Is This Heaven? No, It's I.O.U.: Why Major League Baseball Must Modify Its Current Revenue-Sharing and Luxury-Tax Procedures

"There's nothing wrong with a baseball team turning a profit. What is wrong is a baseball team that cries poor while posting 18 consecutive losing seasons turning a profit. This difference is why the Pittsburgh Pirates, whose financial data from 2007 and 2008, the 15th and 16th of those seasons . . . are the target of such recrimination. While positioning themselves as the victim of 'the system' and trading away an entire starting lineup, the Pirates have been one of the most profitable teams in MLB, pocketing $29.3 million in 2007 and '08 combined, years in which they cashed revenue-sharing checks for a whopping $69.3 million."[1]

I. INTRODUCTION

In August 2010, Deadspin.com, a sports and entertainment website, published leaked financial records for a number of Major League Baseball (MLB) clubs, including the Pittsburgh Pirates, Florida Marlins, Tampa Bay Rays, and Los Angeles Angels of Anaheim.[2] According to these documents, the Pirates, one of the league's worst teams, raked in an operating profit upwards of $14.4 million in 2008.[3] MLB's current revenue-sharing system aided in the Pirates' accumulation of such a robust profit margin.[4] These leaked financial statements served to demonstrate what many baseball commentators have bemoaned for years: the current MLB revenue-sharing system is clearly dysfunctional, as evidenced by the fact that smaller market teams are realizing substantial profits while remaining consistently

1. Joe Sheehan, *Don't Blame the Pirates, Blame MLB's Revenue-Sharing System*, SI.COM (Aug. 25, 2010, 12:05 PM), http://sportsillustrated.cnn.com/2010/writers/joe_sheehan/08/25/pirates.finances/index.html.

2. *See* Tommy Craggs, *MLB Confidential: The Financial Documents Baseball Doesn't Want You to See, Part 1*, DEADSPIN.COM (Aug. 23, 2010, 10:00 AM), http://deadspin.com/5615096/mlb-confidential-the-financial-documents-baseball-doesnt-want-you-to-see-part-1 (providing detailed team financial information).

3. *See* PITTSBURGH BASEBALL PARTNERSHIP, CONSOLIDATED STATEMENTS OF OPERATION 3 (2008), *available at* http://deadspin.com/5615096/mlb-confidential-the-financial-documents-baseball-doesnt-want-you-to-see-part-1. In 2008, the Pirates finished the regular season last in their division. *See Regular Season Standings*, MLB.COM, http://mlb.mlb.com/mlb/standing/#20080930 (last visited Oct. 5, 2011) (listing final standings for 2008 regular season).

4. *See* PITTSBURGH BASEBALL, *supra* note 3, at 3 (listing amount received via revenue sharing, comprising approximately 25% of team's total revenues); *see also infra* notes 10-13 and accompanying (explaining basic premise of MLB revenue-sharing system).

uncompetitive.[5] Parties on both sides of the collective-bargaining process believe that the Pirates embody the "core problem" with a system that has been implemented over the last two decades, "step by arduous step."[6] In other words, the revenue-sharing structure that MLB ostensibly created to increase parity has simply produced "a welfare class of teams that can turn significant profits by keeping payroll down."[7]

The relationship between MLB owners and players has been notoriously rocky.[8] For over a century, both sides have been embroiled in a number of passionate labor disputes concerning everything from MLB's longstanding federal antitrust exemption to its infamous reserve system, and now revenue sharing.[9] MLB first implemented a revenue-sharing system to combat glaring payroll disparities between small- and large-market teams, which most owners believed to be the predominant source of competitive imbalance in the late 1990s and early 2000s.[10] Under the system, money generated from local revenue sources is transferred from presumably wealthier, large-market teams, such as the New York Yankees and the Boston Red Sox, to smaller-market teams such as the Pirates and the Marlins.[11] MLB also employs a competitive balance—or "luxury"—tax whereby a team whose salary exceeds a predetermined threshold must pay into a central fund, which is then distributed to less wealthy teams based on financial need.[12] MLB implemented this tax with an eye towards an overall depression in player salaries, much to the dismay of the Major League Baseball Players Association (MLBPA).[13] The league's revenue-sharing system will undoubtedly be a major point of contention between the players and ownership, and quite possibly among the

5. *See, e.g.*, Jon Berkon, Note, *A Giant Whiff: Why the New CBA Fails Baseball's Smartest Small Market Franchises*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 9, 15 (2007) (asserting revenue-sharing system failed to create competitive balance); Matthew Ryan McCarthy, Note, *Revenue Sharing in Major League Baseball: Are Cuba's Political Managers on Their Way Over Too?*, 7 VAND. J. ENT. L. & PRAC. 555, 556 (2005) (stating current redistribution system may not have intended effect on competitive balance); Jayson Stark, *Pushing for a Minimum Payroll Threshold*, ESPN.COM (Nov. 20, 2009, 7:31 AM), http://sports.espn.go.com/mlb/columns/story?columnist=stark_jayson&page=rumblings091119 (proposing solutions for currently flawed system).

6. *See* Sheehan, *supra* note 1 (outlining fundamental shortcomings of current system).

7. *Id.* (identifying ways in which current revenue-sharing system fails to implement system's original goals); *see also* Maury Brown, *Will Leaked MLB Financials Alter Revenue-Sharing?*, FANGRAPHS.COM (Aug. 25, 2010, 11:00 AM), http://www.fangraphs.com/blogs/index.php/will-leaked-mlb-financials-kill-revenue-sharing/ (observing current system provides little incentive for small-market teams to improve).

8. *See* Sheehan, *supra* note 1.

9. *See id.*

10. *See* Berkon, *supra* note 5, at 10.

11. *See id.* at 14; *see also* Stark, *supra* note 5 (designating Red Sox and Yankees as large-market payers and Pirates and Marlins as payees).

12. *See* Ryan T. Dryer, Comment, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 271 (2008).

13. *See* McCarthy, *supra* note 5, at 566 (arguing MLB instituted competitive balance tax in attempt to increase parity by limiting player salaries). The luxury tax is intended to deter wealthy teams from outbidding smaller-market teams for players, thereby decreasing player salaries in general. *See id.*

owners themselves, during the next collective-bargaining process.[14] Given professional baseball's long history of acrimonious labor negotiations, a smooth resolution seems highly unlikely.[15]

This Note will analyze the fundamental flaws in MLB's current revenue-sharing system, which has failed to bring about increased parity.[16] Part II.A will discuss MLB's formative years, including the genesis of its nonstatutory exemption from federal antitrust regulation as formed by the Supreme Court through a now-infamous trio of cases known as the "Baseball Trilogy."[17] These antitrust issues, and their relation to the National Labor Relations Act, which governs all agreements reached through collective bargaining, must be considered before any changes are made to MLB's current revenue-sharing structure.[18] Part II.C will then traverse the history of the collective-bargaining process between players and owners.[19] Part II.E will further discuss the fundamental structure and shortcomings of the current revenue-sharing system by comparing it to those of other prominent professional sports leagues, such as

14. *See* Ken Rosenthal, *Next Labor Deal Must Improve Balance*, FOXSPORTS.COM (Sept. 8, 2010, 2:25 AM), http://msn.foxsports.com/mlb/story/rosenthal-next-labor-deal-must-improve-competitive-balance-090710; *see also* Clark Spencer, *MLB, Union: Florida Marlins Need to Spend More Revenue-Sharing Money*, MIAMI HERALD, Jan. 13, 2010, http://soflamarlins.com/showthread.php?t=1439 (commenting on MLB requiring Marlins to adjust how team spends revenue-sharing dollars). This article references a December 2009 email by Red Sox owner John Henry in which he declared the need for a complete overhaul of MLB's revenue-sharing system citing the "'fact that over a billion dollars has been paid to seven chronically uncompetitive teams.'" Spencer, *supra*. In March 2011, John Henry revealed that MLB Commissioner Bud Selig fined him $500,000 for these comments. *See* Peter Abraham, *Henry Reveals $500,000 fine from MLB*, BOSTON.COM (Mar. 1, 2011, 4:54 PM), http://www.boston.com/sports/baseball/redsox/extras/extra_bases/2011/03/henry_reveals_5.html?s_campaign=8315#. Less than two weeks prior to Henry's disclosure of MLB's fine, Hank Steinbrenner, co-chairman of the Yankees, stated, "'We've got to do a little something about [the revenue-sharing system] and I know Bud (Selig) wants to. . . . Obviously we're very much allied with the Red Sox, and [New York] Mets and [Los Angeles] Dodgers and [Chicago] Cubs, in that area.'" Nick Cafardo, *Steinbrenner Sounds Off on Revenue Sharing; Criticizes Jeter*, BOSTON.COM (Feb. 21, 2011, 2:52 PM), http://www.boston.com/sports/baseball/redsox/extras/extra_bases/2011/02/steinbrenner_so.html#. Abraham also notes that, in the prior year, the Yankees and Red Sox contributed $130 million and $86 million, respectively, in revenue-sharing and luxury-tax dollars. *See id.*

15. *See generally*, Marc Chalpin, Comment, *It Ain't Over 'Til It's Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball*, 60 ALB. L. REV. 205 (1996) (outlining long and complex history of adversarial labor negotiations between players and ownership); *see also* William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61 (2004) (describing MLB's labor history as marred by conflict). Prior to 2002, a work stoppage accompanied negotiations surrounding each collective-bargaining agreement. *See* Gould, *supra*, at 62.

16. *See* Jayson Stark, *Revenue-Sharing System Gets Exposed*, ESPN.COM (Aug. 26, 2010), http://sports.espn.go.com/mlb/columns/story?columnist=stark_jayson&page=rumblings100826 (noting failures of current revenue-sharing system). In this article, Stark quotes a baseball authority who states, "'The real goal [of revenue sharing] is competitive balance. . . . It was not intended for big clubs to finance the operations of small-market teams.'" *Id.*

17. *See infra* Part II.A (discussing MLB's early antitrust exemption).

18. *See infra* Part II.B (describing tension between federal antitrust and labor law with respect to MLB).

19. *See infra* Part II.C (outlining MLB collective-bargaining negotiations as impacted by federal labor law).

the National Basketball Association (NBA) and the National Football League (NFL).[20] Finally, Part III will utilize this comparison to suggest potential improvements to MLB's revenue-sharing system, and discuss what legal recourse the players, owners, or both, may have moving forward.[21]

II. HISTORY

A. MLB's Formative Years

Baseball slowly emerged as a profitable professional sport during the latter half of the nineteenth century.[22] In the early years, players signed one-year contracts and negotiated with any interested team at the end of each season.[23] This free and open system had the effect of dramatically increasing player salaries.[24] In an effort to maintain control over ever-fluctuating rosters and payrolls, baseball's owners adopted the infamous "reserve rule" at a secret meeting on September 30, 1879.[25] The original reserve system allowed each team to prohibit five of its players from engaging in contract negotiations with other clubs.[26] Because the rule quickly and successfully reduced player mobility and salaries, the owners expanded the application of the reserve system to all major and minor league contracts.[27] The expanded reserve system effectively provided ownership with the "option of renewing a player's contract ad infinitum at a salary determined by the owner."[28] Thus, if a player did not agree with the terms provided unilaterally each year by the club, he had only two possible courses of action: continue to play begrudgingly for the same owner or retire from professional baseball altogether.[29] By instituting an expanded reserve clause, baseball's owners were able to successfully prevent professional baseball players from enjoying the ability to offer their services in

20. *See infra* Part II.E (analyzing and comparing revenue-sharing structures of MLB, NFL, and NBA).

21. *See infra* Part III (suggesting potential improvements to current structure and discussing remedies under federal antitrust and labor law).

22. *See* Chalpin, *supra* note 15, at 207 (examining professional baseball's business origins).

23. *See id.* (outlining labor structure leading to owners' imposition of "infamous reserve system").

24. *See* Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW. J. 183, 184 (1994) (examining baseball's original free agent system and its effect on player salaries). This system, "free agency in its purest form," caused owners great angst, as they believed that losing star players each year would lead to diminished fan interest and an ensuing decrease in profits. *See id.*

25. *See id.* (describing ownership concerns leading to implementation of professional baseball's reserve system).

26. *See id.* (examining circumstances surrounding baseball's first reserve rule).

27. *See* Chalpin, *supra* note 15, at 208 (outlining adoption of expanded reserve system).

28. Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 20 SETON HALL J. SPORT L. 301, 304 (1992) (examining effects of expanded reserve system on players' negotiation rights). The oppressive effects of the reserve system coupled with the owners' unfair tactics eventually led the players to seek relief in the courts. *See id.* at 304-05.

29. *See id.* at 304 (summarizing players' potential recourse, or lack thereof, resulting from imposition of expanded reserve clause).

a competitive, open market.[30] Yet such an obvious restraint on free trade and services would have seemed to constitute "a perfect example of a Sherman Act violation and an easy way for the players to confront the owners."[31]

Beginning in the 1880s, the United States underwent an industrial revolution, during which business tycoons, such as John D. Rockefeller, were able to create "megacorporations" in an effort to monopolize entire industries.[32] In 1890, Congress took direct aim at these monopolies by passing the Sherman Antitrust Act (Sherman Act), which was designed to encourage fair trade and competition in the open market.[33] On its face, the Sherman Act appeared to provide baseball players with a federal cause of action against the owners for their decision to restrain competition for player services.[34] Historically, however, both the United States Supreme Court and Congress have deemed the business of professional baseball to be outside the scope of federal antitrust law, and thus immune from attack under the Sherman Act.[35]

The United States Supreme Court first recognized, and subsequently developed, baseball's federal antitrust exemption through three landmark decisions known as the "Baseball Trilogy."[36] In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,[37] the first case in the trilogy, the plaintiff, a member club of the defendant league, brought a claim for treble damages against the two major professional baseball leagues in existence at the time, alleging a conspiracy among owners to monopolize the business of baseball.[38] Writing for the majority, Justice Holmes held that the business of baseball did not fall within the purview of federal antitrust

30. *See* Chalpin, *supra* note 15, at 210 (arguing reserve clause stifled competition for player services).

31. *Id.* (noting players' labor situation ripe for antitrust action).

32. *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 Collective Bargaining and the Impact of the Curt Flood Act of 1998*, 15 OHIO ST. J. ON DISP. RESOL. 445, 447 (2000) (describing economic climate leading to passage of Sherman Antitrust Act).

33. *See* Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1 (2006)) (declaring illegal any contract or conspiracy aimed at, or effective in, restraining free trade); *see also* Bautista, *supra* note 32, at 447-48 (discussing Congress's purported goals in passing Sherman Act).

34. *See* Sherman Antitrust Act § 1; *see also* Chalpin, *supra* note 15, at 210 (describing reserve clause as competitive restraint on trade); McCarthy, *supra* note 5, at 556 (describing Sherman Act antitrust suit as most common form of enforcement against uncompetitive practices).

35. *See* McCarthy, *supra* note 5, at 556-57. Although Congress created no specific legislation, years of inaction concerning the topic reflected a conscious decision to preserve the status quo. *See id.*; *see also infra* note 36 and accompanying text (introducing Supreme Court decisions developing antitrust exemption).

36. *See generally* Flood v. Kuhn, 407 U.S. 258 (1972) (limiting owners' application of antitrust exemption to reserve clause only); Toolson v. N.Y. Yankees, 346 U.S. 356 (1953) (holding professional baseball not subject to federal antitrust regulation); Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922) (holding business of professional baseball outside scope of Sherman Act); *see also* Bautista, *supra* note 32, at 450 (examining "Baseball Trilogy" with regard to history of baseball's antitrust exemption).

37. 259 U.S. 200 (1922).

38. *See id.* 207 (explaining plaintiff's antitrust claim).

regulation because baseball was not part of interstate commerce.[39] The Court acknowledged that players occasionally crossed state lines for purposes of league competition, but dismissed the practice as immaterial, analogizing such travel to that of lawyers crossing state lines to try a case.[40] More than thirty years later, in *Toolson v. New York Yankees*,[41] the Court affirmed *Federal Baseball*, reasoning that because the decision had stood for such a length of time, Congress had clearly decided against taking any action regarding baseball's antitrust exemption.[42] Almost twenty years later, in the final act of the "Baseball Trilogy," Curt Flood, a major league baseball player who had been traded to another team without his knowledge or consent, challenged the propriety of baseball's reserve clause.[43] Flood argued that the reserve clause subjected professional baseball players to "a form of peonage and involuntary servitude" that constituted a violation of federal civil rights and antitrust law.[44] The Court rejected this argument, choosing instead to reaffirm baseball's antitrust exemption, but limited the application of the exemption to the reserve clause.[45] The Court referred to *Federal Baseball* and *Toolson* as "an aberration" and concluded that baseball was engaged in interstate commerce, but, given its unique history, the business of baseball still required such a narrow exemption.[46]

39. *See id.* at 208-09 (characterizing business of baseball as "purely state affair"). Because the reach of the Sherman Act extends only to practices affecting interstate commerce, purely intrastate activities are beyond its scope. *See* Sherman Antitrust Act § 1.

40. *See Fed. Baseball*, 259 U.S. at 208-09 (reasoning interstate transport of players merely incidental to baseball's nature as intrastate affair).

41. 346 U.S. 356 (1953).

42. *See id.* at 357 (determining any change to baseball's antitrust status should be made legislatively). The majority, in a brief opinion, declined to overrule the exemption because baseball had been "left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." *Id.* In a lengthy dissent, Justice Burton argued that the business of professional baseball was engaged in interstate commerce, and therefore should not be exempt from federal antitrust regulation. *See id.* at 357-58 (Burton, J., dissenting). Justice Burton reasoned that developments over the past thirty years in the areas of radio, television, and transportation allowed baseball to reach across state lines to an expanded audience, thus rendering the sport part of interstate commerce and within the scope of the Sherman Act. *See id.*

43. *See* Flood v. Kuhn, 407 U.S. 258, 265-66 (1972). Curt Flood argued that he should have the right to become a free agent and negotiate with any interested team. *See id.* at 265.

44. *See id.* at 265-66.

45. *See id.* at 283 (emphasizing Court's reluctance to overrule antitrust exemption in light of congressional inaction). The Court also noted that since *Toolson*, other professional sports such as football, basketball, and boxing were all determined to be engaged in interstate commerce. *Id.* at 282-83.

46. *See id.* at 282-83 (summarizing baseball's unique characteristics and history as impetus for antitrust exemption). The Court reasoned that *Federal Baseball* and *Toolson* were outliers because similar professional sports had since been deemed to be engaged in interstate commerce and thus subject to federal antitrust laws. *See id.* The Court, as it did in *Toolson*, argued that some form of exemption was necessary because, historically, baseball had been allowed to develop free from federal antitrust scrutiny. *See id.* In a poignant dissent, Justice Douglas noted, "While I joined the Court's opinion in Toolson v. New York Yankees, Inc., I have lived to regret it; and I would now correct what I believe to be its fundamental error." *Id.* at 286 n.1 (Douglas, J., dissenting) (internal citations omitted).

B. The History of Baseball and Labor Law

In recent years, players and owners have relied on collective bargaining to negotiate and resolve major labor issues.[47] Yet, the history of MLB's collective-bargaining processes illustrates the historical tension between federal antitrust and labor law.[48] As discussed above, Congress designed the Sherman Act to prohibit industry monopolization and to prevent the formation of conspiracies to control and restrain trade.[49] Less than twenty years after Congress passed the Sherman Act, the Supreme Court characterized organized labor as a conspiracy against trade and therefore a violation of the Sherman Act.[50] Congress responded to this ruling shortly thereafter by passing the Clayton Antitrust Act, situating organized labor outside the scope of the Sherman Act.[51] Congress further reinforced its position by passing the Norris-LaGuardia Act, which outlined a federal policy in favor of organized labor.[52] Finally, in 1935, Congress enacted the National Labor Relations Act (NLRA), instituting a federal policy in favor of agreements between labor and management reached via the collective-bargaining process.[53] Congress

47. *See generally* Bautista, *supra* note 32; Chalpin, *supra* note 15 (summarizing MLB's historical reliance on collective-bargaining process).

48. *See* Matthew J. Parlow, *The NBA and the Great Recession: Implications for the Upcoming Collective Bargaining Agreement Renegotiation*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 195, 214 (2010) (explaining antitrust law intended to prohibit collusive business practices and unfair market control). *Compare Flood*, 407 U.S. at 294 (Marshall, J., dissenting) (arguing collective-bargaining process operates to "'restrain' trade"), *with* Brown v. Pro Football, Inc., 518 U.S. 231, 253 (1996) (Stevens, J., dissenting) (citing Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co., 353 U.S. 30, 40 (1957)) (explaining labor law assumes collective negotiations lead to achievement of highest price for workers' services).

49. *See supra* note 33 and accompanying text (discussing legislative purpose of Sherman Act).

50. *See* Loewe v. Lawlor, 208 U.S. 274, 305 (1908) (holding labor union designed to restrain and control markets for production).

51. Clayton Antitrust Act, ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. § 17 (2006)). The statute specifically states, "The labor of a human being is not a commodity or article of commerce." *Id.* § 6, 38 Stat. at 731.

52. *See* Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-108 (2006)) (introducing clear federal policy in favor of organized labor). In *United States v. Hutcheson*, the Court construed the Norris-LaGuardia Act as according labor unions a broad exemption from federal antitrust law. *See* 312 U.S. 219, 231-32 (1941). Writing for the majority, Justice Frankfurter determined that labor unions may form a united front to pressure employers economically, "[s]o long as a union acts in its self-interest and does not combine with nonlabor groups." *Id.* at 232. The Court's holding proved monumental, as it assured union workers the ability to unite and negotiate for increased wages and improved working conditions. *See* Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1669-70 (1997). Furthermore, *Hutcheson* insulated labor unions from exposure to potential "treble damages, injunctions, or criminal prosecutions under the [federal] antitrust laws." *Id.*

53. *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)) (explaining need for protection of collective-bargaining process). The statute's text outlines Congress's intent to establish a reasonable degree of bargaining equality in the negotiation process between workers and management. *See id.* Furthermore, in 1965, the Supreme Court held that agreements reached through mandatory collective bargaining existed outside the scope of federal antitrust regulation. *See generally* Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (plurality opinion) (holding agreement reached via mandatory collective-bargaining process exempt from Sherman Act coverage).

implemented the NLRA with an eye towards curbing unfair labor practices, facilitating the flow of commerce, and promoting the rights of laborers to self-organize and strike.[54] The NLRA also established the National Labor Relations Board (NLRB), the administrative body responsible for enforcing the NLRA's mandates, overseeing collective-bargaining issues affecting commerce, and determining which labor organizations should receive protection under the NLRA.[55]

Despite the enactment of the NLRA in 1935, the players did not form the first MLBPA until 1954.[56] In its nascent years, the MLBPA merely served as an avenue of communication for the players to collectively present their grievances to the owners.[57] Over the next ten years, the owners had the option of listening to player grievances and unilaterally deciding whether to take any action.[58] The MLBPA did not emerge as a legitimate collective-bargaining body until 1966, when it hired Marvin Miller, former chief negotiator for the United Steel Workers of America, as its executive director.[59] Under Miller, the MLBPA finally had the leadership necessary to make significant progress in the collective-bargaining process.[60] Three years later, in 1969, the NLRB further emboldened the MLBPA's position by asserting jurisdiction over professional baseball's collective-bargaining process.[61] The NLRB reasoned that the business of baseball affected interstate commerce and was therefore subject to the protections of the NLRA.[62] The NLRB also concluded that

54. *See* National Labor Relations Act §§ 7, 13, 49 Stat. at 452, 457.

55. *See id.* §§ 3, 9, 11, 49 Stat. at 451, 453, 455 (establishing jurisdiction and role of NLRB).

56. *See* William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL'Y J. 283, 286 (2007) (characterizing formation of first MLBPA as response to player dissatisfaction concerning pension funds). The concept of a players' union traces back to 1885, when players formed the "National Brotherhood of Baseball Players" in an effort to eliminate a $3,000 player salary maximum and to present a united front against a reserve clause implemented unilaterally by the owners. *See* Gould, *supra* note 15, at 65.

57. *See* Bautista, *supra* note 32, at 455 (discussing MLBPA's primary functions in early years).

58. *See id.* (describing early MLBPA as relatively powerless due to one-sided nature of existing negotiation structure).

59. *See id.* (characterizing Miller's hiring as seminal moment for MLBPA). Miller served as the head of the United States Steelworkers of America for sixteen years and was renowned for his relentless negotiating tactics. *See id.* During Miller's term as Executive Director of the MLBPA, the player pension fund tripled and both the minimum and average player salaries more than doubled. *See* Gould, *supra* note 15, at 66.

60. *See* Bautista, *supra* note 32, at 455 (discussing progress made as result of Miller's hiring).

61. *See* Am. League of Prof'l Baseball Clubs, 180 N.L.R.B. 190, 190-91 (1969). The NLRB found jurisdiction was proper based on two recent Supreme Court decisions holding that professional football and boxing were engaged in interstate commerce. *See id.* (determining baseball no longer considered outside interstate commerce in light of these decisions); *see also* Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957) (ruling business of professional football part of interstate commerce); United States v. Int'l Boxing Club of N.Y., Inc., 348 U.S. 236, 242-43 (1955) (holding professional boxing engaged in interstate commerce). The NLRB concluded that characterizing baseball as part of interstate commerce would "best effectuate the mandates of the [NLRA], as well as national labor policy." *Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. at 191.

62. *See Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. at 192 (finding jurisdiction proper under NLRA because employer [MLB] engaged in interstate commerce). Under the NLRA, the players enjoyed the

MLB's internal system for resolving disputes directly contravened the spirit of the NLRA.[63] The Board concluded that the grievance system—whereby the Commissioner, who was appointed solely by the owners, heard all player grievances—unfairly favored the owners and was unlikely to resolve disputes impartially.[64]

C. MLB's History of Collective Bargaining

The NLRB's 1969 ruling opened the door to the modern era of collective bargaining.[65] The following year, the MLBPA negotiated its first collective-bargaining agreement (Basic Agreement) armed with the collective labor rights granted by the NLRA.[66] The Basic Agreement established a dispute-resolution system permitting a player to submit his grievance to a panel of independent, neutral arbitrators.[67] Two years later, the players went on strike for the first time, protesting the lack of improvement to their pensions and medical benefits.[68] This strike was symbolic because it indicated to ownership that the MLBPA was a formidable negotiating opponent.[69] It also set the stage for the pivotal 1973 Basic Agreement.[70] This Basic Agreement was significant because, for the first time, the MLBPA negotiated the right to submit salary grievances to an impartial arbitrator, ending the owners' ability to decide player salaries unilaterally.[71]

Shortly thereafter, in 1975, two players submitted grievances to an

right to bargain collectively through chosen representatives and to have their unfair labor practice claims against ownership heard by the NLRB. *See supra* note 54 and accompanying text; *see also* Bautista, *supra* note 32, at 455-56 (discussing impact of NLRB's ruling on negotiations between owners and players).

63. *See Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B at 191 (holding NLRA prohibits NLRB's deferment to dispute resolution system established unilaterally).

64. *See id.* (determining unilateral system unlikely to prevent or resolve labor disputes). The NLRB decision reflects the NLRA policy in favor of dispute-settlement systems, achieved through bilateral negotiation, and moderated by a neutral arbiter. *See id.*

65. *See* Bautista, *supra* note 32, at 456 (explaining NLRB decision afforded players basic labor rights under NLRA).

66. *See id.* (discussing circumstances surrounding 1970 Basic Agreement).

67. *See* Hopkins, *supra* note 28, at 307 (outlining 1970 Basic Agreement's changes to grievance procedure). This shift in the agreement—requiring an independent arbitrator—marked the first time in baseball's history that neither the owners nor the Commissioner had control over the adjudication of player grievances. *See id.*

68. *See id.* (discussing circumstances leading to 1972 player strike). The NLRA explicitly grants labor unions the right to implement a concerted strike, while still remaining beyond the reach of federal antitrust law. *See* National Labor Relations Act, 29 U.S.C. § 163 (2006) (acknowledging workers' right to strike).

69. *See* Hopkins, *supra* note 28, at 307 (describing strike as symbolic of players' "solidarity").

70. *See id.*; *see also* McCarthy, *supra* note 5, at 558 (referring to 1973 Basic Agreement as "major victory" for players).

71. *See* Bautista, *supra* note 32, at 457. This new right—having an independent arbitrator hear salary grievances—set the stage for the practical destruction of the infamous reserve clause. *Id.* Three members comprised the arbitration panel: one appointed by the MLBPA, one appointed by the owners, and an independent chairman agreed upon by both sides. *See* Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 618 (8th Cir. 1976).

independent arbitrator pursuant to the 1973 Basic Agreement, requesting the right to effectively eliminate the infamous reserve clause by allowing a player to negotiate with any interested team.[72] In a landmark decision, arbitrator Peter Seitz interpreted the 1973 Basic Agreement as affording ownership the right to unilaterally renew a player's services for only one year beyond the term of his original contract.[73] Because both players who submitted the grievances had already fulfilled this obligation, Seitz ruled them eligible to negotiate with any MLB team, thus creating modern-day free agency in baseball.[74] Consequently, in one decision, a private arbitrator accomplished what the courts had been unable to do because of the antitrust exemption constraints fostered by the "Baseball Trilogy."[75] The next Basic Agreement in 1976 embodied the elimination of the reserve clause, affording the players the right to become free agents after six years of major-league service.[76]

The 1981 Basic Agreement, ratified after a fifty-day work stoppage, attempted to address the effect of the recent increase in player movement on clubs.[77] The agreement allowed for significant player mobility, but implemented a system designed to compensate teams for players lost to free agency.[78] The system divided departing players into two pools based on past performance: a team losing a player in the "A" pool would receive an extra pick in the next year's amateur draft, as well as a pick from a compensatory pool of players; the loss of a "B" pool player garnered two extra selections in the following draft.[79] The owners believed that such a system would help preserve the competitive balance among the teams.[80]

In 1985, the owners first introduced the idea of implementing a salary cap and revenue-sharing system in an effort to combat rising player salaries.[81] In response to this proposal, the players went on strike for two days and forced the owners to withdraw the salary cap proposal before finally reaching an

72. *See Kan. City Royals Baseball Corp.*, 532 F.2d at 618 (describing players' rationale for grievance submissions). The MLBPA argued that the owners should only be able to renew a player's services for one year following the expiration of the original contract, whereas the owners believed that the reserve clause inured in them the right to unilaterally renew the contract for a "reasonable number of years" until a new agreement could be reached. *See id.* at 618-19.

73. *See id.* at 619.

74. *See id.* (reiterating impact of arbitrator's holding).

75. WALTER T. CHAMPION JR., FUNDAMENTALS OF SPORTS LAW § 18:4 (2009) (assessing influence of Seitz decision). As an independent arbitrator, the principle of *stare decisis* did not restrict Seitz, and, consequently, he was free to simply interpret the language of the 1973 Basic Agreement as he saw fit. *See id.*

76. *See* McCarthy, *supra* note 5, at 558-59 (discussing monumental shift encompassed by 1976 Basic Agreement). The owners and MLBPA engaged in highly contentious negotiations leading up to the 1976 Basic Agreement and completed the deal only after a seventeen-day lockout by the owners. *See id.*

77. *See id.* at 559.

78. *See id.* (summarizing new method to aid clubs in absorbing effects of players lost to free agency).

79. *See* Bautista, *supra* note 32, at 460.

80. *See id.*

81. *See id.*

agreement.[82] The 1985 Basic Agreement granted the players a portion of MLB's overall revenues and an increase in minimum salary, in exchange for agreeing to a system whereby a player could not submit a claim for independent salary arbitration until after his third year of major-league service.[83] The owners responded to what they believed to be major concessions on their part by agreeing among themselves not to sign free agents following the 1985 season.[84] As a result, the players filed a grievance with an independent arbitrator arguing that the owners had colluded to depress player salaries and therefore had engaged in unfair labor practices.[85] The arbitrator agreed and awarded the players $280 million in damages.[86] This decision only served to exacerbate what had become an acrimonious relationship between players and ownership.[87]

In 1990, the owners once again turned their focus towards decreasing player salaries and implementing some form of general revenue sharing.[88] The players viewed this proposal as another attempt to implement a salary cap and retaliated with a month-long work stoppage.[89] In late March 1990, both sides reached an agreement under which the owners once again tabled the revenue-sharing concept in return for the players' acceptance of the owners' terms regarding minimum salary levels and player arbitration.[90] The parties also agreed that such fundamental issues as free agency, arbitration, and minimum salaries could be revisited again in three years, thus setting the stage for the disastrous 1994 season.[91]

The period of tranquility following the 1990 agreement did not last long, as the owners voted to reopen the free agency and arbitration issues for the 1993 season.[92] Negotiations between the two sides progressed throughout 1993 and into the 1994 season, despite the fact that the 1990 Basic Agreement had expired in December 1993.[93] Nonetheless, after nearly eighteen months of fruitless negotiations, the players elected to strike on August 12, 1994.[94] The

82. *See id.* at 460-61.

83. *See* Bautista, *supra* note 32, at 461.

84. *See* McCarthy, *supra* note 5, at 559-60 (discussing decisions to collude in elimination of free-agent market).

85. *See* Bautista, *supra* note 32, at 461 (summarizing arbitration grievances filed by Donald Fehr, then-head of MLPBA).

86. *See* McCarthy, *supra* note 5, at 560.

87. *See* Bautista, *supra* note 32, at 462 (describing relationship between players and ownership after arbitrator's award as increasingly bitter).

88. *See* McCarthy, *supra* note 5, at 560.

89. *See* Bautista, *supra* note 32, at 462.

90. *See id.* at 462-63 (outlining central terms of 1990 Basic Agreement).

91. *See* McCarthy, *supra* note 5, at 560 (analyzing impact of provision allowing for renegotiation in three years).

92. *See* Bautista, *supra* note 32, at 463.

93. *See id.*

94. *See id.* (discussing circumstances surrounding players' decision to institute strike). The owners' proposal to share revenue equally with the players caused particular consternation because it represented a

strike lasted for seven months and resulted in both the cancellation of the 1994 World Series and a delayed start to the 1995 season.[95]

During the course of the strike, both sides filed grievances with the NLRB alleging that the other was engaged in unfair labor practices and had failed to bargain in good faith.[96] The owners informed the MLBPA that they would not negotiate any new player contracts until reaching a new Basic Agreement.[97] The NLRB believed the owners' decision constituted an unfair labor practice and sought a temporary injunction to allow the upcoming season to proceed under the provisions of the expired 1990 Basic Agreement.[98] Armed with a promise from the players that they would return to work if the injunction were allowed, then-District Court Judge Sonia Sotomayor granted relief, and the 1995 and 1996 MLB seasons were played under the constructs of the 1990 Basic Agreement.[99] The next Basic Agreement was ratified in 1996; in this agreement, the owners successfully introduced revenue-sharing and luxury-tax systems aimed at combating rising player salaries.[100]

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significant reduction from the approximately 56% revenue share they enjoyed previously. *See* McCarthy, *supra* note 5, at 560. Donald Fehr, the MLBPA Executive Director at the time, estimated that this new proposal, which included implementation of a salary cap and elimination of salary arbitration, would cost the players approximately $1.5 billion over the life of the Basic Agreement. *See id.*

95. *See* Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 77-82 (1997). During the strike, the parties continued to exchange proposals shaped by the owners' unflagging interest in some form of a salary cap, elimination of salary arbitration, and a more restrictive version of free agency. *See id.* The players rejected the owners' initial proposals including the implementation of revenue-sharing and luxury-tax systems, but offered counterproposals in an effort to appear reasonable. *See* Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246, 251-52 (S.D.N.Y. 1995) (summarizing proposals made by both sides following commencement of player strike).

96. *See Silverman*, 880 F. Supp. at 252. NLRA section 160(j) authorizes the NLRB to petition for temporary relief to enjoin any ongoing unfair labor practice. *See* 29 U.S.C. § 160(j) (2006). Section 158(d) of the NLRA requires employers and unions bargain in good faith over mandatory subjects of collective bargaining, such as "wages, hours, and other terms and conditions of employment." *See id.* § 158(d).

97. *See Silverman*, 880 F. Supp. at 252.

98. *See id.* at 252-53. The determinative legal issue for the NLRB was whether the two sides had actually bargained to an impasse and, if so, whether the bargaining had been conducted in good faith. *See* Gould, *supra* note 15, at 74. For the NLRB, the answer to the question of whether an impasse existed was influenced by the potential for future negotiations between the two sides, in light of the MLBPA's apparent interest in continued bargaining. *See id.* The NLRB believed the owners' unilateral imposition of a salary cap was improper and done in bad faith. *See id.*

99. *See Silverman*, 880 F. Supp. at 255 (holding NLRB had "reasonable cause to believe . . . owners . . . engaged in . . . unfair labor practice"). Judge Sotomayor determined that, under the NLRA, wages were a mandatory subject of collective bargaining, and the owners' unilateral rescission of the free-agency period, as it related to player wages, constituted a violation of the duty to bargain in good faith regarding mandatory subjects of collective bargaining. *See id.* at 257. Judge Sotomayor relied on a Second Circuit case involving the NBA to determine whether a professional sports league's free-agency system could constitute a mandatory subject of collective bargaining under the NLRA. *See id.* at 256; Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 961-62 (2d Cir. 1987) (concluding issues regarding free agency qualify as mandatory subjects of collective bargaining).

100. *See* Dryer, *supra* note 12, at 271. The luxury-tax system required the "teams with the five highest payrolls . . . [to] pay a 35% tax . . . on the amount by which their payrolls exceed the threshold amount." Daniel C. Glazer, *Can't Anybody Here Run this Game? The Past, Present and Future of Major League*

D. The Narrow Scope of MLB's Antitrust Exemption

Baseball suffered from significant fan and media backlash as a result of the protracted 1994 player strike.[101] In 1998, Congress introduced the Curt Flood Act in an effort to prevent another work stoppage and to restore the public faith in MLB.[102] Congress intended the Curt Flood Act to place the business of baseball within the scope of federal antitrust law, thereby affording baseball players the same protections as other professional athletes.[103] There are four subsections to the Curt Flood Act, however, that significantly limit its application.[104] The first subsection defines the type of conduct that may give rise to an antitrust claim, including, "acts . . . directly relating to or affecting employment of major league baseball players."[105] The second subsection enumerates practices not actionable under the Curt Flood Act.[106] The third subsection expressly outlines the coverage of the Act's standing requirements, including both past and present major league baseball players.[107] The final subsection states that even a minor league baseball player may be covered under the Act if a particular claim relates to potential employment at the major-league level.[108]

In the wake of the Curt Flood Act, MLB made further attempts to regain fan support by turning its attention to the issue of revenue disparity among teams

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Baseball, 9 SETON HALL J. SPORT L. 339, 364 (1999).

101. *See* Bautista, *supra* note 32, at 445-46 (discussing need to regain fan trust as impetus for Curt Flood Act).

102. *See* Curt Flood Act of 1998, Pub. L. No. 105-297, 12 Stat. 2824 (codified at 15 U.S.C. § 26b (2006)); Bautista, *supra* note 32, at 445-46 (discussing connection between fan mistrust and enactment of Curt Flood Act).

103. *See* Curt Flood Act of 1998 § 3. *See generally* Gary R. Roberts, *A Brief Appraisal of the Curt Flood Act of 1998 from the Minor League Perspective*, 9 MARQ. SPORTS L.J. 413, 433 (1999) (discussing passage of Curt Flood Act). Ostensibly, the purpose of limiting the scope of MLB's antitrust exemption was to allow courts to analyze baseball's policies and practices under federal antitrust law. *See* ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 26 (2003). Professor Zimbalist states, "Given that MLB faces no direct competition (it is the only top-level professional baseball league in the United States) and that it is not regulated, the opportunity for judicial review would provide the only chance to limit the potential abuse of its monopoly powers." *Id.*

104. *See* Curt Flood Act of 1998, 15 U.S.C. § 26b (2006). These restrictions significantly limit the scope of the repeal of MLB's antitrust exemption. *See* Nathanial Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 748 (2009). *See generally* Edmund P. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L.J. 315 (1999). Because of its limited scope, some commentators believed baseball's antitrust exemption would remain largely unaffected. *See* Grow, *supra*, at 752. However, since the Curt Flood Act's passage, MLB has maintained its longest period of labor peace in more than forty years. *See id.* at 753. From 1972 to 1996, MLB averaged at least one work stoppage every three years; MLB has not endured a labor dispute since the Act's passage in 1998. *See id.*

105. *See* 15 U.S.C. § 26b(a). Thus, given the statute's plain language, the Act applies only indirectly to minor league baseball players. *See id.*

106. *See id.* § 26b(b).

107. *See id.* § 26b(c).

108. *See id.* § 26b(d)(2) (explaining minor leaguer may demonstrate violation by showing claim affects employment at major-league level).

and its influence on parity.[109] In 2000, MLB commissioned an independent panel to determine what effect, if any, revenue disparities had on the league's competitive balance.[110] In a comprehensive memorandum known as the Blue Ribbon Report, the panel offered several suggestions to increase parity, specifically calling for MLB to implement a minimum team payroll, search for new ways to generate revenue, and treat a higher percentage of current revenue as general industry revenue, which would be distributed to all thirty teams.[111] In theory, such a system would level the playing field among the clubs and focus competition on player ability and front-office acumen.[112] The Blue Ribbon Report proved to be somewhat influential, as the 2002 Basic Agreement saw a trend towards increased revenue sharing among teams and the implementation of a more stringent luxury tax.[113] The current Basic Agreement, ratified in 2006, incorporated most of the previous agreement's major provisions, but called for a slight increase in the luxury-tax threshold.[114]

109. *See* RICHARD C. LEVIN ET AL., THE REPORT OF THE INDEPENDENT MEMBERS OF THE COMMISSIONER'S BLUE RIBBON PANEL ON BASEBALL ECONOMICS 1 (2000) [hereinafter BLUE RIBBON REPORT], *available at* http://mlb.mlb.com/mlb/downloads/blue_ribbon.pdf; *see also* McCarthy, *supra* note 5, at 561 (discussing MLB's desire to "level the economic playing field" as impetus for Blue Ribbon Report). *See generally* Victor Matheson, *The Perils of Revenue Sharing*, THE SPORTS ECONOMIST (Aug. 23, 2010), http://thesportseconomist.com/2010/08/23/the-perils-of-revenue-sharing/ (articulating correlation between revenue and on-field success for small-market teams). The Blue Ribbon Report's authors argue that if chronically uncompetitive teams must compete against more successful clubs, the public interest in those teams, and baseball in general, will be affected negatively. *See* BLUE RIBBON REPORT, *supra*, at 36.

110. *See* BLUE RIBBON REPORT, *supra* note 109, at 1. Unfortunately, Commissioner Bud Selig handpicked panel members who represented only the interests of the owners. *See* ZIMBALIST, *supra* note 103, at 3. The panel disseminated its reports after a fifteen-month analysis of the economics of baseball, and the MLBPA "was not invited to participate" in its construction. *Id.* at 3-4. Some MLB insiders felt as though it would have been in baseball's best interest to form a panel that represented the interests of both sides, particularly in light of the impending collective-bargaining negotiations. *See id.*

111. *See* BLUE RIBBON REPORT, *supra* note 109, at 36-46. The panel believed that instituting a minimum team payroll would discourage less-wealthy clubs from using revenue-sharing dollars to become profitable without first making a concerted effort to field a competitive team. *See id.* at 38. The authors further warned that, unlike in its formative years, baseball now faced competition for the attention of sport fans. *See id.* at 5. They also noted that in the past, baseball acted as the preeminent professional sport in the United States each year from April until October. *See id.* At the time of the Blue Ribbon Report, "there [were] just six weeks between the last . . . [NBA] championship game and the first . . . [NFL] preseason game. MLB must improve its competitive balance if it is to remain competitive with other sports attractions." *Id.* The authors believed that competitive balance would likely follow when the average payroll of the wealthiest 25% of MLB clubs amounted to twice as much as the average payroll of the 25% of teams with the lowest revenues. *See id.* at 7. The authors noted that the NFL, known for its continuing parity, enjoys a 1.5:1 ratio in terms of the average payroll of its top seven teams as compared to the average payroll of its seven poorest clubs. *See id.*

112. *See id.* at 37 (emphasizing competitive balance means equal opportunity to compete, "not equal outcome").

113. *See* McCarthy, *supra* note 5, at 561 (discussing increased interest in revenue sharing among ownership). The owners voted 29-1 for the new Basic Agreement, with the Yankees, the league's wealthiest team, as the lone holdout. *See id.* The new agreement provided for the distribution of a pool of $175 billion, or $248 million per team, in revenue-sharing dollars over the next four years. *See* MLB, 2003-2006 BASIC AGREEMENT 105 (2002). Over that same period, the agreement mandated that the luxury-tax threshold increase from $117 million to $136.5 million. *Id.* at 80.

114. *See* MLB, 2007-2011 BASIC AGREEMENT 83 (2006) (outlining parameters for luxury tax under current

E. Revenue-Sharing and Luxury-Tax Systems in the NFL and NBA

The NFL and NBA do not enjoy the same federal antitrust exemption as MLB, and, consequently, antitrust laws have shaped each league's respective history of collective bargaining.[115] In 1957, the Supreme Court held that the NFL was subject to federal antitrust laws because its business was part of interstate commerce.[116] Less than two decades later, in *Mackey v. National*

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agreement); *see also* Barry M. Bloom, *MLB, Union Announce New Labor Deal*, MLB.COM (Oct. 25, 2006, 1:21 AM), http://mlb.mlb.com/news/article.jsp?ymd=20061024&content_id=1722211&fext=.jsp&c_id=mlb (outlining basic differences between current Basic Agreement and previous agreement). The luxury tax threshold for 2007 was set at $148 million, $155 million in 2008, $162 million in 2009, $170 million in 2010, and $178 million in 2011. *See* Bloom, *supra*. While the thresholds are set to shift, the tax rates for teams exceeding the cut-off will not change. *See id.* Luxury-tax rates are set at 22.5% of the club's payroll for the first violation, 30% for the second violation, and 40% for the third. *See id.* The players believed that the luxury tax would act as a damper on player salaries and vehemently resisted the imposition of the tax-threshold increases. *See* ZIMBALIST, *supra* note 103, at 100. According to Professor Zimbalist, the players reasoned as follows:

> Suppose that George Steinbrenner believes that Jason Giambi will add $20 million a year to the New York Yankees' local revenues. That being the case, Steinbrenner should be willing to offer Giambi a salary of up to $20 million. Now suppose that MLB informs Steinbrenner that it will tax away 50 percent of any local revenue generated by the Yankees. Suddenly, Giambi is no longer worth up to $20 million to Steinbrenner. He is now worth only $10 million, and Steinbrenner's pay offer would be scaled down accordingly.

Id.

One additional aspect of the luxury tax, unique to MLB, is the relationship between the current luxury-tax system and the posting system for Japanese players who wish to leave their teams in Japan to play professional baseball in the United States. *See* Scott R. Rosner & William T. Conroy, *The Impact of the Flat World on Player Transfers in Major League Baseball*, 12 U. PA. J. BUS. L. 79, 91 (2009). When Japanese players wish to transfer to MLB they must do so through the posting process. *See id.* at 80. This system allows each interested MLB team to bid for the player's services, with the Japanese club then presumably accepting the highest bid. *See id.* The money paid by the team whose bid is accepted is known as the "transfer" fee. *Id.* at 84. Concerns about competitive balance have arisen with respect to the posting process because it favors high-revenue teams who have the resources to make substantial bids. *See id.* at 91. Under the current Basic Agreement, a transfer fee paid pursuant to the posting process is not included when calculating the team's luxury-tax obligations. *See* Gould, *supra* note 56, at 293. As a result, the usual calculations employed by clubs to determine a player's actual net worth may not apply when attracting Japanese players. *See id.* For example:

> Had the Red Sox signed a free agent pitcher from another team within MLB for the $103.1 million they paid for [Daisuke] Matsuzaka, all $103.1 million of that contract would have been subject to the 40% luxury tax aimed at leveling the playing field in MLB. However, because $51.1 million of the money paid for Matsuzaka was allocated as a transfer fee (and not subject to the luxury tax), the Red Sox luxury-tax figure for the Matsuzaka signing was only $52 million. This legal loophole circumvents precisely the problem that the luxury tax was aimed at fixing, and furthers the problem of competitive balance in MLB.

Rosner & Conroy, *supra*, at 91.

115. *See generally* Dryer, *supra* note 12 (discussing federal antitrust law's influence on collective bargaining in NFL and NBA).

116. *See* Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957) (concluding NFL's high-volume interstate business placed its actions within scope of Sherman Act).

Football League,[117] the Court of Appeals for the Eighth Circuit determined that the "Rozelle Rule," a league requirement that any club acquiring a free agent compensate the prior club, constituted a violation of the Sherman Act as a restraint on trade.[118] Thus, the Eighth Circuit held that restraints on competition for player services fell within the reach of federal antitrust regulations, unless the surrounding circumstances satisfied the requirements of the nonstatutory labor exemption to federal antitrust law as previously defined by the United States Supreme Court in *Amalgamated Meat Cutters v. Jewel Tea*.[119] The Supreme Court further clarified *Mackey* in *Brown v. Pro Football, Inc.*,[120] by ruling that any party engaged in the collective-bargaining process was barred from bringing an antitrust action.[121]

In 1976, professional basketball experienced a similar trend in increased player movement as the NBA and its players' union (NBPA) entered into an agreement to eliminate basketball's version of the reserve clause.[122] This agreement, known as the Robertson Settlement Agreement (RSA), was

117. 543 F.2d 606 (8th Cir. 1976).

118. *See id.* at 609 n.1 (defining "Rozelle Rule"); *id.* at 623 (determining "Rozelle Rule" constituted unreasonable restraint on trade, therefore violating Sherman Act).

119. *See id.* at 616 (concluding nonstatutory labor exemption not applicable because "Rozelle Rule" not product of arm's-length bargain). In *Mackey*, the owners had unilaterally imposed the "Rozelle Rule" in an effort to restrict player movement. *See id.* at 616 (summarizing history of "Rozelle Rule"). The court explained that an arm's-length bargain was only one of three requirements necessary for the nonstatutory labor exemption to apply. *See id.* at 614. The first requirement is that the restraint on trade must only affect the parties to the agreement. *See id.* The second requirement is that the restraint must affect a mandatory subject of collective bargaining pursuant to the NLRA, such as wages or terms or conditions of employment. *See id.* In *Amalgamated Meat Cutters*, Justice White's plurality opinion emphasized that the nonstatutory labor exemption from antitrust law was a product of the federal policy favoring collective bargaining. *See* Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (plurality opinion). The Court further provided:

> Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects. But neither party need bargain about other matters and either party commits an unfair labor practice if it conditions its bargaining upon discussions of a nonmandatory subject.

Id. at 689 (citing NLRB v. Div. of Wooster Borg-Warner Corp., 356 U.S. 342 (1958)); *see also* National Labor Relations Act, 29 U.S.C. § 158(d) (2006) (indicating mandatory subjects of collective bargaining). Section 158(d) states that employers and employees' representatives have a mutual obligation to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d).

120. 518 U.S. 231 (1996).

121. *See id.* at 250 (holding nonstatutory labor exemption applies to parties currently engaged in collective-bargaining process). *See generally* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (explaining "Rule of Reason"); McNeil v. Nat'l Football League, 790 F. Supp. 871 (D. Minn. 1992). The players would likely have had to disband as a union through the process of "decertification" to end the collective-bargaining process. *See* Gould, *supra* note 15, at 82 (explaining players must decertify or show elimination of collective-bargaining relationship before bringing antitrust suit).

122. *See* Robertson v. Nat'l Basketball Ass'n, 556 F.2d 682, 686 (2d Cir. 1977) (discussing suit on NBPA's behalf resulting in NBA's modern free-agency rules); *see also* Dryer, *supra* note 12, at 275 (discussing elimination of NBA's reserve clause).

intended to last until the 1986-87 season.[123] Unrest arose in 1983, however, as many teams faced financial difficulties; consequently, both the NBA commissioner and NBPA decided to implement a salary cap in order to curb excessive spending.[124] The salary-cap agreement—the first of its kind in any professional sports league—also required a minimum salary floor in an attempt to create competitive balance.[125] The NBA's salary cap is referred to as a "soft cap" because it allows teams to exceed the threshold when signing their own players who face impending free agency.[126] The NBA currently shares 57% of its earned revenue with the players, an amount referred to as Basketball Related Income (BRI).[127] Each year's salary cap level is set as a percentage of BRI.[128] The NBA also employs a luxury tax to deter teams from completely disregarding the salary cap.[129]

Conversely, the NFL instituted a "hard" salary cap in 1994.[130] Under this regime, the league will not approve any transaction that would cause a team's payroll to exceed the salary cap.[131] The current cap is calculated as 58% of league revenues, less projected league benefits, divided by the number of teams.[132] The NFL also employs a minimum payroll, which, in 2006, was 84% of the cap and has increased slightly more than 1% each year since.[133] While the NFL's "hard" cap renders a luxury tax unnecessary, the league does employ a significant revenue-sharing system.[134] Though 40% of all general revenue is shared equally among the teams, the top fifteen revenue-generating teams contribute some local revenue to a general pool, which is then distributed to lower-revenue teams on the basis of financial need.[135]

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123. *See* Dryer, *supra* note 12, at 275. Oscar Robertson, the hall-of-fame guard and then-president of the NBPA, was the namesake of the agreement. *Id.* at 275 n.106.

124. *See* Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 218-19 (2003).

125. *See id.* at 219. A salary floor requires all teams to maintain a total payroll above a certain amount set by the current Basic Agreement. *Id.*

126. *See id.* at 219-20.

127. *See* Steve Kyler, *The Things to Know About The Next CBA*, HOOPSWORLD.COM (Jan. 28, 2010, 7:48 AM), http://www.hoopsworld.com/the-things-to-know-about-the-next-cba.

128. *See id.* Thus, the current salary cap is set at 57% of BRI divided by the number of teams. *See id.* Not surprisingly, ownership will likely seek more of an even split during the next collective-bargaining negotiation. *See id.*

129. *See* Aubut, *supra* note 124, at 220. The current luxury tax line is $69 million. *See* Kyler, *supra*, note 127. The NBA employs a dollar-for-dollar luxury tax, whereby a team whose payroll is $79 million would be taxed $10 million, the amount by which the club exceeds the luxury-tax threshold. *Id.*

130. *See* Aubut, *supra* note 124, at 216.

131. *See id.* (describing differences between "hard" and "soft" salary caps).

132. *See* NFL, 2006-2012 COLLECTIVE BARGAINING AGREEMENT 96 (2006); *see also* Dryer, *supra* note 12, at 282-83 (detailing formula for calculating NFL salary cap).

133. *See* NFL, 2006-2012 COLLECTIVE BARGAINING AGREEMENT 102 (2006); *see also* Dryer, *supra* note 12, at 282 (discussing minimum salary floor).

134. *See* NFL, 2006-2012 COLLECTIVE BARGAINING AGREEMENT 143 (2006).

135. *See* Judy Battista, *Pro Football; New Commissioner Faces a Fiery Baptism*, N.Y. TIMES, Aug. 22, 2006, http://www.nytimes.com/2006/08/22/sports/football/22commissioner.html?_r=2&ref=ralph_wilson_jr.

III. ANALYSIS

A. Potential Courses of Action for MLBPA Under Federal Antitrust Law

If MLB players and owners are unable to agree upon an effective system of revenue sharing and taxation through the collective-bargaining process, then some form of legal action may be appropriate under federal antitrust or labor law.[136] When Congress enacted the Curt Flood Act in 1998, it provided the players with a cause of action under federal antitrust law against MLB and its owners.[137] It is unclear, however, what effect such a bargaining chip may have on future negotiations.[138] Nonetheless, if improvements are not made, a player could conceivably allege that the revenue-sharing system is a restraint on trade because it has the overall effect of moderating player salaries.[139] As mentioned above, the language of the Curt Flood Act puts narrow limitations on the conduct triggering its coverage, and on who has standing to sue.[140] Presently, only a current or former MLB player may bring an antitrust suit against the owners to contest the propriety of an increased revenue-sharing and luxury-tax system.[141] In *Mackey*, however, the Eighth Circuit listed the qualifications necessary to determine whether a player may bring an antitrust suit against league owners.[142] For a player's claim to be viable, he must show that the restraint on trade affects parties outside the scope of the collective-bargaining agreement, that the restraint does not impact a mandatory subject of collective bargaining, and that the restraint was not the product of an arm's-length negotiation.[143] In *Brown*, the Supreme Court created an additional timing requirement for antitrust claims by holding that the *Mackey* qualifications apply so long as the parties are engaged in a collective-bargaining process, even if the previous agreement has expired.[144] Thus, in order to succeed against the owners on antitrust grounds, a player would have to prove that his claim was beyond the scope of the *Mackey* limitations, or that the two sides were not

136. *See* McCarthy, *supra* note 5, at 557-58 (explaining potential avenues of litigation with respect to collective-bargaining agreements).

137. *See supra* note 103 and accompanying text (reviewing legislative intent of Curt Flood Act).

138. *See* Bautista, *supra* note 32, at 476 (noting collective-bargaining relationship might temper efficacy of antitrust claim under Curt Flood Act). In some respects, the Curt Flood Act has served to pacify the traditionally acrimonious collective-bargaining process between the two sides. *See* Grow, *supra* note 104, at 754. For instance, the Curt Flood Act armed the players with the threat of bringing an antitrust suit for treble damages, which, in turn, has caused ownership to approach negotiations with greater caution. *See id.*

139. *See* Bautista, *supra* note 32, at 478-79 (noting contentious issues may lead to litigation).

140. *See supra* notes 103-108 and accompanying text (explaining limitations of Curt Flood Act with regard to elimination of MLB's antitrust exemption).

141. *See supra* notes 106-107 and accompanying text (discussing standing limitations of Curt Flood Act).

142. *See supra* notes 117-119 and accompanying text (presenting *Mackey*'s analytical framework).

143. *See supra* note 119 (outlining requirements for application of nonstatutory labor exemption).

144. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 235-36 (1996) (discussing history of antitrust exemptions and applicability to present case).

currently engaged in a collective-bargaining relationship.[145] The MLBPA, therefore, would have to decertify in order to cease the collective-bargaining process.[146]

Absent the MLBPA's decertification, it is unlikely that a player's antitrust claim could succeed against the owners due to the difficulty in satisfying the *Mackey* requirements.[147] While MLB's current revenue-sharing and luxury-tax programs likely do not affect parties outside the Basic Agreement, these issues would be considered mandatory subjects of collective bargaining, as the programs have a direct effect on player wages.[148] Furthermore, a player would find it difficult to satisfy *Mackey*'s third prong—that the current system was not the result of an arm's-length bargain—given the competent and effective representation of the MLBPA throughout its collective-bargaining history.[149]

The MLBPA could consider decertification as a means of ending the collective-bargaining relationship.[150] In the event of decertification, a court would likely apply the *Standard Oil* "Rule of Reason" test to determine whether a proposal by ownership to increase revenue-sharing and luxury-tax requirements constitutes a violation of federal antitrust law.[151] Most commentators, however, believe that decertification of the union would not be a prudent course of action for the players because it is a "costly process."[152] By decertifying, the players would risk losing hard-won benefits, such as pension and disability plans, and also subject themselves to potential antitrust litigation on behalf of the owners.[153] Given the remote chance of decertification, the players' likely sole option for changing the current revenue-sharing and luxury-tax systems is through the private collective-bargaining process.[154]

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145. *See* Bautista, *supra* note 32 at 478 (detailing appropriate context for player antitrust claim).

146. *See supra* notes 120-121 and accompanying text (noting engaging in collective-bargaining process precludes antitrust actions).

147. *See* Bautista, *supra* note 32, at 476 (arguing nonstatutory labor exemption would likely preclude player antitrust claim under Curt Flood Act).

148. *See id.* (observing terms and conditions of employment considered mandatory subjects of collective bargaining); *see also supra* note 99 (noting Judge Sotomayor's holding wages constitute mandatory subject of collective bargaining under NLRA).

149. *See* Bautista, *supra* note 32, at 476. "[B]ecause baseball has relied upon collective bargaining to resolve key economic . . . issues, a player would, in all likelihood, encounter difficulty in arguing that the terms and conditions of his employment were not forged through the collective bargaining process." *Id.*

150. *See supra* notes 120-121 and accompanying text (explaining union cannot enjoy antitrust coverage if engaged in collective-bargaining process).

151. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62 (1911) (explaining "Rule of Reason"); *see also* McNeil v. Nat'l Football League, 790 F. Supp. 871, 897 (D. Minn. 1992) (applying "Rule of Reason" test to professional football antitrust claim); Bautista, *supra* note 32, at 479-80 (explaining application of "Rule of Reason" test to potential antitrust claim).

152. *See* Edmonds, *supra* note 104, at 341 (explaining decertification unlikely); Grow, *supra* note 104, at 750-51 (discussing potential detriment to players caused by decertification); Roberts, *supra* note 103, at 434 (detailing problems associated with union decertification).

153. *See* Edmonds, *supra* note 104, at 341; Roberts, *supra* note 103, at 433.

154. *See generally* Rosenthal, *supra* note 14 (characterizing upcoming collective-bargaining negotiations as best opportunity for implementing changes to current system).

B. Limitations to the Current Revenue-Sharing System

Leading up to the most recent Basic Agreement in 2006, MLB's owners insisted upon greater revenue sharing and an increase in the luxury-tax threshold.[155] Unfortunately, the owners were negotiating for a fundamentally flawed system whose objective—to increase competitive balance—has failed.[156] MLB's current method of revenue sharing and payroll taxation allows small-market teams to garner substantial profits while remaining consistently uncompetitive.[157] The MLBPA opposes the system because of its negative effect on salary growth.[158] The MLBPA maintains that the current construct stifles player salaries in four ways.[159] First, the competitive-balance tax acts as a soft cap serving as a natural deterrent to owner spending.[160] Second, the system relieves high-revenue teams of much of the income they had used previously to set the free agent market, leading to a general decrease in player salaries.[161] Third, the system reduces the monetary value of each player because it decreases the portion of revenue generated by each player that his team actually retains.[162] Fourth, the MLBPA contends that small-market teams pocket these revenue-sharing dollars instead of using them in an effort to field a more competitive team.[163]

155. *See supra* note 113 and accompanying text (discussing increase in revenue-sharing and luxury-tax thresholds).

156. *See supra* notes 5-6 and accompanying text (summarizing system's purpose and shortcomings).

157. *See supra* notes 1-7 and accompanying text (outlining revenue-sharing system's failure to bring about intended goals and effects).

158. *See* Berkon, *supra* note 5, at 9 (noting MLBPA's historic opposition to MLB's revenue-sharing and competitive-balance tax). In 2006, Donald Fehr, then-Executive Director of the MLBPA, stated, "'I don't see a need for increased revenue sharing.'" *MLB Hopes to Reduce Number of Positive Drug Tests*, ESPN.COM (Mar. 6, 2006, 7:01 PM), http://sports.espn.go.com/mlb/news/story?id=2357037. Fehr believed that the system first needed to be adjusted to ensure that teams were actually spending their revenue-sharing dollars "'in an effort to improve its performance on the field.'" *Id.*

159. *See* Berkon, *supra* note 5, at 12-13 (discussing effects of revenue-sharing system on player salaries).

160. *See id.* at 12 (describing luxury-tax threshold as payroll limit owners would not want); *see also supra* note 126-28 and accompanying text (discussing NBA's soft cap and its natural curbing effect on owner spending).

161. *See* Berkon, *supra* note 5, at 12 (explaining relieving large-market teams of income leads to overall tamp on player salaries). For example, during the 2005 offseason, the Yankees decided not to bid on that year's preeminent free agent, Carlos Beltran, because of looming revenue-sharing and luxury-tax issues. *See* Michael O'Keeffe & T.J. Quinn, *Yanks Losing at Money Ball. Up to $85M in the Red for 2005*, N.Y. DAILY NEWS, Dec. 4, 2005, http://articles.nydailynews.com/2005-12-04/sports/18309993_1_revenue-sharing-yankees-major-league-baseball-sources.

162. *See* Berkon, *supra* note 5, at 12-13 (analyzing increased taxation of each player's marginal value under current system). The marginal value of a player is the increased amount of local revenue he is expected to generate. *See id.* Owners often use expected marginal value as a basis for determining whether to offer a player a free-agent contract. *See id.*; *see also supra* note 114 (discussing owners' calculation of player value in light of potential luxury-tax implications).

163. *See supra* note 158 and accompanying text (discussing former MLBPA Executive Director Donald Fehr's view of current system); *see also* Berkon, *supra* note 5, at 13 (suggesting small-market teams use revenue sharing for purposes other than improving on-field performance).

C. Proposals for the Next Basic Agreement

According to the 2000 Blue Ribbon Report, some small-market teams believed the extra revenue to be "insufficient" to become competitive, and instead used the funds to become profitable.[164] The authors stressed that MLB would not achieve "[p]roper competitive balance . . . until every well-run club has a *regularly recurring reasonable hope of reaching postseason play*."[165] Heading into the next collective-bargaining process, it would benefit both sides to implement a number of modifications to the current system, with a focus on incentivizing lower-revenue teams to either become competitive, or lose their place at the revenue-sharing and luxury-tax table.[166]

First, the Basic Agreement's language concerning the requirement that teams who receive revenue-sharing and luxury-tax dollars use the funds to "'improve . . . performance on the field,'" must be sharpened during the next collective-bargaining negotiation.[167] In its new form, this language should require owners to allocate a significant percentage of these funds directly to payroll and baseball operations.[168] The second modification should be the implementation of a salary floor similar to those employed by the NBA and NFL.[169] MLB teams are not currently required to spend a predetermined amount of their financial resources on team payroll.[170] A minimum salary floor would act as a reverse luxury tax, whereby any team whose payroll failed to satisfy a certain threshold would either be taxed on the difference, or be disqualified from receiving revenue-sharing and luxury-tax disbursements from large-market teams.[171] If the goal of the revenue-sharing system is to achieve parity, then a mandatory salary floor would be a step towards a decrease in club payroll disparities which, as the Blue Ribbon Report concluded, contribute directly to competitive imbalance.[172] Absent a salary floor, owners of

164. *See* BLUE RIBBON REPORT, *supra* note 109, at 1.

165. *Id.* at 5.

166. *See generally* Stark, *supra* note 16 (arguing changes to current system necessary to bring about intended competitive balance).

167. *See id.* (emphasizing need for clarification in how teams may spend revenue-sharing dollars). The current Basic Agreement's language is designed to provide owners with some flexibility in spending these funds. *See* Brown, *supra* note 7. However, when teams such as the Pirates and Marlins spend revenue-sharing dollars to pay owners' taxes and satisfy stadium financing debts, they are clearly abusing the intended spirit of the system. *See* Stark, *supra* note 16; *see also* Rosenthal, *supra* note 14.

168. *See* Stark, *supra* note 16. The current rules allowed Pirates ownership to use revenue-sharing funds to pay taxes, and enabled Marlins ownership to satisfy some of the club's debt to qualify for the financing of its new stadium. *Id.* Stark suggests that, at a minimum, the language should be honed to ensure that revenue-sharing dollars are not misappropriated by owners in such a manner. *See id.*

169. *See* BLUE RIBBON REPORT, *supra* note 109, at 38 (recommending implementation of salary floor in conjunction with other changes to system).

170. *See* McCarthy, *supra* note 5, at 566 (explaining lack of minimum salary allows low-revenue teams to spend insufficient amount on payroll).

171. *See* Stark, *supra* note 166 (discussing potential impact of salary-floor requirement).

172. *See id.* (declaring time has come to tax chronically uncompetitive teams). Under Stark's proposed rubric, the first time a small-market team failed to meet the minimum-payroll threshold, for any reason, it

uncompetitive, low-revenue clubs will continue to realize large profits, as they will continue to receive millions of dollars for poor performance.[173] Furthermore, a salary floor could be supplemented by providing small-market teams with a reward for being "well run."[174] Such a system would provide bonuses to low-revenue teams who feed their revenue-sharing dollars back into player salaries, and as a result, improve their club's on-field performance.[175]

A minimum-salary requirement, without more, may not go far enough to achieve competitive balance in baseball.[176] Lowering the luxury-tax ceiling while increasing sanctions on those large-market teams who exceed the threshold may help level the economic playing field.[177] This concept, known as "salary compression," would encourage parity by serving as a drag on large-market team payrolls, while the minimum-salary requirement would force small-market team payrolls to rise towards the MLB median.[178]

A system that uses potential revenue rather than actual revenue in determining whether a club is eligible to receive revenue-sharing and luxury-tax funds would also ensure that poorly run teams are not simply being subsidized by wealthier clubs.[179] The current system, which employs actual revenue as its eligibility gauge, "incentivize[s] sloth and aggressively diminish[es] a franchise's motivation to move upward, as gains in revenue will be offset initially by lost welfare payments."[180] A small-market team that generates on-field success and its attendant revenue streams is penalized in an actual-revenue system.[181] Under a potential-revenue construct, however, clubs that do not capitalize on a predetermined percentage of the potential revenue in their respective markets will not be eligible for subsidies.[182] The use of a

would not be taxed. *See id.* If a club continued to fall below the salary floor, however, it would then be penalized a certain percentage of its revenue-sharing and luxury-tax dollars. *See id.* Stark believes that this construct would create an adequate financial incentive to ensure that owners are spending to directly improve their teams. *See id.*

173. *See* McCarthy, *supra* note 5, at 566-67 (arguing salary floor would prevent small-market owners from continuing to abuse current system).

174. *See* BLUE RIBBON REPORT, *supra* note 109, at 5 (observing teams must be "well run" to achieve proper competitive balance); Berkon, *supra* note 5, at 31-32 (noting Blue Ribbon Report requires competitive teams be "well run").

175. *See* Berkon, *supra* note 5, at 34 (recommending financial bonuses for small-market teams who use funds to reach playoffs).

176. *See* Brown, *supra* note 7 (urging focus on "salary compression" in next negotiation cycle if salary floor proves implausible).

177. *See id.* (stressing additional need for moderating high-revenue team payrolls with eye toward improving competitive balance). Many large-market teams have breached the luxury-tax threshold, with the Yankees doing so in each year of the threshold's existence. *See id.*

178. *See id.* (arguing for financial accountability from both large-market and small-market teams).

179. *See* Sheehan, *supra* note 1 (suggesting basing eligibility for disbursement on potential revenues instead of actual revenues).

180. *Id.* (discussing shortcomings of "actual" revenue system).

181. *See* Matheson, *supra* note 109 (articulating correlation between revenue and on-field success for small-market teams).

182. *See* Sheehan, *supra* note 1 (outlining revenue-sharing system based on potential revenue). Sheehan

potential-revenue system would incentivize teams to improve in order to gain profits from untapped revenue sources.[183] Above all, a system based on potential revenue will not pursue competitive balance by rewarding teams that have little interest in generating their own local revenue.[184]

Furthermore, the current system has created a philosophical divide between the owners of large-market and small-market clubs.[185] The changes suggested above might help assuage the feeling of some large-market owners, such as John Henry of the Red Sox and Hank Steinbrenner of the Yankees, that their clubs are simply subsidizing "chronically uncompetitive" teams like the Pirates.[186] If these small-market owners continue to evade the spirit of the revenue-sharing and luxury-tax systems by refusing to use revenue-sharing dollars to improve on-field performance, then large-market owners may be compelled to pursue legal recourse.[187] The parties would likely submit such a claim to arbitration as mandated by the grievance-procedure provision of the current Basic Agreement.[188] Moving forward, however, if MLB continues to utilize the current Basic Agreement's language, large-market owners may argue that their claim falls outside the grievance procedure because the revenue-sharing and luxury-tax systems relate to "proceeds of sale of radio or television broadcasting rights."[189] If large-market owners successfully argue that the Basic Agreement's private grievance procedures do not govern, they may be able to sue a small-market owner in court based on a violation of the implied duty of good faith embodied in the Basic Agreement, a contract to which every owner is a party.[190]

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argues, "If a team does a particularly good job of leveraging its market to make money, they shouldn't be penalized for that." *Id.* It may be difficult to determine how to precisely quantify the amount of potential revenue in each market. *See id.*

183. *See id.* (arguing system based on actual revenue includes no incentive to improve on-field performance). *But see* Matheson, *supra* note 109 (concluding potential-revenue system would not completely eliminate incentive issue for small-market teams).

184. *See* Sheehan, *supra* note 1 (explaining system based on actual revenues simply creates "welfare class of teams").

185. *See supra* note 14 and accompanying text (identifying flaws in current system as major point of contention among ownership).

186. *See* Spencer, *supra* note 14 (discussing sentiments of large-market team owners regarding current revenue-sharing system).

187. *See supra* notes 5-15 and accompanying text (discussing failures of current system and rift among ownership).

188. *See* MLB, BASIC AGREEMENT 2007-2011, 32-42 (2006) (outlining grievance-filing procedure for claims arising out of Basic Agreement). Section (A)(1)(a) of the Grievance Procedures provision states: "'Grievance' shall mean a complaint which involves the . . . interpretation of, or compliance with, any agreement, or any provision of any agreement, between the Association [MLBPA] and the Clubs or any of them." *Id.* at 32.

189. *See id.* at 34 (placing television and radio revenue disputes outside scope of grievance procedure).

190. RESTATEMENT (SECOND) OF CONTRACTS § 205 (2008). This section states: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.*

IV. CONCLUSION

It is clear that the current MLB revenue-sharing and luxury-tax systems must change. The system has failed to achieve its initial goals—increased parity and competitive balance—because certain small-market owners' actions have undermined the system. Teams such as the Pirates have found it more profitable to underperform and collect funds from large-market teams than to place a successful team on the field and bear the associated costs. These owners argue that they are economically disadvantaged because their teams operate in markets with a relatively small revenue pool. Nevertheless, modifications such as conditioning revenue-sharing and luxury-tax dollars on generating potential revenue in the local market would reward small-market teams for operating efficiently and effectively.

The implementation of these changes to the system would only solve part of the problem; the enforcement of new provisions is equally crucial. The new Basic Agreement should include specific language controlling the manner in which clubs receiving subsidies spend these funds. A mandate requiring small-market teams to spend in a manner that relates directly to increasing the team's payroll and overall performance would help achieve the original goal of improved competitive balance. While the MLBPA's decertification in order to bring an antitrust suit against ownership seems unlikely, action by large-market owners against a small-market club could be possible. Hopefully, the collective-bargaining process can cure this fundamentally flawed area of our national pastime so that such drastic measures need not be taken.

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