup> Edmonds, *supra* note 46, at 17–19.

<sup>138</sup> *Id.* at 19.

Year award.<sup>139</sup> He received the National League Most Valuable Player award in 2006<sup>140</sup> and was eligible for salary arbitration as a Super Two after the 2007 season.<sup>141</sup> Fielder also reached the majors in 2005, just a little while after Howard, but missed the Super Two cutoff after the 2007 season, meaning he was not eligible for arbitration.<sup>142</sup> While Howard beat the Phillies in arbitration and earned \$10 million for the 2008 season,<sup>143</sup> the Brewers exercised their right to set Fielder's salary and paid him \$670,000.<sup>144</sup>

Salary arbitration has led some teams to adopt a strategy of signing players to long-term deals early in their careers.<sup>145</sup> These contracts provide the players with financial security, guaranteeing millions of dollars. However, if the player develops as strongly as both the player and team expect, he ultimately will be drastically underpaid relative to his market value. The player trades off possible future earnings for present guarantees. The club gains cost certainty, and sets itself up for a potential salary bargain if the player develops well, and simultaneously shoulders the risk of a financial loss if the player does not meet expectations.

### III. DISPUTE SYSTEMS DESIGN OVERVIEW

Before considering how baseball's salary arbitration system comports with DSD research, it is critical to introduce DSD as a body of research. To start, some definitions are needed. A dispute occurs when "one person (or organization) makes a claim or demand on another who rejects it."<sup>146</sup> A dispute system is the process or processes "adopted to prevent, manage or resolve a stream of disputes connected to an organization or institution."<sup>147</sup>

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<sup>139</sup> *Street Wins AL Rookie of Year; Howard Wins NL*, ESPN.COM (Nov. 7, 2005), <http://sports.espn.go.com/mlb/news/story?id=2216645>.

<sup>140</sup> *Howard Beats Out Pujols to Win NL MVP Award*, ESPN.COM (Nov. 22, 2006), <http://sports.espn.go.com/mlb/news/story?id=2669508>.

<sup>141</sup> *See Howard's \$10M Win in Arbitration Sets New High-Water Mark*, ESPN.COM (Feb. 22, 2008), <http://sports.espn.go.com/mlb/news/story?id=3256452>.

<sup>142</sup> *See* Edmonds, *supra* note 46, at 18–19.

<sup>143</sup> Jayson Stark, *Arbitration Payout Puts Howard in Uncharted Salary Territory*, ESPN.COM (Feb. 21, 2008), [http://sports.espn.go.com/mlb/spring2008/columns/story?columnist=stark\\_jayson&id=3257829](http://sports.espn.go.com/mlb/spring2008/columns/story?columnist=stark_jayson&id=3257829).

<sup>144</sup> Edmonds, *supra* note 46, at 19.

<sup>145</sup> *Id.* at 23–24.

<sup>146</sup> WILLIAM J. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 4 (1993).

<sup>147</sup> Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009).

In other words, a dispute system is a structured method to resolve specific types of disputes; DSD, then, is the research around disputes and dispute systems. The overall goal of DSD is to resolve disputes.<sup>148</sup> Turning “opposed positions . . . into a single outcome” marks the resolution of the dispute.<sup>149</sup> The system of MLB salary arbitration encompasses both the various stages of negotiations between player and team and the arbitration hearings themselves.

This DSD overview will begin with foundational concepts regarding disputes and dispute resolution. The discussion will then describe three theoretical models for designing and evaluating dispute systems. The interrelations between these models serve to structure an analysis of MLB salary arbitration.

#### A. *Dispute Elements: Interests, Rights, Power*

Professors William Ury, Jeanne Brett, and Stephen Goldberg (“Ury”) posit that “[i]nterests, rights, and power . . . are three basic elements of any dispute.”<sup>150</sup> Parties may choose to focus on any or all of these elements in resolving a dispute.<sup>151</sup> Parties can “(1) reconcile their underlying interests, (2) determine who is right, and/or (3) determine who is more powerful.”<sup>152</sup>

Within the three-element framework, “[i]nterests are needs, desires, concerns, fears—the things one cares about or wants.”<sup>153</sup> In a dispute, the parties take positions, defined as “the tangible items they *say* they want.”<sup>154</sup> In baseball, a player and team each take a position in demanding or offering a given salary. While money may represent the dominant interest for both sides, there are often more interests at play. The player may see the money as a means of getting respect from the team,<sup>155</sup> caring for his family, providing the freedom to pursue other interests, or simply as part of obtaining fair treatment. These interests underlie the player’s salary demand. The team, on

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<sup>148</sup> Lisa Blomgren Bingham et al., *Dispute Systems Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 4 (2009).

<sup>149</sup> URY ET AL., *supra* note 146, at 4.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 4–5.

<sup>153</sup> *Id.* at 5.

<sup>154</sup> *Id.*

<sup>155</sup> See ABRAMS, *supra* note 3, at 109 (describing the role of “respect” in Mo Vaughn’s contract negotiations with the Boston Red Sox during the 1998 season and following offseason).

the other hand, might worry about how other teams perceive it, or about setting a precedent for future salary negotiations with this player or other players.<sup>156</sup> The team also wants to attract fans to the ballpark and put a successful product on the field. Although the importance of money should not be understated, positions only scratch the surface of the parties' interests.

Common means of interest-focused dispute resolution include negotiation, where the parties exchange ideas and proposals to reach an agreement, and mediation, where a third party facilitates dialogue between the parties.<sup>157</sup> These methods rely on the parties sharing information with each other to help them understand the other side's underlying interests. Interest-based negotiation is also referred to as "*problem-solving negotiation*," so called because it involves treating a dispute as a mutual problem to be solved by the parties."<sup>158</sup>

In contrast to interest-based dispute resolution, a rights-based dispute resolution system relies "on some independent standard with perceived legitimacy or fairness to determine who is right."<sup>159</sup> Rights can be formal, like those in a contract. They also can be based on "socially accepted standards" that contemplate fairness.<sup>160</sup> For example, the Phillies' renewal of Ryan Howard in 2007 implicated notions of fairness. After Howard won the NL MVP award in 2006, the Phillies exercised their contractual right to renew his contract for \$900,000.<sup>161</sup> While Howard may have felt that his performance warranted a higher figure, the team may have felt that a salary at twice the league minimum, which they could have paid him under the rights of renewal, was sufficiently generous. The right to renew in this example is a formal right, and less concrete standards of fairness shaped the exercise of the right. The typical means of resolving a rights-based dispute is some form of adjudication, including arbitration.<sup>162</sup> Such adjudicative proce-

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<sup>156</sup> See *id.* at 114 ("Salary negotiations thus have a spillover effect on a ball club" because teams must negotiate with a full roster of players.). See also *id.* at 101 (discussing how the team wants to make all of its players happy).

<sup>157</sup> URY ET AL., *supra* note 146, at 6.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 7.

<sup>160</sup> *Id.*

<sup>161</sup> Ken Mandel, *Phillies Renew Howard's Contract*, MLB.COM (Mar. 3, 2007), [http://mlb.mlb.com/news/article.jsp?ymd=20070302&content\\_id=1822474&vkey=spt2007news&fext=.jsp](http://mlb.mlb.com/news/article.jsp?ymd=20070302&content_id=1822474&vkey=spt2007news&fext=.jsp)

<sup>162</sup> URY ET AL., *supra* note 146, at 7.

dures often involve a third party who renders a binding decision on the parties following presentations and argument.

Power, the third dispute resolution element, is “the ability to coerce someone to do something he would not otherwise do.”<sup>163</sup> Often, a party relying on power will “impose[ ] costs on the other side or threaten[ ] to do so.”<sup>164</sup> A hypothetical alteration of Ryan Howard’s negotiation with the Philadelphia Phillies prior to the 2007 season shows how either side’s reliance on power could have dramatically changed the tone of the negotiation. The Phillies could have threatened to renew Howard’s salary at an amount lower than \$900,000, while Howard could have threatened to hold out if the team did not meet his salary demands. In this hypothetical clash of power-based strategies, the prevailing party would likely be the one “who is less dependent on the other.”<sup>165</sup> Such resolutions, however, are not without costs, as explained below.

Interests, rights, and power necessarily interact. Ury illustrates these elements as three concentric circles, with interests inside of rights inside of power, explaining that “[t]he reconciliation of interests takes place within the context of the parties’ rights and power.”<sup>166</sup> Power and rights frame the range in which parties can negotiate over interests. In Howard’s case, for example, the team’s unilateral ability to set his salary drastically limited his ability to negotiate for higher pay based upon interests. Ury’s illustration proves useful as a structure for ordering processes, whereby rights and power serve only as backups when interest-based negotiations reach an impasse.<sup>167</sup>

Baseball’s processes emphasize different elements in this structure based on a player’s service time. For those players not yet eligible for arbitration, teams hold a strong power option because they unilaterally can renew the player’s contract.<sup>168</sup> Therefore, interest-based negotiations are more limited. A player’s only recourse, other than holding out, is to file a grievance

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 8.

<sup>166</sup> *Id.* at 9. See also Mnookin, *supra* note 70, at 968 (discussing how rules set negotiation boundaries in the divorce context, such that “legal rules . . . give each [party] certain claims based on what each would get” if they failed to reach agreement through negotiation).

<sup>167</sup> Bingham et. al., *supra* note 148, at 3.

<sup>168</sup> Ken Rosenthal & Jon Paul Morosi, *Marlins’ Salary Plan May Anger Union*, FOXSPORTS.COM (Feb. 23, 2012, 10:45 AM), <http://msn.foxsports.com/mlb/story/miami-marlins-renew-young-players-contracts-at-league-minimum-possible-dispute-022212>.



alleging that the team did not bargain in good faith.<sup>169</sup> However, there are costs to teams that simply rely on their power to renew a player's contract. For example, players could be angry, and relationships may suffer.<sup>170</sup> Arbitration offers players a rights-based option and checks a team's power, creating a more robust interest-based negotiation.<sup>171</sup>

The identity and character of the designer of any given system can impact the system's fairness and legitimacy. There are three basic options: one party can unilaterally institute a system, two parties can jointly negotiate a dispute resolution system, or a third party can impose such a system.<sup>172</sup> The latter two options generally produce fairer systems than unilateral design.<sup>173</sup> In MLB, the league and the Players Association collectively bargain the contours of the salary arbitration process as part of the Basic Agreement. This structure allows the two sides to refine the system when they negotiate the underlying CBA.<sup>174</sup>

### B. *Evaluating Approaches to Dispute Resolution*

There are many different models for evaluating dispute resolution systems. Three in particular help to frame this analysis: cost-benefit, procedural justice, and structural assessment. They are not mutually exclusive, but complement each other by focusing on different aspects of the analysis. Ury's cost-benefit analysis includes four criteria: transaction costs, satisfaction with outcomes, relationship effects, and resolution durability.<sup>175</sup> Procedural justice literature examines parties' perceptions of process fairness.<sup>176</sup> Finally, Professors Smith and Martinez conduct a structural assessment that analyzes a system's goals, processes, stakeholders, necessary resources, and success and

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*; see also Jeff Euston, *Contract Renewal Round-Up: Players 0-3 Years*, THE BIZ OF BASEBALL (Mar. 19, 2007), [http://bizofbaseball.com/index.php?option=com\\_content&task=view&id=897&Itemid=41](http://bizofbaseball.com/index.php?option=com_content&task=view&id=897&Itemid=41) (using the 2007 Howard negotiation to describe the frustration that can result from unilateral renewal).

<sup>171</sup> See Mnookin, *supra* note 70, at 997 (stating that background factors, including "the preferences of the parties, the entitlements created by law, transaction costs, attitudes towards risk, and strategic behavior will substantially affect the negotiated outcomes.").

<sup>172</sup> Bingham et al., *supra* 148, at 6.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 9.

<sup>175</sup> URY ET AL., *supra* note 146, at 11.

<sup>176</sup> See Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753 (2004).

accountability.<sup>177</sup> These complementary models guide an evaluation of MLB salary arbitration.

### 1. Ury Cost-Benefit Analysis

Ury conducts a cost-benefit analysis based on a system's transaction costs, the parties' satisfaction with the outcomes, the effects on the relationship between the parties, and the recurrence of disputes.<sup>178</sup> Transaction costs are the "costs of disputing."<sup>179</sup> These costs range from economic costs to opportunity costs to the emotional energy expended.<sup>180</sup> The different categories overlap. For example, in a salary dispute, a player could hold out and miss time. The player loses money while he has no contract and does not play, and both the team and player suffer without the player training and performing.<sup>181</sup> Even if a player misses no games, his performance can suffer.<sup>182</sup> As explained in more detail below, MLB salary arbitration resolves contractual disputes before spring training, and there are no holdouts, eliminating much of this type of opportunity cost.

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<sup>177</sup> See Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 Harv. Negot. L. Rev. 123, 128 (2009).

<sup>178</sup> URY ET AL., *supra* note 146, at 11.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> For comparison, in the National Football League ("NFL"), where there is no salary arbitration mechanism, there are holdouts every year. See Tim Dahlberg, *NFL Holdouts a Rite of Summer for Many Teams*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d80994e19&template=without-video&confirm=true> (last visited Oct. 17, 2012). In 2010, Vincent Jackson, then a wide receiver for the San Diego Chargers, held out the first seven games of the season in a salary dispute, and played in only six games that year. *Chargers Wide Receiver Will End a Long Holdout*, NY-TIMES.COM (Oct. 21, 2010), <http://www.nytimes.com/2010/10/22/sports/football/22nfl.html>. The Chargers suspended Jackson an additional three games upon his return.

<sup>182</sup> In an example drawn from the NFL, Philadelphia Eagles wide receiver DeSean Jackson held out the first eleven days of training camp prior to the 2011 season. *DeSean Jackson Holdout Was a Win-win*, PHILLY.COM (Aug. 9, 2011), [http://articles.philly.com/2011-08-09/sports/29867536\\_1\\_eagles-training-camp-desean-jackson-control-contracts](http://articles.philly.com/2011-08-09/sports/29867536_1_eagles-training-camp-desean-jackson-control-contracts). He subsequently had the lowest receiving yard and touchdown totals since his rookie year. *DeSean Jackson Stats*, ESPN.COM, [http://espn.go.com/nfl/player/stats/\\_/id/11283/desean-jackson](http://espn.go.com/nfl/player/stats/_/id/11283/desean-jackson) (last visited Mar. 24, 2012). The Eagles stumbled to an 8-8 record. *Philadelphia Eagles 2011 Schedule*, ESPN.COM, [http://espn.go.com/nfl/team/schedule/\\_/name/phi/year/2011](http://espn.go.com/nfl/team/schedule/_/name/phi/year/2011) (last visited Oct. 17, 2012).

Ury's second factor, satisfaction with outcomes, assesses the extent to which an outcome meets the parties' interests.<sup>183</sup> It asks whether the parties perceive both the outcome and the process that led to the outcome as fair.<sup>184</sup> Ury's third factor, relationship effects, looks at the impact of the dispute and its resolution on the parties' "ability to work together" moving forward.<sup>185</sup> The last factor, recurrence, assesses "whether a particular approach produces durable resolutions."<sup>186</sup> This factor includes whether the parties adhere to the resolution the process produces.<sup>187</sup>

## 2. Procedural Justice

Procedural justice literature conducts the same inquiry as Ury's second factor, satisfaction with outcomes. Procedural justice assesses parties' perceptions of process fairness. It posits "that participant satisfaction with outcomes is a function of opportunities to control and participate in the process, present views, and receive fair treatment from the [decision-maker]."<sup>188</sup> Fairness of the process, apart from the actual result, independently impacts parties' satisfaction with the outcome.<sup>189</sup> Professor Nancy Welsh suggested there were four criteria that influenced perceptions of procedural justice;<sup>190</sup> other authors later labeled these criteria as voice, neutrality, trustworthiness, and dignity.<sup>191</sup> Voice is the opportunity to tell one's story.<sup>192</sup> People tend to perceive a process as more fair when they can present their story to the decision-maker. Neutrality concerns the decision-maker, setting an ideal of one who is impartial, listens to the parties, is transparent about the process, and applies rules consistently across disputes.<sup>193</sup> Trustworthiness captures

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<sup>183</sup> URY ET AL., *supra* note 146, at 11.

<sup>184</sup> *Id.* at 12. Note that this inquiry is the same as that in the procedural justice literature. See *infra* Part III.B.2.

<sup>185</sup> URY ET AL., *supra* note 146, at 12.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 403 (2001).

<sup>189</sup> Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 5 (2011).

<sup>190</sup> See Welsh, *supra* note 176, at 763–64.

<sup>191</sup> Hollander-Blumoff & Tyler, *supra* note 189, at 5–6.

<sup>192</sup> Welsh, *supra* note 176, at 763.

<sup>193</sup> Hollander-Blumoff & Tyler, *supra* note 189, at 5.

the parties' perception of whether the decision-maker tried to achieve the right outcome in accordance with the process.<sup>194</sup> Dignity assesses the extent to which the parties perceive the process accorded them and their legal rights proper respect.<sup>195</sup>

These four factors influence parties' perceptions of process fairness independent of the distributional outcome. Essentially, people feel less bad about adverse outcomes if they perceive the process as fair and just.<sup>196</sup> More importantly, people are more likely to comply with the results of a fair process.<sup>197</sup>

### 3. Structural Assessment

Smith and Martinez conduct a structural assessment to evaluate potential dispute resolution systems for an organization.<sup>198</sup> This framework focuses on a system's goals, structure, stakeholders, resources, success, and accountability.<sup>199</sup> Goals include both the types of conflicts the system is intended to address and what the system seeks to accomplish.<sup>200</sup> Process includes the various options available within the system, as well as the extent to which the system contains disputes rather than having them spill into, for example, the legal system.<sup>201</sup> Stakeholders are the parties the system affects.<sup>202</sup> This metric considers stakeholder groups' relative powers, and the input those groups had in designing the system.<sup>203</sup> Resources are defined as the system's funding, and whether that funding provides sufficient support in light of the system's goals.<sup>204</sup> Finally, a system's success and accountability are determined by inquiring whether the system's operation, accessibility, and results are transparent.<sup>205</sup>

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 6.

<sup>196</sup> *Id.* at 5.

<sup>197</sup> *Id.*

<sup>198</sup> See Smith & Martinez, *supra* note 177, at 129.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* System goals are desired outcomes, ordered based on priority for purposes of later evaluation. *Id.* at 129–30.

<sup>201</sup> *Id.* at 130–31.

<sup>202</sup> *Id.* at 131.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 131–32.

<sup>205</sup> *Id.* at 132.

These three frameworks work in tandem to facilitate an evaluation of MLB's salary arbitration system. First, Smith and Martinez's structural assessment model helps to define the goals of the system. Second, the system's costs are considered under Ury's model, its fairness is assessed under the procedural justice literature, and structural assessment focuses on how the system captures the parties' interests as well as the actual results. This hybrid evaluation is explained below.

#### IV. EVALUATING MLB SALARY ARBITRATION

This evaluation starts with an application of Smith and Martinez's structural assessment model to describe the system's goals. The goals set the baseline against which the system can be evaluated, considering both cost-benefit principles and procedural justice. The system's success is assessed relative to those goals. The primary stakeholders considered in this assessment are the players and teams, and to a lesser extent, the business of baseball and the fans of the game. After laying out the system's goals, five specific characteristics of MLB Salary Arbitration are discussed. The first two draw upon cost-benefit analysis, the third utilizes the procedural justice paradigm, and the last two are informed by structural assessment. Considering the models discussed above, and the goals elaborated below, this system is a successful dispute resolution system. It encourages teams and players to settle salary issues on their own and provides an arbitration hearing as a fallback to ensure resolution of any dispute no later than spring training. The critiques levied against this system, discussed in section V, raise valid concerns. However, the characteristics alleged to be problems actually enhance the settlement imperative at the system's core. Thus, viewed as a whole, the system is an alternative dispute resolution success.

##### A. *Goals*

MLB salary arbitration's primary goal is to set a player's salary for the coming season. The broader goal is for the player and team to mutually agree upon the player's salary for the coming season and prevent prolonged disputes. The system also aims to treat the parties fairly to further player and team interests. Under the Smith and Martinez model, the disputes within the system's reach are salary disputes. If the matter reaches an arbitration panel, the player's salary for the coming season is the only question

considered.<sup>206</sup> Hearings are “designed to award players of comparable ability and experience a similar salary based on objective criteria by a neutral, disinterested decision maker.”<sup>207</sup>

### B. *Strengths of MLB Salary Arbitration*

Five examples serve to demonstrate the strength of MLB salary arbitration. First, the system lowers the costs of resolving salary disputes and avoids holdouts, comporting with cost-benefit analysis.<sup>208</sup> Second, in accordance with cost-benefit analysis, the system lowers costs by encouraging the parties to negotiate reasonably, and it incentivizes settlement prior to a hearing.<sup>209</sup> Third, it largely fits the procedural justice model because it is perceived as fair. Fourth, in line with structural assessment, it establishes a middle ground between the reserve system and free agency that advances the interests of players, owners, fans, and the game as a whole. Fifth, the outcomes demonstrate the system’s success at producing settlement prior to a hearing. In total, the combination of these factors ameliorates the potential negative effects of contentious salary negotiations.

#### 1. Cost-Benefit: Lowers the Costs of Dispute Resolution

MLB salary arbitration ensures the resolution of salary issues for eligible players prior to the start of spring training, minimizing costs under the Ury framework. Arbitration sets a preseason deadline for resolving disputes, so as to avoid significant disruptions to team and player.<sup>210</sup> In this regard, the system functions perfectly: “[u]nlike the experience in other professional sports, there are no ‘holdouts’ in baseball among players eligible to use the salary arbitration process.”<sup>211</sup> Furthermore, hearings serve as a rights-based

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<sup>206</sup> John E. Sands, *Baseball Arbitration and the ‘Engineering’ of Effective Conflict Management*, 13 DISP. RESOL. MAG. 10, 11 (2007).

<sup>207</sup> Donegan, *supra* note 10, at 204.

<sup>208</sup> Hopkins, *supra* note 9, at 331.

<sup>209</sup> ABRAMS, *supra* note 3, at 148–49.

<sup>210</sup> See Sands, *supra* note 206, at 10. (“It meets the twin objectives of encouraging good faith negotiations between clubs and players yet assuring that all covered players’ contracts will be completed and signed before the start of spring training.”); see also Hopkins, *supra* note 9, at 335 (“These disputes can breed team dissension, fan frustration and alienation, which may be reflected at the turnstiles and in the Nielson ratings.”).

<sup>211</sup> Roger I. Abrams, *Inside Baseball’s Salary Arbitration Process*, 6 U. CHI. L. SCH. ROUNDTABLE 55, 72 (1999).

backup when interest-based negotiations do not produce an agreement. This ordering fits Ury's preferred structure for lowering the costs derived from a dispute resolution system.<sup>212</sup> A hearing could deleteriously impact the player-team relationship, but that outcome is less costly than having the dispute linger into the season.<sup>213</sup> These relationship concerns will be discussed in more detail below, but it is important to note that there are no holdouts in MLB, unlike in the NFL, where they are prevalent.<sup>214</sup> Under the Ury framework, the system reduces transaction costs because players do not miss training time with the team. A hearing could have a negative impact on the relationship, but the system encourages the parties to settle prior to a hearing, and there are in fact few hearings each year. Similarly, settlement allows both parties to "win," while hearings have a winner and a loser.<sup>215</sup> Finally, the results are durable in that players and teams abide by the results of the process.

## 2. Cost-Benefit: Promotes Reasonable Bargaining and Settlement

The system encourages the parties to negotiate reasonably, reducing the costs of dispute resolution.<sup>216</sup> If the matter goes to arbitration, the panel must choose between the figures that the player and team submit.<sup>217</sup> Whichever party submits a figure closer to the player's "real market value" will prevail.<sup>218</sup> Contrasting this system to one where the arbitrator can select a compromise between the submitted figures illustrates the strengths of the MLB system. Under a compromising system, parties are more likely to submit aspirational numbers than reasonable figures.<sup>219</sup> In MLB's system, however, "the best final position is the more reasonable one."<sup>220</sup> Once the parties exchange numbers, they have a period of time prior to the hearing in which

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<sup>212</sup> URY ET AL., *supra* note 146, at 15.

<sup>213</sup> See Hopkins, *supra* note 9, at 335 n.254 (discussing examples of holdouts' negative impacts on the 1991 Cincinnati Reds). Additionally, as will be discussed in more detail below, the system's design encourages settlement, and the low number of cases each year suggests that it does so effectively.

<sup>214</sup> See *supra* notes 181–82.

<sup>215</sup> ABRAMS, *supra* note 3, at 149.

<sup>216</sup> *Id.* at 148; Conti, *supra* note 34, at 231.

<sup>217</sup> ABRAMS, *supra* note 3, at 148.

<sup>218</sup> *Id.*; see also Donegan, *supra* note 10, at 191–92 (describing how each side must submit a reasonable figure to the arbitrator or they will lose by default).

<sup>219</sup> ABRAMS, *supra* note 3, at 149; Conti, *supra* note 34, at 231.

<sup>220</sup> ABRAMS, *supra* note 3, at 149.

they can settle.<sup>221</sup> Therefore, the system forces the parties to commit to a position that must be reasonable to have any chance of winning, and then gives them time to bargain between those reasonable positions.

The system allots time for bargaining, and its design encourages settlement prior to a hearing.<sup>222</sup> First, as noted above, the final-offer arbitration leads to a convergence of offers, increasing the “opportunity for settlement.”<sup>223</sup> Second, the risk of damage to the player-team relationship (URY’s third prong) inherent to a hearing will incentivize settlement.<sup>224</sup> Teams’ presentations to the panel highlight the players’ flaws and performance deficiencies to demonstrate why the player’s value is closer to the team’s offer. Third, settling allows the parties to forge creative agreements.<sup>225</sup> While settled agreements can use incentive and bonus clauses to bridge differences in estimates of the player’s value, contracts that result from binding arbitration cannot include these options.<sup>226</sup> Parties also can agree on deals that cover multiple seasons.<sup>227</sup> Hearings produce a defined salary for only one year.<sup>228</sup> Fourth, arbitrators issue no opinions,<sup>229</sup> so neither side knows for certain what issues proved dispositive in the case.<sup>230</sup> Settling reduces these unknown variables, and allows the player and team to shape the agreement to their needs.<sup>231</sup>

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<sup>221</sup> See 2012 Basic Agreement, art. VI(E)(3).

<sup>222</sup> FizeL, *supra* note 132, at 43–44; ABRAMS, *supra* note 3, at 61–63.

<sup>223</sup> ABRAMS, *supra* note 3, at 149; see also Donegan, *supra* note 10, at 192; FizeL, *supra* note 132, at 44 (“Unreasonable salary proposals have less chance of acceptance in this no-compromise environment. Cognizant of this risk, each party will make concessions in order to submit what it believes to be a reasonable salary offer.”).

<sup>224</sup> See URY ET AL., *supra* note 146, at 12.

<sup>225</sup> ABRAMS, *supra* note 3, at 149.

<sup>226</sup> Cf. Hopkins, *supra* note 9, at 311. Bonuses are payments contingent upon certain events, such as the number of plate appearances for a batter or the number of starts for a starting pitcher. The parties may also include bonus clauses for traditional baseball awards, such as making the all-star team or winning the Cy Young or Most Valuable Player awards. *Id.*

<sup>227</sup> ABRAMS, *supra* note 3, at 149.

<sup>228</sup> See 2012 Basic Agreement, art. VI(E)(4, 13).

<sup>229</sup> *Id.* art. VI(E)(13) (“There shall be no opinion.”).

<sup>230</sup> FizeL, *supra* note 132, at 42.

<sup>231</sup> See Cecilia Morgan, *Employment Dispute Resolution Processes 2004*, 11 TEX. WESLEYAN L. REV. 31, 36 (2005) (“The solutions are more flexible because the parties choose how to implement their agreements.”).



### 3. Procedural Justice: Enhances Perceived Fairness

MLB salary arbitration comports with many of the procedural justice tenants. Such a design should improve parties' perceptions of the fairness of the process and results. As a threshold matter, the fact that the MLBPA and the league collectively bargained for the current salary arbitration system enhances the parties' perceptions of the system's fairness, as disputants generally experience mutually designed systems as fairer than systems that one party unilaterally imposes upon another.<sup>232</sup> The various salary negotiating phases meet the four procedural justice criteria of voice, neutrality, trustworthiness, and dignity.<sup>233</sup> The hearings might appear to fall short on neutrality and trustworthiness, but these features reflect an intentional design that serves the overall goal of facilitating settlement prior to a hearing.<sup>234</sup>

#### *a. Voice*

The system satisfies the voice criterion at each stage of the process. Interest-based negotiations allow each side to control its story's presentation and to participate in the decision-making process. If negotiations fail to produce a resolution, the parties go before an arbitration panel. Each side presents its story to the panel. While the criteria set forth in the Basic Agreement place some limits on permissible information,<sup>235</sup> players and teams are afforded wide latitude in making presentations.

#### *b. Neutrality*

Negotiations satisfy the neutrality criterion, but panels, while impartial, render decisions without explanation. A neutral system would have a decision-maker that is impartial, transparent about the process, and makes consistent decisions over time.<sup>236</sup> When player and team negotiate, they collectively serve the decision-making role. Each side is partial, but they exert joint control over the process. The MLBPA and LRD collectively select the

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<sup>232</sup> Bingham et. al., *supra* note 148, at 6. The individual disputants (in this case Player and Team) need not have designed the system themselves. An organization ostensibly representing their interests (MLBPA and the owners' representatives) collectively bargained the system. *Id.*

<sup>233</sup> For a description of the criteria, see Hollander-Blumoff & Tyler, *supra* note 189, at 5–6.

<sup>234</sup> See *infra* Parts IV.B.3.b–c.

<sup>235</sup> 2012 Basic Agreement, art. VI(E)(10).

<sup>236</sup> Hollander-Blumoff & Tyler, *supra* note 189, at 5.

arbitrators, and both have veto power in the selection process, so the player and team in any hearing know that someone representing their interests approved the panel. However, the fact that arbitrators issue no opinions, written or otherwise, makes individual decisions more opaque. It is difficult to know whether different arbitrators consistently apply the criteria listed in the Basic Agreement. This fact does not detract from the system for two reasons. First, it increases the incentive for parties to settle prior to a hearing. Settling allows the parties to retain control over the decision. If they do go to a hearing, they can be confident in the decision-maker's impartiality because their collective representative selected the panel. Second, the MLBPA and LRD can look at results across cases to analyze the consistency of outcomes.

*c. Trustworthiness*

Joint player and team participation during negotiations fulfills the trustworthiness criterion,<sup>237</sup> because each side retains a decisional veto and can seek to further its own interests. The lack of disclosed panel opinions raises similar problems for trustworthiness as it does for neutrality. Were the system trustworthy, participants would perceive arbitrators as trying to determine the player's actual value and choosing the submitted position closest to that value. The reasoning behind the result is opaque without opinions, so it is unclear whether the panel actually listens to the presentations. However, the MLBPA and LRD jointly select the arbitrators each season. If either side were concerned that an arbitrator was not trying to reach the right outcome according to the criteria specified in the Basic Agreement, they would be able to veto that arbitrator in subsequent years.<sup>238</sup> Thus, the mutual selection of arbitrators enhances the system's trustworthiness for the player and team participating in a given hearing. Additionally, arbitrators are "experienced neutrals, typically members of the honorary National Academy of Arbitrators, who have resolved labor grievance cases for decades."<sup>239</sup> Arbitrators have both a wealth of experience and substantial outside indicators of reliability.

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<sup>237</sup> "Trust" is the idea that the decision-maker seeks to reach a result that is right and good for the parties. See Hollander-Blumoff & Tyler, *supra* note 189, at 5–6.

<sup>238</sup> See 2012 Basic Agreement, art. VI(E)(5).

<sup>239</sup> ABRAMS, *supra* note 3, at 147.

*d. Dignity*

Finally, the system also respects the dignity of both parties during negotiations and at hearings. One unusual feature of these salary disputes is that the player cannot shop his services to another employer. In this industry, the player is tied to one team until he accumulates enough MLST to reach free agency, and the team wants the player to perform well. Both sides have incentives to treat the other with courtesy and respect. At hearings, arbitrators must treat the parties with dignity or they will not be selected in subsequent years. At a hearing, there is a danger that a player will perceive the team's presentation as disrespectful.<sup>240</sup> This adds to the incentive to settle, because each side would prefer not to have to go through that potentially uncomfortable process.<sup>241</sup>

#### 4. Structural Assessment: Balances Interests of Owners and Players

Salary arbitration is a compromise between the reserve system and free agency,<sup>242</sup> balancing team and player interests. Eligible players obtain salaries closer to their market values, and owners retain players at least until they accumulate six years of MLST.<sup>243</sup> With multiple minor league levels, MLB has a longer apprenticeship for players than the other major sports. Player development is expensive for teams. Arbitration nudges player salaries upward, but it also allows teams to retain players and recoup the costs and expenses of developing players in the minor leagues.<sup>244</sup> Additionally, delaying free agency serves the game's broader interests. Fans cheer for more than a uniform; they cheer for players. Arbitration keeps players with one team for a long time, giving fans a chance to develop deeper ties to players. Greater fan interest helps the business, because fans generate revenue. Similarly, the system enhances the league's competitive balance. If free agency came earlier, big market teams like the New York Yankees and Boston Red Sox would buy all the top young talent, while lower revenue teams like the

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<sup>240</sup> See ABRAMS, *supra* note 3, at 164.

<sup>241</sup> *Id.* at 149.

<sup>242</sup> Conti, *supra* note 34, at 223.

<sup>243</sup> *Id.* at 222–23.

<sup>244</sup> *Id.* Minor league teams do sell tickets and generate their own revenues. In many instances, teams keep players in the minor leagues for reasons other than a player's developmental benefit. See, e.g., Frankie Piliere, *Call Ups Begin As Super Two Season Passes*, SCOUTINGBASEBALL.COM (June 14, 2011), <http://sbb.scout.com/2/1079645.html>.

Pittsburgh Pirates and the Tampa Bay Rays would be perennially weak due to an inability to retain their top talent.<sup>245</sup>

These business benefits address the economic reality that players want to be paid what the market will bear and owners want to pay players less. Arbitration delays free agency for a couple of years, helping to increase the business's total revenues. Furthermore, the interest in wealth maximization, though perhaps predominant, is one of many interests. Players, for example, want to provide for their families, play well, be respected, and have good relationships with their teams and teammates. Owners want the team to be successful and profitable, which requires the players to perform to their highest capabilities. Owners also want to have good relationships with players. For the reasons described above, arbitration furthers these interests.

##### 5. Structural Assessment: High Settlement Rates Demonstrate Success

High settlement rates and low numbers of hearings each year demonstrate that the system effectively encourages the parties to reach negotiated agreements.<sup>246</sup> This effect has become more pronounced over time. From 1974 to 1993, 46% of eligible players filed for arbitration.<sup>247</sup> That means more than half of all eligible players settled before the deadline to file for arbitration. Nearly 80% (1398 out of 1765) of the players who filed for arbitration settled with their team prior to a hearing.<sup>248</sup> In this period, 91% of all eligible players resolved the salary dispute through negotiation. Only 9%, or 360 total cases, went before an arbitrator.<sup>249</sup> Twenty percent (360 out of 1765) of the players who filed for arbitration ended up before an arbitrator.<sup>250</sup> In this time period, there was only one year with fewer than ten hearings, with a peak number of cases in 1986 (35).<sup>251</sup> 1987 had the highest percentage of hearings, with 16% of all eligible players going before

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<sup>245</sup> See generally JONAH KERI, *THE EXTRA 2%* (2011).

<sup>246</sup> Ideally, one would examine the number of players eligible for arbitration each year as a baseline, and then compare the number of cases heard to that figure. However, that data is not readily available for the period from 1994–present. Therefore, this paper looks at the number of hearings relative to the number of players who filed for arbitration over the last eighteen years.

<sup>247</sup> Fixel, *supra* note 132, at 44. 1765 players filed for arbitration out of the 3825 eligible players. *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

an arbitrator.<sup>252</sup> Overall, there was an average of ninety-eight filings and twenty cases heard per year over these eighteen seasons.<sup>253</sup> Teams won 200 out of 360 cases, or just under 56%.<sup>254</sup>

From 1994 to 2004, 857 players filed for arbitration, an average of seventy-eight per year.<sup>255</sup> Only 101 of those cases went to a hearing,<sup>256</sup> for an average of roughly nine per year. Those 101 cases amount to less than 12% of the cases filed, meaning that in more than 88% percent of these salary disputes, the player and team were able to reach agreement without a hearing. That figure shows improvement upon the already impressive 20% rate at which players who filed for arbitration went before an arbitrator over the system's first eighteen years. The 12% rate does not account for the players eligible for arbitration who agreed with their teams prior to the filing deadline. The inclusion of that group would further demonstrate the system's success at encouraging teams and players to reach negotiated settlements.

Over the last eight years, the frequency of hearings has decreased further. Since 2005, there have been between three and eight arbitration hearings each year, with an average of approximately five-and-a-half hearings per season.<sup>257</sup> In 2011, 137 players were eligible for salary arbitration, and 119 filed.<sup>258</sup> Only three players, or 2.5% of those who filed, went to hearings.<sup>259</sup> In 2012 there were 172 arbitration eligible players,<sup>260</sup> and 142 players

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.* Arbitration was suspended from 1976–1977 due to the lack of a collective bargaining agreement. *Id.*

<sup>254</sup> *Id.* at 45.

<sup>255</sup> *Salary Arbitration Summary: 1974–2004 Seasons*, THE BIZ OF BASEBALL, <http://bizofbaseball.com/data/arbitrationresults.pdf>.

<sup>256</sup> *Id.*

<sup>257</sup> Maury Brown, *Arbitration Scorecard*, THE BIZ OF BASEBALL, [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=719&Itemid=116](http://bizofbaseball.com/index.php?option=com_content&view=article&id=719&Itemid=116).

<sup>258</sup> Maury Brown, *Salary Arbitration Filings*, THE BIZ OF BASEBALL, [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=492&Itemid=65](http://bizofbaseball.com/index.php?option=com_content&view=article&id=492&Itemid=65).

<sup>259</sup> Brown, *supra* note 257.

<sup>260</sup> Tim Dierkes, *2012 Arbitration Eligible Spending By Team*, MLBTradeRumors (Feb. 20, 2012, 2:38PM), <http://www.mlbtraderumors.com/2012/02/2012-arbitration-eligible-spending-by-team.html>.

filed.<sup>261</sup> In forty-four cases, the player and team exchanged numbers.<sup>262</sup> Only seven cases, or 5% of those filed, went before a panel.<sup>263</sup>

Setting aside the issue of eligibility, which has an enormous distributional impact, the system works for the players who can access it. The frequency of hearings generally has decreased over time, demonstrating that the system effectively encourages teams and players to resolve these disputes amongst themselves while providing a backup option to ensure the dispute's resolution prior to spring training.

## V. RESPONSE TO CRITIQUES OF MLB ARBITRATION

System critiques address either distributional issues or process issues. Though the process issues are the primary focus here, the distributional issues are briefly framed and addressed.

### A. *Distributional Issues*

The primary distributional critique is that the system creates a no-lose situation for players.<sup>264</sup> The system nearly always generates a substantial raise for the player. However, that effect is precisely the point of arbitration. Prior to becoming eligible, players make close to the league minimum salary. Players are vastly underpaid relative to their market values during their first three years, so it is no surprise that arbitration produces increased salaries.<sup>265</sup> Arbitration brings a player closer to his open market value without forcing the player's team to compete for his services.<sup>266</sup>

A related critique suggests that arbitration leads to salaries beyond that which a player could get on the open market.<sup>267</sup> There are three responses to this critique. First, Marvin Miller intended this effect, and the parties collectively bargained the system. Arbitration, in combination with free agency, does produce greater salaries than if every player were a free agent. Miller

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<sup>261</sup> Maury Brown, *Detailed Salary Info For 142 MLB Salary Arbitration Players*, THE BIZ OF BASEBALL, [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=5604:detailed-salary-info-for-142-mlb-salary-arbitration-players-available-for-download&catid=72:salary-arbitration&Itemid=183](http://bizofbaseball.com/index.php?option=com_content&view=article&id=5604:detailed-salary-info-for-142-mlb-salary-arbitration-players-available-for-download&catid=72:salary-arbitration&Itemid=183).

<sup>262</sup> Maury Brown, *Arbitration Figures*, THE BIZ OF BASEBALL, [http://bizofbaseball.com/index.php?option=com\\_content&task=view&id=599&Itemid=72](http://bizofbaseball.com/index.php?option=com_content&task=view&id=599&Itemid=72).

<sup>263</sup> See Brown, *supra* note 257.

<sup>264</sup> Conti, *supra* note 34, at 235.

<sup>265</sup> Fizel, *supra* note 132, at 45.

<sup>266</sup> See Conti, *supra* note 34, at 235–37.

<sup>267</sup> Donegan, *supra* note 10, at 193.

wisely bargained for arbitration knowing that the limited free agent market would drive up free agent salaries and benefit players as a whole. Arbitration allows players to achieve higher salaries without depressing the market. Second, arbitration benefits the business as a whole because, as described above, it facilitates fan interest and competitive balance, thereby offsetting the salary costs to owners with increased revenue. Third, teams are not bound to pay an arbitration eligible player. A team can decline to offer the player a contract, making him a free agent,<sup>268</sup> or if it loses arbitration it can attempt to trade the player.<sup>269</sup> These options give a team the freedom not to pay a player more than the team's view of the player's worth.

### B. Process Issues

#### 1. Single-Choice Arbitration

Baseball arbitration's defining feature is the single-choice model. Critics of this model argue that it constrains the arbitrator.<sup>270</sup> If both sides submit unreasonable figures, the arbitrator must pick one of them, so one side reaps a windfall while the other absorbs a substantial loss.<sup>271</sup> This hypothetical is no reason to alter this facet of the system. One cannot force parties to behave reasonably. One can only provide incentives to do so. Additionally, if both parties submit ridiculous numbers it heightens the settlement incentive, because each side faces a greater potential loss.

#### 2. Relationship Effects

Another feature distinguishing baseball from non-professional sports businesses is the fact that players are bound to a team. Player and team generally remain together after the resolution of the salary issue, sometimes for many years.<sup>272</sup> The player, in fact, has no choice in the matter prior to attaining free agency. Arbitration, some claim, risks harm to the player-team relationship, as teams are often forced to present information denigrat-

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<sup>268</sup> Conti, *supra* note 34, at 237.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 231.

<sup>271</sup> *See id.*

<sup>272</sup> For example, after Ryan Howard beat the Phillies in arbitration in 2008, he subsequently signed two contracts with the team; the latter one, signed in April of 2010, runs through the 2017 season. *See Philadelphia Phillies*, BASEBALL PROSPECTUS: COT'S BASEBALL CONTRACTS, [http://www.baseballprospectus.com/compensation/cots/?page\\_id=116](http://www.baseballprospectus.com/compensation/cots/?page_id=116) (last visited Oct. 17, 2012).

ing a player's performance, or even information that could humiliate a player.<sup>273</sup> Hearings temporarily place team and player in an adversarial forum, with no process in place to smooth the transition back to their joint goal of winning a championship.

The response to this critique is that a hearing serves as a backstop in case negotiations fail. Player and team ideally will resolve the dispute themselves, and the potential problems with a hearing merely serve to lower the best alternative to a negotiated agreement ("BATNA") for both sides. Furthermore, teams have an interest in maintaining good relationships with players, both for future negotiations and because they want players to play well. These interests serve to reduce antagonism even when disputes go before an arbitration panel.

### 3. Lack of Written Opinions

Arbitrators have only twenty-four hours to render a decision, and there are no written opinions.<sup>274</sup> These facets of the system, some claim, produce opaque decisions. Nevertheless, the outcomes have some precedential weight in future cases.<sup>275</sup> The critique concludes that written opinions would improve the system because both sides could see whether the arbitrators paid attention to the proper evidence and tried to reach the right outcome.

Despite arguments to the contrary,<sup>276</sup> MLB should not institute written opinions in arbitration because it would detract more from the system than it would add. Twenty-four hours is enough time for an arbitration panel with this level of expertise and experience to render thoughtful decisions.<sup>277</sup> More importantly, written opinions would not necessarily give the parties more information than they currently possess. Teams and players see and experience these presentations. They know what the other side argued, and it is logical to conclude that the prevailing party more successfully presented the data favorable to their position.

Additionally, arbitrators issuing written opinions would have reason to obfuscate their rationale to some degree. Either the MLBPA or the LRD can effectively fire an arbitrator by vetoing that arbitrator's selection in subse-

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<sup>273</sup> Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 55, 58 (2003).

<sup>274</sup> 2012 Basic Agreement, art. VI(E)(13).

<sup>275</sup> See *id.* art. VI(F)(12).

<sup>276</sup> Conti, *supra* note 34, at 245.

<sup>277</sup> See Abrams, *supra* note 3, at 147.



quent years.<sup>278</sup> The press almost certainly would get hold of any opinions, resulting in critiques and talk show fodder. For these reasons, arbitrators may not be completely forthright in opinions, thus adding little revelatory information to outcomes. Opinions also take time to write, and therefore would drag out the duration of disputes.

A related argument in favor of written opinions posits that arbitrators simply alternate between finding for players and teams to avoid the appearance of bias. Opinions, on the other hand, would force arbitrators to justify decisions. There are two responses to this critique. First, correlation does not amount to causation. An equally plausible explanation for the roughly equal results for players and teams is that the system's design forces the parties to submit reasonable figures that are fairly close together. Reasonable figures logically would produce roughly equal wins and losses over time. Second, some teams perform markedly better than others in arbitration. For example, the Washington Nationals have six wins against two losses in arbitration over the last eight years, while the Tampa Bay Rays have an unblemished five wins in that span.<sup>279</sup> The Miami Marlins, meanwhile, have one win against five losses in that time.<sup>280</sup> These sample sizes are certainly too small to draw firm conclusions, but it is doubtful that some teams would do consistently better than others if the results were random.

Finally, the lack of written opinions maintains mystery around the system, increasing the parties' incentives to resolve the dispute themselves, which is the system's primary goal. While written opinions might enhance the perceived fairness of hearings, they would detract from the system as a whole.

#### 4. Criteria

One final critique argues for changes in the arbitration criteria. There are two forms to this critique. First, that the Basic Agreement should prioritize the various criteria.<sup>281</sup> Second, that the criteria should better measure a player's value to the team.<sup>282</sup>

The league and MLBPA could collectively bargain changes to the Basic Agreement that would assign weight to certain criteria in arbitration. In particular, they could assign weight to recent performance, such as the most

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<sup>278</sup> See 2012 Basic Agreement, art. VI(E)(5).

<sup>279</sup> Brown, *supra* note 257.

<sup>280</sup> *Id.*

<sup>281</sup> Hopkins, *supra* note 9, at 332.

<sup>282</sup> See Gillard, *supra* note 77, at 139.

recent two years.<sup>283</sup> This issue is largely distributional, and one for the parties to resolve. It would impact arbitrators' determinations of player value, not the system's process.

Critics of the current system also suggest that arbitration could be adjusted to take account of teams' varying profitability.<sup>284</sup> Rather than comparing salaries of players with similar performance and service time, one could direct arbitrators to focus on the impact a player has on his team's profitability.<sup>285</sup> This change would be problematic because it would make the system less fair for both players and teams. Players have no control over the team that drafts them, and essentially would be punished for being drafted by a small market team. It would be unfair for large market, high-revenue teams to pay higher arbitration salaries for the same level of performance. Inconsistent outcomes across cases would undermine the system's trustworthiness under the procedural justice analysis.

## VI. CONCLUSION

MLB salary arbitration serves as a model for alternative dispute resolution systems. The MLBPA and the owners likely will continue to bargain over the distributional issue of which players have access to the system, but the system works for eligible players. It meets Ury's standard by emphasizing interest-based negotiations and providing a rights-based backup if negotiations should fail. It satisfies the procedural justice criteria for a fair dispute resolution system. Under the structural assessment model, it represents the interests of players and teams, and the results demonstrate its success.

That final point bridges theory to reality. There are no holdouts in baseball. Salaries disputes are resolved before spring training, minimizing distractions to both the player and team. The system effectively incentivizes settlement prior to hearing, and the results are corroborative. It treats the parties fairly and respectfully. MLB salary arbitration works for players, teams, and the business of baseball.

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<sup>283</sup> Hopkins, *supra* note 9, at 332.

<sup>284</sup> Gillard, *supra* note 77, at 139.

<sup>285</sup> *Id.*

