

BASEBALL JURISPRUDENCE: Its Effects on America's Pastime and Other Professional Sports Leagues

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INTRODUCTION

This article analyzes leading baseball-related judicial decisions, arbitration awards, and federal legislation regarding the Major League Baseball (MLB) commissioner's "best interests" power, baseball's antitrust exemption, and labor relations with MLB players as well as the scope of league, club, and players' intellectual property rights. As the first law review article authored or co-authored by a current or former commissioner of a North American major professional sports league, it provides a unique insider perspective regarding baseball jurisprudence and its effects on the historical development and business affairs of MLB and its member clubs as well as their relationships with baseball players and their union, fans, and others. It also briefly considers how baseball jurisprudence has influenced the evolution, operations, and relationships of other North American major professional sports leagues such as the National Basketball Association (NBA), National Football League (NFL), and National Hockey League (NHL) as well as others such as Major League Soccer (MLS) and the Women's National Basketball Association (WNBA).

I. COMMISSIONER "BEST INTERESTS" POWER

The first commissioner of any United States professional sports league was Kenesaw Mountain Landis, a Chicago federal judge who became Major League Baseball commissioner on January 12, 1921, to protect the integrity of the sport, specifically to ensure that "game fixing" like the infamous 1919

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World Series “Black Sox” scandal did not happen again.¹ As a condition of agreeing to serve as commissioner, Judge Landis insisted upon having “absolute control over baseball.”² The first Major League Agreement between the National League of Professional Base Ball Clubs, the American League of Professional Base Ball Clubs, and their respective clubs, which was entered into immediately before Landis assumed office, gave him broad authority to investigate “any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of base ball” and to take appropriate “preventive, remedial or punitive action.”³ It expressly provided: “The Major Leagues, and their constituent Clubs,

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1. J.G. TAYLOR SPINK, *JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL* 57–79 (1947); Matthew J. Parlow, *Professional Sports League Commissioners’ Authority and Collective Bargaining*, 11 *TEX. REV. ENT. & SPORTS L.* 179, 183 (2010); Depak Sathy, *Reconstruction: Baseball’s New Future*, 4 *SETON HALL J. SPORTS L.* 27, 41–42 (1994); *see also* JEROME HOLTZMAN, *THE COMMISSIONERS: BASEBALL’S MIDLIFE CRISIS* 20–21 (1998) (observing that Landis was well known to American League and National League club owners because he took under advisement and withheld his opinion in a 1915 antitrust suit by the upstart Federal League, which gave the two established leagues time to acquire most of its clubs resulting in its folding; during the case, Landis remarked, “Any blow at the thing called baseball would be regarded as a blow against a national institution.”).

2. SPINK, *supra* note 1, at 72.

3. MAJOR LEAGUE AGREEMENT art. I, § 2(a) and (b). MAJOR LEAGUE AGREEMENT art. I, § 3 provided:

In the case of conduct detrimental to base ball by Major Leagues, Major League Clubs, officers, employe[e]s or players, punitive action by the Commissioner may in any case take the form of a public reprimand. In the case of a Major League or Club, the Commissioner may impose a fine not exceeding Five Thousand (\$5,000.00) Dollars for any one offense. In the case of a Major League Club, punishment may extend to temporary deprivation of representation in joint meetings held under this agreement. In the case of any official or employe[e] of a Major League or of any Major League Club, punishment may extend to suspension or removal. For such conduct, a player may be declared by the Commissioner temporarily or permanently ineligible to play for any Club which is a party to this agreement.”

MAJOR LEAGUE AGREEMENT art. I, § 4 provided:

In the case of conduct detrimental to base ball by organizations not parties to this agreement, or by individuals not connected with any of the parties hereto, the Commissioner may pursue appropriate legal remedies, advocate remedial legislation, and take such other steps as he may deem necessary and proper in the interests of the morale of the players and the honor of the game.

severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this agreement, and severally waive such right of recourse to the Courts as would otherwise have existed in their favor.”⁴

Exercising his plenary “best interests” power, Landis permanently banned from professional baseball eight Chicago White Sox players accused of losing the 1919 World Series to the Cincinnati Reds in exchange for payments from gamblers, even though they were acquitted of criminal charges.⁵ In December 1921, “to show somebody who is running this game” he fined Babe Ruth and two other New York Yankees players an amount equal to the sum of their payments for winning the 1921 World Series and suspended them until May 20, 1922 for violating rules prohibiting players from the two World Series teams from subsequently participating in “barnstorming tours.”⁶

From 1944 until 2000, the MLB clubs modified the MLB commissioner’s contractually granted “best interests” power several times. After Landis’ November 25, 1944 death, the Major League Agreement narrowed the scope of the MLB commissioner’s “best interests” power by adding the following provision to Article I, Section 3: “No Major League Rule or other joint action of the two Major Leagues, and no action or procedure taken in compliance with any such Major League Rule or joint action of the two Major Leagues shall be considered or construed to be detrimental to Baseball.”⁷ It also eliminated the provision waiving the clubs’ right of judicial recourse to challenge a decision by the commissioner.⁸

These 1944 amendments remained in effect for twenty years, encompassing the terms of Commissioner A.B. “Happy” Chandler and Ford Frick. After Frick’s 1964 retirement and consistent with his recommendations, the Major League Agreement deleted the foregoing language in Article I, Section 3 and restored the waiver of judicial recourse provision.⁹ In addition, it substituted “not in the best interests of the national game of Baseball” or “not in the best interests of Baseball” for “detrimental to the best interests of the national game of baseball” or “detrimental to baseball” respectively.¹⁰

4. MAJOR LEAGUE AGREEMENT art. VII, § 1.

5. Douglas Linder, *The Black Sox Trial: An Account*, FAMOUS TRIALS, <http://www.famous-trials.com/blacksox/943-home> (last visited Dec. 21, 2018).

6. SPINK, *supra* note 1, at 100–06, 104.

7. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 534, 547 n.32 (7th Cir. 1978).

8. *Id.* at 534.

9. *Id.*

10. *Id.* at 534.

In 2000, the Major League Agreement was amended and renamed the Major League Baseball Constitution.¹¹ The nature and scope of the MLB commissioner's "best interests" authority has remained substantially the same since the 1964 amendment of the Major League Agreement, although the specific punitive sanctions the commissioner is empowered to impose have varied over time.¹² Along with inherent administrative authority to further baseball's best interests (analogous to the United States president's executive order authority), the MLB commissioner historically and currently has enjoyed broad investigative, remedial, preventative, and disciplinary power to ensure that baseball players, coaches, and other personnel engage in honest athletic competition and to refrain from activities that harm the sport's integrity such as gambling on or improperly influencing the results of baseball games.¹³ In addition, the commissioner's "best interests" power encompasses plenary authority to take appropriate steps to preserve leaguewide competitive balance as well as fair play (both on-field and off-field) among MLB league clubs.¹⁴ This authority enables the MLB commissioner to maintain the integrity of and public confidence in the game of baseball.

In exercising authorized "best interests" of the game power, the MLB commissioner generally has broad discretion, and courts usually provide substantial deference to the commissioner's judgment and uphold action taken pursuant to this authority. For example, in *Charles O. Finley & Co. v. Kuhn*, the Seventh Circuit upheld the MLB commissioner's rejection of the

11. MAJOR LEAGUE BASEBALL CONST. art. II.

12. MAJOR LEAGUE BASEBALL CONST. art. II, § 3 provides:

In the case of conduct by Major League Clubs, owners, officers, employees or players that is deemed by the Commissioner not to be in the best interests of Baseball, punitive action by the Commissioner for each offense may include any one or more of the following: (a) a reprimand; (b) deprivation of a Major League Club of representation in Major League Meetings; (c) suspension or removal of any owner, officer or employee of a Major League Club; (d) temporary or permanent ineligibility of a player; and (e) a fine, not to exceed \$2,000,000 in the case of a Major League Club, not to exceed \$500,000 in the case of an owner, officer or employee, and not to exceed \$500 in the case of a player; (f) loss of the benefit of any or all of the Major League Rules, including but not limited to the denial or transfer of player selection rights provided by Major League Rules 4 and 5; and (g) such other actions as the Commissioner may deem appropriate.

13. *Id.* § 2 (b)–(c), §§ 3–4; Matthew B. Pachman, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1417 (1990).

14. MAJOR LEAGUE BASEBALL CONST. art. II., § 4.

assignments of the contracts of three star players (Vida Blue, Rollie Fingers, and Joe Rudi) by the Oakland Athletics club to two other clubs (the Boston Red Sox and New York Yankees, traditionally strong teams in large markets) “as inconsistent with the best interests of baseball, the integrity of the game and the maintenance of public confidence in it.”¹⁵ Commissioner Bowie Kuhn expressed his concern for the debilitation of the Oakland club through the loss of three of its best players and the lessening of leaguewide competitive balance if the more affluent clubs were able to purchase another club’s best players for cash.¹⁶ The court rejected the Oakland club’s contention because these player transactions did not violate any Major League Rule.¹⁷ The commissioner’s invalidation of its sale of the players’ contracts was “arbitrary, capricious, unreasonable, discriminatory, directly contrary to historical precedent, baseball tradition, and prior rulings and actions of the [MLB] Commissioner.”¹⁸ Observing that the commissioner has broad authority to prevent any act, transaction or practice not in the best interests of baseball, the court ruled that he “acted in good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball” and that “whether he was right or wrong is beyond the competence and the jurisdiction of this court to decide.”¹⁹ It explained: “While it is true that professional baseball selected as its first Commissioner a federal judge, it intended only him and not the judiciary as a whole to be its umpire and governor.”²⁰

Courts have recognized and enforced contractual, due process, and applicable public law limits on the exercise of the MLB commissioner’s “best interests” of the game authority.²¹ The *Finley* court explained that judicial intervention is appropriate if the commissioner’s “rules, regulations or judgments . . . are in contravention to the laws of the land or in disregard of the charter or bylaws of the association [i.e., Major League Baseball or Minor League Baseball] and . . . where [he] has failed to follow the basic rudiments of due process of law.”²² For example, Commissioner Kuhn’s 1977

15. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 531–32, 544 (7th Cir. 1978).

16. *Id.* at 531.

17. *Id.*

18. *Id.* at 535.

19. *Id.* at 539.

20. *Id.* at 537.

21. *See id.* at 544.

22. *Id.*; *see id.* at 544 n.65 (stating that when exercising disciplinary authority pursuant to his “best interests” power, the commissioner’s process “must not be a sham designed merely to give colorable propriety to an inadequate process”). *See also* Rose v. Giamatti, 721 F. Supp. 906, 916 (S.D. Ohio 1989) (observing that under the Basic Agreement, “Commissioner is given virtually unlimited authority to formulate his own rules of procedure for conducting [‘not in the

disciplinary sanction requiring the Atlanta Braves club to forfeit its first-round selection in the amateur player draft for having indirect dealings with another club's potential free agent player before the end of the season was judicially overturned because it "is simply not among the penalties authorized for this offense."²³ Similarly, in a ruling that subsequently was vacated, a federal district court invalidated Commissioner Fay Vincent's 1992 decision to transfer the Chicago Cubs to the Western Division of the National League because the National League Constitution provided that no club could be transferred to a different division without its consent and his general "best interests" power could not be used to unilaterally abrogate the Cubs' express right to prevent this move.²⁴ In summary, the Commissioner's "best interest" power generally is judicially construed as extremely broad as long as he is acting with authority granted to him by the MLB Collective Bargaining Agreement ("Basic Agreement").

In *Rose v. Giamatti*, an Ohio trial judge temporarily enjoined Commissioner Bart Giamatti from holding a disciplinary hearing to determine whether Pete Rose, the manager of the Cincinnati Reds, placed bets on MLB games involving his team.²⁵ Rose alleged he was being denied his right to a fair hearing because Giamatti, after reviewing a report prepared by his special investigator and upon which he intended to rely, wrote a letter to a federal judge on behalf of Ron Peters, a convicted drug dealer who was awaiting sentencing.²⁶ The letter stated that Peters had provided sworn testimony that Rose had bet on MLB games, and Giamatti was satisfied that Peters had told the truth to his special investigator.²⁷ Commissioner Giamatti and Rose subsequently entered into a settlement agreement pursuant to which Rose accepted a lifetime suspension from baseball,²⁸ which was based on the exercise of his "best interests" authority to protect the integrity of baseball as well as MLB Rule 21.²⁹ To date, Rose's suspension has been maintained and respected by all of Commissioner Giamatti's successors.

best interests' of baseball] investigations, the only limitations being that whatever rules he adopts must recognize the right of any party in interest to appear before him and be heard . . .").

23. *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1216–17, 1223, 1226 (N.D. Ga. 1977).

24. Sathy, *supra* note 1, at 57–60.

25. *Rose v. Giamatti*, No. A8905178, 1989 WL 111447, at *1 (Ct. Com. Pl. Ohio, Hamilton Cty. June 26, 1989).

26. *See Pachman, supra* note 13, at 1410.

27. *See id.*

28. Jill Lieber & Craig Neff, *An Idol Banned*, SPORTS ILLUSTRATED, Sept. 3, 1989, at 29, 29–30.

29. THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK R. 21(d)(2), at 100 (Comm'r of Baseball, 2018) provides: "Any player, umpire, or Club or League official or employee, who shall

The broad scope of the “best interests” power combined with historically substantial judicial deference to the commissioner’s discretion and judgment have enabled MLB commissioners to advance baseball’s role as a social institution,³⁰ to ensure compliance with MLB rules and fair play, and to promote competitive balance among MLB clubs, as well as to maintain the integrity of the game. For example, in 1990, Commissioner Vincent initially permanently banned New York Yankees owner George Steinbrenner from day-to-day management (but not ownership) of the club for paying Howie Spira, a Bronx gambler, \$40,000 to dig up “dirt” on Dave Winfield, one of the team’s players, with whom he frequently had conflicts (which was lifted after two years).³¹ In 1974, Commissioner Kuhn suspended Steinbrenner for two years (which subsequently was reduced to 15 months after an internal appeal) from any involvement in the operation of the Yankees after he pleaded guilty in a federal criminal case for making illegal campaign contributions.³² In 1993, the MLB Executive Council (chaired by future

bet any sum whatsoever upon any baseball game in connection with which the bettor has a duty to perform, shall be declared permanently ineligible.” THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK R. 21(f), at 101 (Comm’r of Baseball, 2018) provides: “[A]ny and all other acts, transactions, practices or conduct not to be in the best interests of baseball are prohibited.”

30. Among MLB’s many positive contributions to American society are its efforts to achieve racial integration (e.g., in 1947 Jackie Robinson became the first African-American major league player, which was prior to President Truman’s 1948 Executive Order prohibiting racial discrimination in the United States Armed Forces and the U.S. Supreme Court’s 1954 *Brown v. Board of Education* decision invalidating “separate but equal” racial segregation), and to promote diversity in employment (e.g., the Selig rule requiring consideration of persons of color, females, and LGBTs for MLB club general manager, assistant general manager, head coach, director of player personnel, and director of scouting positions), as well as its collectively bargained drug testing policy, the most stringent in North American major league professional team sports, and its substantial charitable contributions to various organizations (e.g., more than \$30 million donated to Stand Up to Cancer). Joshua D. Winneker, David Gargone & Zhen Ma, *Intra-City Rivalries Pushed Major League Baseball’s Desegregation Forward*, 38 WHITTIER L. REV. 215, 215 (2017); Richard Justice, ‘Selig Rule’ First of Its Kind in Sports, MLB (Aug. 26, 2013), <https://www.mlb.com/news/c-58500104/print>; Steve Carell, *Colin Hanks and Ken Jeong Re-Enact Historic Baseball Moments*, MLB: NEWS (Sept. 4, 2012), <https://www.mlb.com/news/mlb-and-stand-up-to-cancer-create-new-campaign-titled-baseball-believes/c-37863712>.

31. Murray Chass, *Owner’s Varying Explanations Are at Issue*, N.Y. TIMES, (July 19, 1990), <https://www.nytimes.com/1990/07/19/sports/owner-s-varying-explanations-are-at-issue.html>; Maryann Hudson, *The Steinbrenner Decision*, L.A. TIMES (July 31, 1990), http://articles.latimes.com/1990-07-31/sports/sp-1099_1_general-partner; Jim McLennan, *Baseball’s Greatest Scandals, #10: Steinbrenner vs. Winfield*, AZ SNAKE PIT (Apr. 18, 2011, 10:00 PM), <https://www.azsnakepit.com/2011/4/18/2095444/baseballs-greatest-scandals-steinbrenner-winfield>.

32. *Former Yankees Owner George Steinbrenner Blamed Illegal Nixon Campaign Contribution on Bad Advice*, NJ (May 9, 2011, 6:53 PM), http://www.nj.com/yankees/index.ssf/2011/05/former_yankees_owner_george_st.html.

Commissioner Bud Selig), which effectively exercised “best interests” of the game power because there was no commissioner at the time, suspended owner Marge Schott from operating the Cincinnati Reds club for one-year and fined her \$25,000 for making ethnic and racist comments.³³

Pursuant to his “best interests of baseball” authority, current MLB Commissioner Rob Manfred has imposed significant sanctions for violations of MLB rules and other misconduct by clubs and their front office personnel. In November 2017, he determined that the Atlanta Braves violated MLB’s international player signing rules from 2015 to 2017 by improperly assigning bonus pool money among players’ contracts.³⁴ Commissioner Manfred declared nine Braves players to be free agents as well as prohibited the club from signing any international player for more than \$10,000 during the 2019–2020 signing period and reduced its international player signing bonus pool by fifty percent for the 2020–2021 signing period.³⁵ In addition, he permanently banned former Braves General Manager John Coppolella from professional baseball employment for life and suspended Gordon Blakeley, the club’s former international scouting chief, from performing services for any MLB team for one year.³⁶

On January 30, 2017, Commissioner Manfred permanently banned former St. Louis Cardinals scouting director Chris Correa from baseball for hacking into the Houston Astros’ team database and accessing it forty-eight times over two-and-a-half years, thereby obtaining confidential information about Astros’ player statistics, trade discussions, and scouting reports.³⁷ In 2016, Correa pled guilty to twelve counts of corporate espionage (a federal crime) and was sentenced to four years in prison.³⁸ Based on his belief that the Cardinals gained a competitive advantage from Correa’s actions even if the

33. Claire Smith, *Baseball Bans Cincinnati Owner for a Year Over Racial Remarks*, N.Y. TIMES (Feb. 4, 1993), <http://www.nytimes.com/1993/02/04/sports/baseball-bans-cincinnati-owner-for-a-year-over-racial-remarks.html>.

34. *Commissioner’s Statement Regarding Braves’ Violations*, MLB (Nov. 21, 2017), <https://www.mlb.com/news/commissioners-statement-regarding-braves-violations/c-262293910>.

35. *Id.*

36. *Id.*; Mark Bowman, *Blakeley’s Hiring Gives Hints to Braves’ Direction*, MLB (Oct. 3, 2014), <https://www.mlb.com/news/braves-tap-former-yankees-scout-gordon-blakeley-as-special-assistant-to-general-manager/c-97424698>.

37. Christopher Correa, *Former Cardinals Executive, Sentenced to Four Years for Hacking Astros’ Database*, N.Y. TIMES (July 18, 2016), <https://www.nytimes.com/2016/07/19/sports/baseball/christopher-correa-a-former-cardinals-executive-sentenced-to-four-years-for-hacking-astros-database.html>.

38. Mike Axisa, *Former Cardinals Executive Sentenced to 46 Months in Astros Hacking Case*, CBS SPORTS (July 18, 2016), <https://www.cbssports.com/mlb/news/former-cardinals-executive-sentenced-to-46-months-in-astros-hacking-case/>.

club did not know how he obtained this information, Commissioner Manfred required the Cardinals to pay \$2 million in compensation and to give its top two picks in the 2017 MLB draft to the Astros.³⁹

The Basic Agreement and uniform player contract provisions define and limit the commissioner's authority to discipline MLB players for on-field or off-field conduct,⁴⁰ which is subject to review by an arbitration panel in accordance with the process agreed upon by the MLB clubs' collective bargaining representative and the players' union. At times, even if the arbitration panel determined that the commissioner had just cause to discipline a player in accordance with his "best interests" of baseball power, it has reduced the length of a player's suspension. For example, in 2014, an arbitration panel chaired by independent arbitrator Frederic Horowitz reduced the 211-game suspension imposed by Commissioner Selig on New York Yankees player Alex Rodriguez for violating MLB's drug testing policy to one full season (162 games) and any post-season games for which his team qualified.⁴¹ In 2000, Commissioner Selig suspended Atlanta Braves pitcher John Rocker for seventy-three days (encompassing all of spring training and the first month of the season) and fined him \$20,000 for disparaging comments about immigrants, minorities and homosexuals published in *Sports Illustrated*, which was reduced by Arbitrator Shyam Das to the first two weeks of the 2000 baseball season and to \$500, respectively.⁴²

Arbitrator reductions of authorized disciplinary sanctions for player misconduct erodes the commissioner's "best interests" power and is contrary to the generally deferential judicial review of action taken pursuant to his

39. Jenifer Langosch, *MLB Refutes Correa's Response to Penalty*, MLB (Jan. 31, 2017), <https://www.mlb.com/news/rob-manfred-refutes-chris-correas-response/c-214819996>.

40. MLB, 2017–2021 BASIC AGREEMENT 41–51 (2016) [hereinafter BASIC AGREEMENT], <http://www.mlbplayers.com/pdf9/5450407.pdf>. Article XII, which is the product of collective bargaining between the MLB clubs' representative and the MLB players' union, provides:

Players may be disciplined for just cause for conduct that is materially detrimental or materially prejudicial to the best interests of Baseball including, but not limited to, engaging in conduct in violation of federal, state or local law. The Commissioner and a Club shall not discipline a Player for the same act or conduct under this provision. In cases of this type, a Club may only discipline a Player, or take other adverse action against him, when the Commissioner defers the disciplinary decision to the Club.

Id. at 52.

41. Steve Eder, *Arbitrator's Ruling Banishes the Yankees' Alex Rodriguez for a Season*, N.Y. TIMES (Jan. 11, 2014), <https://www.nytimes.com/2014/01/12/sports/baseball/arbitrators-ruling-banishes-the-yankees-alex-rodriguez-for-a-season.html>.

42. Ross Newhan, *Rocker's Penalty Trimmed Severely*, L.A. TIMES (Mar. 2, 2000), <http://articles.latimes.com/2000/mar/02/sports/sp-4687>.

express authority, with corresponding potential adverse effects on the commissioner's ability to further the best interests of baseball in an appropriate and socially responsible manner. In response to Arbitrator Das's reduction of Rocker's disciplinary sanction, Commissioner Selig stated: "I disagree with the decision. . . . It does not reflect any understanding or sensitivity to the important social responsibility that baseball has to the public. It completely ignores the sensibilities of the groups or people maligned by Mr. Rocker and disregards the player's position as a role model for children."⁴³

As illustrated by *Finley*, the MLB commissioner's "best interests" power is an important counterbalance to the economic incentive for a club (or group of clubs) to act in its (or their) own interest contrary to that of the league as a whole. In January 2000, the MLB clubs gave the MLB Commissioner "economic best interests" power, which authorized appropriate and necessary action to promote "long-term competitive balance among [MLB] Clubs."⁴⁴ While he was in office, Commissioner Selig exercised this authority based on the guiding principle that fans of each MLB club should have "hope and faith" on Opening Day of the baseball season that their team can win enough games to qualify for postseason play.⁴⁵

Other North American major professional sports leagues have adopted MLB's independent commissioner model of governance, which involves club owners' selecting and appointing a particular person with contractually defined "best interests" of the sport authority.⁴⁶ Following MLB's lead, the NBA, NFL, and NHL generally provide their respective commissioners with broad "best interests" power, which has been used as appropriate and necessary to protect the league's integrity and its member clubs' common

43. Phil Rogers, *Arbitrator's Ruling Rocks Selig's Power*, CHI. TRIB. (Mar. 2, 2000), http://articles.chicagotribune.com/2000-03-02/sports/0003020312_1_mr-rocker-and-disregards-john-rocker-atlanta-clubhouse.

44. MAJOR LEAGUE CONST. art. II, § 4 provides:

[N]othing in this Section 4 shall limit the Commissioner's authority to act on any matter that involves the integrity of, or public confidence in, the national game of Baseball. Integrity shall include without limitation, as determined by the Commissioner, the ability of, and the public perception that, players and Clubs perform and compete at all times to the best of their abilities. Public confidence shall include without limitation the public perception, as determined by the Commissioner, that there is an appropriate level of long-term competitive balance among Clubs.

45. Paul Hagen, *Selig Given Lifetime Achievement Award*, MLB (May 18, 2016), <https://www.mlb.com/news/bud-selig-given-lifetime-achievement-award/c-178967764>.

46. See Michael Mondell, *The Roger Goodell Standard: Is Commissioner Authority Good for Sports?*, 42 SETON HALL LEGIS. J. 191, 192–202 (2017).

objectives. Here are a few recent examples: On April 29, 2014, soon after an audio recording became public in which Los Angeles Clippers owner Donald Sterling made racist comments indicating he did not welcome African-Americans at Clippers games, NBA Commissioner Adam Silver fined Sterling \$2.5 million and permanently banned him from having any involvement in the team's management,⁴⁷ which led to his sale of the club.⁴⁸ Pursuant to his plenary "best interests" power, NFL Commissioner Roger Goodell has imposed significant disciplinary suspensions on coaches for misconduct (e.g., New Orleans Saints General Manager Mickey Loomis, Head Coach Sean Payton, and Assistant Head Coach Joe Vitt for their involvement in "Bountygate," an incentivized scheme to injure opposing players during games⁴⁹) as well as players for on-field (e.g., Tom Brady⁵⁰) or off-field misconduct (e.g., Ray Rice,⁵¹ Adrian Peterson,⁵² Ezekiel Elliott⁵³) in violation of their obligations under the NFL Collective Bargaining Agreement or uniform player contract (which discipline, under the NFL Collective Bargaining Agreement, is not subject to independent arbitral review).⁵⁴

47. Jeff Zillgitt, *Adam Silver Gives Donald Sterling Lifetime Ban from NBA*, USA TODAY (Apr. 29, 2014, 2:17 PM), <https://www.usatoday.com/story/news/usanow/2014/04/29/donald-sterling-fine-penalty-racism-audio-commissioner-adam-silver-los-angeles-suspension/8460575/>.

48. James Rainey, *Donald Sterling Says He's Happy, but His Wife Wants to End His NBA Ban*, NBC NEWS (May 25, 2017, 8:47 AM), <https://www.nbcnews.com/news/sports/donald-sterling-says-he-s-ok-his-nba-ban-his-n764346>.

49. Ryan Wilson, *Gregg Williams on Bountygate*, CBS SPORTS (July 26, 2015), [https://www.cbssports.com/nfl/news/gregg-williams-on-bountygate-it-was-nothing-that-hadnt-been-done-before/Saints 'Bounty' Discipline Won't Change, Commissioner Says](https://www.cbssports.com/nfl/news/gregg-williams-on-bountygate-it-was-nothing-that-hadnt-been-done-before/Saints%20Bounty%20Discipline%20Won%20t%20Change%20Commissioner%20Says), NFL (Apr. 9, 2012, 1:03 PM), <http://www.nfl.com/news/story/09000d5d8282dd66/article/saints-bounty-discipline-wont-change-commissioner-says>.

50. *Tom Brady Suspension Case Timeline*, NFL: AROUND THE NFL (July 15, 2016, 1:16 PM), <http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-case-timeline>.

51. Ken Belson, *A Punch Is Seen, and a Player Is Out*, N.Y. TIMES (Sept. 8, 2014), <https://www.nytimes.com/2014/09/09/sports/football/ray-rice-video-shows-punch-and-raises-new-questions-for-nfl.html>.

52. Elliott C. McLaughlin, *NFL Suspends Adrian Peterson Without Pay for Season*, CNN (Nov. 18, 2014, 10:57 AM), <https://www.cnn.com/2014/11/18/us/adrian-peterson-suspended-for-season/index.html>.

53. *NFL: Roger Goodell Aware of Dissent Before Suspending Ezekiel Elliott*, CHI. TRIB. (Sept. 2, 2017, 1:54 PM), <http://www.chicagotribune.com/sports/football/ct-nfl-roger-goodell-ezekiel-elliott-suspension-20170902-story.html>.

54. See, e.g., *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016) (recognizing that the NFL collective bargaining agreement provides for the NFL commissioner to arbitrate a player's appeal of his disciplinary sanction, the court observes that "arbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen[.]" "[h]ad

In *Oakland Raiders v. National Football League*, a California intermediate appellate court rejected the contention that a professional sports league commissioner owes a fiduciary duty to individual clubs, which would inherently conflict with the commissioner's contractual duty to protect the league's best interests.⁵⁵ The court implicitly adopted and followed *Finley's* deferential judicial standard for reviewing challenges to the exercise of a league commissioner's "best interests" power:

Given the unique and specialized nature of . . . the operation of a professional football league[,] there is significant danger that judicial intervention in such disputes will have the undesired and unintended effect of interfering with the League's autonomy in matters where the NFL and its commissioner have much greater competence and understanding than the courts.⁵⁶

II. ANTITRUST EXEMPTION

In 1922, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,⁵⁷ the U.S. Supreme Court considered its first case regarding the application of federal antitrust law to professional sports.⁵⁸ Pursuant to a December 1915 "Peace Agreement" with the American League and National League, the Federal League and seven of eight baseball clubs (except the one in Baltimore), was dissolved.⁵⁹ The Baltimore club alleged that the American League and National League conspired to monopolize professional baseball, which left it without a major league in which to play, in violation of the Sherman Act.⁶⁰ At trial, it obtained a jury verdict and damages award in its favor, which was reversed by the District of Columbia Court of Appeals because the exhibition of baseball games does not directly affect interstate trade or commerce under the Sherman Act.⁶¹

the parties wished to restrict the Commissioner's authority, they could have fashioned a different agreement").

55. *Oakland Raiders v. NFL*, 32 Cal. Rptr. 3d 266 (Ct. App. 2005).

56. *Id.* at 284.

57. 259 U.S. 200 (1922).

58. Brian F. Zeck, Note, *Is This the Bottom of the Ninth for Baseball's Antitrust Exemption? A Proposed Removal of the Exemption and Analysis of Player Restraints in an Exemption-Free Environment*, 43 CLEV. ST. L. REV. 693, 699–700 (1995).

59. *Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc.*, 269 F. 681, 682 (D.C. Cir. 1920).

60. John T. Wolohan, *Major League Baseball Contraction and Antitrust Law*, 10 VILL. SPORTS & ENT. L.J. 5, 8 (2003).

61. *Nat'l League of Prof'l Baseball Clubs*, 269 F. at 684–85. For a detailed history of the circumstances giving rise to this case and related antitrust litigation see Thomas J. Ostertag,

Affirming, the Supreme Court ruled that professional baseball's business activity is wholly intrastate because each game is played within a single state; therefore, it is not interstate "trade or commerce" subject to regulation by federal antitrust law:

The business is giving exhibitions of base ball, 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. . . . [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation . . . takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case . . . does not engage in such commerce because the lawyer . . . goes to another State.⁶²

In a 1953 per curiam opinion, *Toolson v. New York Yankees, Inc.*,⁶³ the Supreme Court reaffirmed *Federal Baseball* in an antitrust case by a minor league baseball player alleging that organized professional baseball is an illegal monopoly.⁶⁴ The Court reasoned that baseball had been allowed to develop for more than thirty years without being subject to the federal

Baseball's Antitrust Exemption: Its History and Continuing Importance, 4 VA. SPORTS & ENT. L.J. 54 (2004).

62. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 208–09.

63. 346 U.S. 356 (1953).

64. *Id.* at 356–57. Specifically, the plaintiff alleged:

[H]e was, and now is, a professional baseball player and that as a result of the alleged monopoly, to which all defendants are allegedly party, he has been deprived of his livelihood. Plaintiff was under contract with the Newark International Baseball Club, Inc., which club assigned his contract to the Binghamton Exhibition Company, Inc. As a result of plaintiff's refusal to report to the latter club, and pursuant to the provisions of his contract with the Newark team and the regulations which govern the structure of 'Organized Baseball' in general, he was placed on the 'ineligible list' of the Binghamton team, and, defendants, because of this, have refused and still do refuse to allow plaintiff to play professional baseball.

Toolson v. N.Y. Yankees, 101 F. Supp. 93, 93 (S.D. Cal. 1951).

antitrust laws.⁶⁵ It noted that Congress did not legislatively eliminate or otherwise modify baseball's judicially-created antitrust exemption, thereby evidencing its intention that professional baseball is not to be regulated by federal antitrust law.⁶⁶

In 1972, in *Flood v. Kuhn*, the Supreme Court again considered whether baseball should have an exemption from federal antitrust law in a case by major league player Curt Flood seeking to invalidate the "reserve clause," which provided a club with perpetual rights to a player even after his contract expired.⁶⁷ The court acknowledged that "[p]rofessional baseball is a business and it is engaged in interstate commerce" and that its antitrust exemption "is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce."⁶⁸ But the Court refused to judicially abrogate this antitrust exemption because "[i]t rests on a recognition and acceptance of baseball's unique characteristics and needs."⁶⁹ Reiterating *Toolson's* reasoning, the Court "expressed concern about the confusion and the retroactivity problems that inevitably would result" if it overturned Federal Baseball because baseball "has been allowed to develop and to expand unhindered" by the Sherman Act for the past fifty years.⁷⁰ The Court stated: "If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court."⁷¹

All federal appellate courts considering the scope of baseball's antitrust exemption have broadly ruled that the "business of baseball" is not subject to the federal antitrust laws.⁷² In *City of San Jose v. Office of the Commissioner*

65. *Toolson*, 346 U.S. at 357.

66. *Id.*

67. *Flood v. Kuhn*, 407 U.S. 258, 266–67 (1972).

68. *Id.* at 282.

69. *Id.*

70. *Id.* at 283.

71. *Id.* at 284. In their dissenting opinion, Justices Marshall and Brennan asserted:

We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here.

Id. at 292–93.

72. See, e.g., *Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC*, 870 F.3d 682, 688 (7th Cir. 2017) (addressing antitrust claims by Wrigley rooftop owners against Chicago Cubs club); *Wyckoff v. Office of Comm'r of Baseball*, No. 16–3795–CV, 2017 WL 3856454, at *29 (2d Cir. Aug. 31, 2017) (discussing terms of a uniform contract for baseball scouts); *Miranda v.*

of *Baseball*, the Ninth Circuit affirmed the dismissal of federal and California antitrust law claims challenging MLB's alleged efforts to prevent the Oakland Athletics club from relocating into the San Francisco Giants club's home territory.⁷³ The court explained:

Flood's stare decisis and congressional acquiescence rationales suggest the [U.S. Supreme] Court intended the exemption to have the same scope as the exemption established in *Federal Baseball* and *Toolson*[, which] . . . extend the baseball exemption to the entire 'business of providing public baseball games for profit between clubs of professional baseball players.'"⁷⁴

The Curt Flood Act of 1998, which is the product of a joint Congressional lobbying effort by MLB and the MLBPA in accordance with the terms of their 1996 CBA, narrows the scope of baseball's antitrust exemption by

Selig, 860 F.3d 1237, 1238 (9th Cir. 2017) (addressing minor league system labor relations); *San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 690–91 (9th Cir. 2015) (addressing a franchise relocation dispute); *MLB v. Crist*, 331 F.3d 1177, 1179 (11th Cir. 2003) (describing a state attorney general investigation of proposed sale and relocation of baseball club); *Prof'l Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1085–86 (11th Cir. 1982) (addressing minor league system labor relations); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 534 (7th Cir. 1978) (addressing the exercise of commissioner's best interests of game authority); *McCoy v. MLB*, 911 F. Supp. 454, 455–56, 458 (W.D. Wash. 1995) (discussing an antitrust suit by fans and businesses arising out of 1994 MLB strike); *Minn. Twins P'ship v. State ex rel. Hatch*, 592 N.W.2d 847, 849 (Minn. 1999) (describing a Minnesota civil investigative demand seeking information regarding proposed sale and relocation of Minnesota Twins franchise and potential relocation to North Carolina).

73. *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 692 (9th Cir. 2015). Some scholars contend that baseball should retain this broad antitrust exemption. Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 215 (2012) ("Congress has obtained considerable leverage over baseball throughout the years by threatening to revoke the sport's antitrust exemption. Congress has used this power to help extract various procompetitive concessions from MLB, benefits that would not have been directly obtained via antitrust litigation alone."); Gary Roberts, *On the Scope and Effect of Baseball's Antitrust Exclusion*, 4 SETON HALL J. SPORTS L. 321, 323 (1994) ("[W]hile it is in theory unjustified to treat baseball differently from other sports and, while problems exist in baseball which concern both the public and Congress, trying to abolish the exclusion would be politically futile and unlikely to further the public interest."). On the other hand, others assert that the Supreme Court trilogy of *Federal Baseball Club*, *Toolson*, and *Flood* is an admitted aberration unduly deferential to its own precedent without any sound reasoning. See, e.g., Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209 (1983); Joseph W. Dellapenna, *The Phoenix Phillies v. The Philadelphia Phillies: A Recently Discovered Opinion on "Baseball" and the "Antitrust" Exemption*, 5 VILL. SPORTS & ENT. L.J. 233 (1998); Edmund P. Edmonds, *Over Forty Years in the On-Deck Circle: Congress and the Baseball Antitrust Exemption*, 19 T. MARSHALL L. REV. 627 (1994); Hon. Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201 (1993).

74. *San Jose*, 776 F.3d at 690 (quoting *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953)).

giving MLB players the same antitrust law rights and remedies as players in other professional sports leagues.⁷⁵ This federal statute permits antitrust challenges only to conduct or agreements “affecting employment of major league baseball players to play baseball at the major league level”⁷⁶ (e.g., free agency restrictions), but not those relating to employment as a minor league baseball player, the amateur or first-player draft, or any reserve clause applicable to minor league players.⁷⁷

In *Miranda v. Selig*, the Ninth Circuit held that baseball’s antitrust exemption extends to Major League Baseball’s labor relationship with minor league baseball players, which its member clubs employ and compensate.⁷⁸ The court rejected the players’ claims that MLB’s Uniform Player Contract for minor league players, which established their individual salaries and provided each MLB club with the exclusive rights to their services for seven years, violated federal antitrust law.⁷⁹ The court initially noted that although the Curt Flood Act makes MLB’s labor relations with major league players subject to federal antitrust law, “it explicitly maintained the baseball exemption for anything related to the employment of minor league baseball players—including the use of reserve clauses.”⁸⁰ Based on *Flood*, *City of San Jose*, and the Curt Flood Act, the Ninth Circuit concluded “it is undeniably true that minor league baseball—particularly the employment of minor league baseball players and the requirement that they sign a uniform contract containing a reserve clause—falls squarely within baseball’s exemption from federal antitrust laws.”⁸¹

Most courts have held that decisions by Major League Baseball and its clubs regarding whether a team should be permitted to relocate to another city are not subject to federal or state law antitrust challenge. For example, in *State v. Milwaukee Braves, Inc.*, the Wisconsin Supreme Court reversed a trial court ruling that the National League and its member clubs violated Wisconsin antitrust law by allowing the Milwaukee Braves to move to Atlanta and by refusing to provide a replacement team in Milwaukee.⁸² Because of baseball’s federal antitrust law exemption, the court concluded that the Supremacy Clause of the U.S. Constitution precluded league

75. 15 U.S.C. § 26b (2018).

76. § 26b(a).

77. § 26b(b)(1).

78. *Miranda v. Selig*, 860 F.3d 1237, 1243–44 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 507 (2017).

79. *Id.* at 1242.

80. *Id.*

81. *Id.*

82. *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 18 (Wis. 1966).

decisions regarding the location of its clubs from being subject to state antitrust law.⁸³

A minority of federal district and state courts have construed *Flood* narrowly and held that only baseball's reserve clause and matters integral or central to baseball are immune from antitrust challenge.⁸⁴ For example, in *Laumann v. National Hockey League*, a New York federal district court ruled that media broadcasting contracts are "not central to the business of baseball" and not encompassed within baseball's antitrust exemption.⁸⁵

Baseball's antitrust exemption provides the MLB commissioner and league clubs with substantial internal governing autonomy regarding their economically interdependent business affairs. It enables MLB to prevent unilateral relocation by a club into another club's home territory, or to reject the geographical movement of a club that would be inconsistent with MLB's league-wide interests, either of which generally also implicates consumer welfare considerations (i.e., the interests of baseball fans in the team's current location). It also protects their collective right to approve or disapprove the purchase and sale of clubs without fear of potential antitrust liability.

In addition, this antitrust exemption has enabled development of baseball's national minor league system, which provides a popular, relatively

83. See *id.* at 12. This holding is consistent with the *Flood* Court's affirmation of the rulings of the federal district court and Second Circuit that the use of state antitrust law to regulate baseball would violate the Dormant Commerce Clause of the federal constitution:

Judge Cooper rejected the state law claims because state antitrust regulation would conflict with federal policy and because national 'uniformity [is required] in any regulation of baseball and its reserve system.' The Court of Appeals, in affirming, stated, '[A]s the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law.'

Flood v. Kuhn, 407 U.S. 258, 284 (1972) (citing *Flood v. Kuhn*, 316 F. Supp. 271, 280 (S.D.N.Y. 1970) and *Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971)). The Court concluded that "these statements adequately dispose of the state law claims." *Id.* at 285.

84. See, e.g., *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992) (holding that there is no antitrust exemption for a common law restraint of trade claim concerning baseball's employment relations with its umpires because *Flood* limits exemption to baseball's "unique characteristics and needs"). Some courts have ruled that baseball's antitrust exemption does not extend to decisions involving the sale and location of baseball franchises. E.g., *Piazza v. MLB*, 831 F. Supp. 420, 421 (E.D. Pa. 1993); *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1021-22 (Fla. 1994); *Morsani v. MLB*, 663 So. 2d 653, 655 (Fla. Dist. Ct. App. 1995).

85. *Laumann v. NHL*, 56 F. Supp. 3d 280, 297 (S.D.N.Y. 2014); see also *Henderson Broad. Corp. v. Hous. Sports Ass'n*, 541 F. Supp. 263, 265 (S.D. Tex. 1982) (finding that terms of contract to broadcast Houston Astros games on radio not immune from antitrust scrutiny).

inexpensive form of entertainment in small and medium communities throughout the U.S. and has facilitated a very successful system of player development that creates thousands of employment opportunities for aspiring MLB players. Development of future MLB players through the minor league system is a proven means of building a competitive MLB team as illustrated by the recent postseason success of clubs such as the Kansas City Royals (2015 World Series champions and 2014 World Series American League representative⁸⁶), the Chicago Cubs (2016 World Series champions, its first championship since 1908⁸⁷), and the Houston Astros (2017 World Series champions, the first championship in its history⁸⁸).

The generally broad judicial scope of baseball's antitrust exemption is particularly important today because of the U.S. Supreme Court's 2010 rejection of the "single entity" defense in *American Needle, Inc. v. National Football League*.⁸⁹ *American Needle* effectively holds that most professional sports league rules and internal governance decisions constitute concerted action under section 1 of the Sherman Act and, without an applicable antitrust exemption, are subject to judicial scrutiny under federal antitrust law.⁹⁰

Laumann's narrow construction of baseball's antitrust exemption, and its post-*American Needle* ruling that MLB restrictions on its clubs' sale of out-of-market television and Internet broadcast rights are concerted action subject to section 1 antitrust challenge, may inhibit MLB and its clubs from making procompetitive business decisions necessary to maintain on-field competitive balance or that otherwise are consistent with consumer welfare. *Laumann*

86. Bob Nightengale, *Nightengale: Royals Find Fitting End to World Series Title*, USA TODAY (Nov. 2, 2015, 12:34 AM), <https://www.usatoday.com/story/sports/mlb/2015/11/02/kansas-city-royals-world-series-championship-game-5/75021956/>.

87. Bob Nightengale, *Chicago Cubs, World Series Champions: Game 7 Provides Excruciating Final Test*, USA TODAY (Nov. 3, 2016, 1:26 AM), <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2016/11/03/cubs-win-world-series-indians-game-7/93219032/>.

88. Bob Nightengale, *Bottoms Up: Astros and MVP George Springer Complete Stunning Rise, Win World Series*, USA TODAY (Nov. 2, 2017, 12:08 AM), <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2017/11/02/astros-win-world-series-george-springer/824013001/>.

89. 560 U.S. 183 (2010). Some commentators have suggested that *American Needle* illustrates the Supreme Court's willingness to look beyond the mere effects of a professional sport's league's historical business operations in determining its application, which may foreshadow its future abrogation of baseball's antitrust exemption. See 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, 295–96 (2011).

90. *American Needle*, 560 U.S. at 186.

was settled before trial with pro-consumer terms,⁹¹ but the court's pre-settlement judicial rulings could limit MLB's ability to protect its clubs' home television territories.⁹² If so, the value of their respective local media rights contracts and total revenues will be reduced (especially many of the small market clubs), with potential corresponding adverse effects on MLB's league-wide competitive balance, which is exacerbated by the lack of a team player salary cap.

Laumann appears inconsistent with the Second Circuit's recognition of the procompetitive effects of MLB's centralized licensing of its clubs' intellectual property rights and pro rata revenue sharing, particularly the promotion of competitive balance among league teams. In *MLB Properties, Inc. v. Salvino, Inc.*,⁹³ the Second Circuit rejected an antitrust challenge to MLB Properties (MLBP)'s business model of exclusive trademark licensing and pro rata distribution of revenues and noted how it enhanced consumer welfare:

[C]entralization of the licensing and protection of MLB Intellectual Property has produced many cost-savings and efficiencies. . . .
[S]ince the Clubs made MLBP their exclusive licensing agent for all retail products bearing MLB Intellectual Property, the number of licenses and licensees has multiplied.

. . . .

[T]he Clubs' agreement that MLBP's profits from licensing MLB Intellectual Property will be distributed equally among the 30 Clubs is a precisely tailored attempt to achieve, or at least increase, competitive balance.

. . . .

91. For example, the price of a subscription to watch all MLB teams on the Internet and a single team's out-of-market games on television was reduced, and fans now can purchase a subscription to watch a single team's out-of-market games on the Internet. *See* Linda Chiem, *NHL Broadcast Antitrust Deal Passes Court Muster*, LAW360 (June 16, 2015, 4:07 PM), <https://www.law360.com/articles/668457/nhl-broadcast-antitrust-deal-passes-court-muster>.

92. While acknowledging that "[m]aintaining competitive balance is a legitimate and important goal for professional sports leagues" and that such restrictions "protect less popular clubs from competition with more popular teams in their own [market]," the *Laumann* court questioned whether territorial broadcast restrictions actually achieve this objective. *Laumann v. NHL*, 56 F. Supp. 3d 280, 299 (S.D.N.Y. 2014). It also was skeptical that MLB's exclusive package sale of out-of-market games on cable and satellite television as well as all games broadcast on the Internet, with net revenues distributed pro rata to all clubs, is procompetitive, noting "support in the economic community for the theory that revenue sharing in fact exacerbates competitive imbalance." *Id.* at 300.

93. 542 F.3d 290 (2d Cir. 2008).

[T]his case involves an integrated professional sports league in which the competitors are not independent but interdependent, competitive balance among the teams is essential to both the viability of the Clubs and public interest in the sport, and profit sharing is a legitimate means . . . of maintaining some measure of competitive balance.

....

The concept of “competitive balance” reflects the expected equality of opportunity to compete and prevail on the field. Competitive balance also relates to the fans’ expectations that each team is a potential champion—i.e. that each Club has a reasonable opportunity to win each game and also to compete for a championship.⁹⁴

Although generally structured and operated essentially similar to MLB except for its extensive U.S. minor league player system, no other North American professional sports league with U.S. clubs has a general antitrust law exemption,⁹⁵ so their respective rules and internal governance decisions are subject to challenge under the Sherman Act.⁹⁶ For example, antitrust law may inhibit the ability of other major professional leagues such as the NBA, NFL, and NHL to prevent unilateral geographical relocation by even profitable clubs with strong fan support in their local community.⁹⁷ A

94. *Id.* at 327–33.

95. The Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 et seq. (2018), provides only a limited antitrust exemption that permits a professional sports league’s clubs to collectively sell rights to the “sponsored telecasting” of their games. Based on its express language and legislative history, it has been construed narrowly by courts to encompass only free over-the-air telecasts, which does not immunize the joint sale of cable or satellite television rights or Internet viewing rights from antitrust challenge. *See Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299, 302 (3d Cir. 1999); *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 808 F. Supp. 646, 649–50 (N.D. Ill. 1992). Although a 1966 statute, Act of Nov. 8, 1966, Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1508, 1515, permitted the American Football League to be merged with the NFL, it does not provide the NFL with any blanket exemption from federal antitrust law. *See Mid-South Grizzlies v. NFL*, 720 F.2d 772, 781–88 (3d Cir. 1983).

96. According to former NFL general counsel Jay Moyer, NFL Commissioner Pete Rozelle’s 1989 retirement was at least partially motivated by the substantial personal toll that the cumulative effects of several 1980s antitrust cases against the NFL had on him, particularly the Oakland Raiders relocation and United States Football League monopolization litigation. *See USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988); *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381 (9th Cir. 1984); Michael Janofsky, *Owners Contend Rozelle Is Slowing*, N.Y. TIMES (Jan. 22, 1989), <https://www.nytimes.com/1989/01/22/sports/super-bowl-xxiii-owners-contend-rozelle-is-slowing.html>.

97. *See, e.g., L.A. Mem’l Coliseum Comm’n*, 726 F.2d at 1409. League restrictions on franchise relocation are not per se illegal; their validity is analyzed on a case-by-case basis under

league's ability to select owners of member clubs⁹⁸ and whether or not new clubs should be added to the league also are subject to antitrust challenge.⁹⁹ Unlike MLB's minor league baseball system, the NHL's affiliation with and control over the U.S. minor and semi-pro hockey league system is not exempt from antitrust challenge and was found to violate the Sherman Act.¹⁰⁰ During the past sixty years, there have been several antitrust challenges to NBA,¹⁰¹ NFL,¹⁰² and NHL¹⁰³ television contracts and/or league restrictions on individual clubs' sale of television or Internet broadcast rights, which resulted in complex, lengthy litigation requiring substantial league resources to defend against (as often as not successfully on the merits).

In summary, MLB's broad common law antitrust exemption generally provides the league and its clubs with a significant degree of legal autonomy regarding their collective internal governance of professional baseball that other professional sports leagues do not have. It has significantly influenced MLB's historical development and business operations without causing any clear predominantly adverse effects on the sport's competitive balance or fans' welfare. Even if federal antitrust law were generally applicable to the business of baseball, pursuant to *American Needle*, MLB and its clubs "share

the rule of reason. See *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562, 567 (9th Cir. 1987); *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 39 (Bankr. D. Ariz. 2009).

98. See, e.g., *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994); *Levin v. NBA*, 385 F. Supp. 149 (S.D.N.Y. 1974). There is, however, relatively little risk of antitrust liability for a league's refusal to approve the purchase or sale of a club because of the difficulty proving that it has the anticompetitive effect of reducing intrabrand economic competition among league clubs. See *Fishman v. Estate of Wirtz*, 807 F.2d 520, 542–44 (7th Cir. 1986); *Levin*, 385 F. Supp. at 152–53, and/or is not justified by procompetitive economic objectives, *NBA v. Minn. Prof'l Basketball, Ltd. P'ship*, 56 F.3d 866, 869–71 (8th Cir. 1995). These cases reflect judicial recognition that a professional sports league's clubs are engaged in an economically interdependent joint venture that produces a particular brand of athletic competition in the entertainment market; therefore, they collectively have a legitimate interest in determining by majority vote the identity of each league team.

99. See *Mid-South Grizzlies*, 720 F.2d 772.

100. *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 517 (E.D. Pa. 1972).

101. See, e.g., *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996); *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002).

102. See, e.g., *Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999); *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988); *In re Nat'l Football Leagues Sunday Ticket Antitrust Litig.*, No. ML 15-02668-BRO, 2017 WL 3084276 (C.D. Cal. June 30, 2017); *United States v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961); *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953).

103. The *Laumann* antitrust litigation also challenged NHL restrictions on its clubs' sale of out-of-market television and Internet broadcast rights, with similar allegations involving MLB restraints being consolidated into a single class action lawsuit. The NHL settled this litigation on terms similar to those to which MLB subsequently agreed. See *supra* note 93 and accompanying text.

an interest in making the entire league successful and profitable” and their “interest in maintaining a competitive balance’ among ‘[themselves] is legitimate and important,”¹⁰⁴ which would justify their rules and collective decisions that reasonably further these procompetitive objectives.

III. LABOR RELATIONS

In 1966, without any challenge to its jurisdiction by either the American League or National League, the National Labor Relations Board (NLRB) certified the Major League Baseball Players Association (MLBPA) as a labor union.¹⁰⁵ Marvin Miller, an economist with the United Steel Workers of America, was the first executive director of the MLBPA, although it is interesting to note that Richard M. Nixon, U.S. president from 1969–1974, was approached about his interest in this position.¹⁰⁶ The history of the collective bargaining relationship between the MLBPA and MLB clubs—as well as U.S. politics and foreign relations—may have been quite different if Mr. Nixon had become the MLBPA’s first executive director rather than our nation’s president.

In 1968, the MLBPA negotiated the first MLB Collective Bargaining Agreement (CBA) (i.e., “Basic Agreement”) with American League and National League clubs on behalf of all baseball players in both leagues.¹⁰⁷ The Basic Agreement included agreed provisions regarding mandatory subjects of collective bargaining (i.e., “wages, hours, and other terms and conditions of employment”),¹⁰⁸ such as a minimum annual player salary, health insurance and pension benefits, and the maximum number of games each club and their players would be scheduled to play within a particular number of

104. *American Needle, Inc. v. NFL*, 560 U.S. 183, 202, 204 (2010) (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984)).

105. *FAQs, When Was the MLBPA Created?*, MAJOR LEAGUE BASEBALL PLAYERS, <https://www.mlbpa.org/faq.aspx> (last visited Dec. 21, 2018). Apparently, the National Basketball Players Association, which was founded in 1954 and recognized by NBA club owners in 1964, is the oldest North American major professional sports league labor union. Andrew Flint, *History of the NBA Labor Union (NBPA)*, HOOPSVIBE (Sept. 2, 2013), <http://www.hoopsvibe.com/features/284571-history-of-nba-labor-union>.

106. *History of the Major League Baseball Players Association*, MAJOR LEAGUE BASEBALL PLAYERS, <https://www.mlbpa.org/history.aspx> (last visited Dec. 21, 2018); *MLBPA History: The 1960’s*, MAJOR LEAGUE BASEBALL PLAYERS (Aug. 31, 2016), http://www.mlbplayers.com/ViewArticle.dbml?DB_OEM_ID=34000&ATCLID=211157621.

107. *History of the Major League Baseball Players Association*, MAJOR LEAGUE BASEBALL PLAYERS, *supra* note 106.

108. Under the NLRA, the required scope of bargaining between management and labor representatives expressly includes all issues relating to “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d) (2018).

days.¹⁰⁹ Unlike most industries but similar to other unionized North American major professional sports leagues, it provided for negotiated individual player salaries above the MLB player minimum because of the differing levels of player talents and their value to their respective clubs.¹¹⁰ It also gave MLB players the right to have an independent arbitrator resolve any grievance with club owners,¹¹¹ a significant modification of the historical practice of having such disputes resolved by the MLB commissioner, whose decision was final, binding, and subject only to very limited judicial review by courts.¹¹²

In a 1969 case, the *American League of Professional Baseball Clubs and Ass'n of National Baseball League Umpires*, the NLRB clearly established the right of multi-state professional sports league and club employees (specifically, American League umpires) to unionize and to collectively bargain their terms and conditions of employment;¹¹³ the existence of this right previously had not been challenged by a sports league or its member clubs.¹¹⁴ Relying on *Flood*, the NLRB determined that “professional baseball is an industry in or affecting commerce, and as such is subject to Board jurisdiction”¹¹⁵ under the National Labor Relations Act (NLRA).¹¹⁶ The NLRB found that the NLRA’s requirements and national labor policy would be furthered by providing “a national forum for uniform resolution of

109. See Mark Armour & Dan Levitt, *A History of the MLBPA’s Collective Bargaining Agreement: Part 1*, *HARDBALL TIMES* (Nov. 7, 2016), <https://www.fangraphs.com/tht/a-history-of-the-mlbpa-collective-bargaining-agreement-part-1/>.

110. *Id.*

111. *FAQs, When Was the First Collective Bargaining Agreement Negotiated Between the Players and Owners?*, MAJOR LEAGUE BASEBALL PLAYERS, <https://www.mlbpa.org/faq.aspx> (last visited Dec. 21, 2018). See *infra* note 121.

112. See *supra* notes 2–4 and accompanying text.

113. 180 N.L.R.B. 190, 193 (1969).

114. See *Sports Unions to Level the Playnig Field*, AM. POSTAL WORKERS UNION, AFL-CIO (July 2009), <http://www.apwu.org/labor-history-articles/sports-unions-work-level-playing-field>. In 1963, the National League umpires unionized and were represented by the Association of National Baseball League Umpires-Independent, which the National League clubs had recognized and collectively bargained with since late 1963. *Am. League of Prof’l Baseball Clubs & Major League Umpires Ass’n, Inc.*, 189 N.L.R.B. 541, 542 (1971). In earlier decisions, the NLRB had asserted jurisdiction over various aspects of the sports and entertainment industry, including casinos, skiing facilities, sight-seeing tours, and theatres, although it had declined to permit unionization of the thoroughbred horse racing industry. *Am. League of Prof’l Baseball Clubs & Ass’n of Nati’l Baseball League Umpires*, 180 N.L.R.B. at 194 n.15.

115. *Id.* at 191. It explained: “We do not agree that Congress, by refusing to pass legislation subjecting the sport to the antitrust laws when it considered the regulation of baseball and other sports under the antitrust statutes, sanctioned a governmentwide policy of ‘non-involvement’ in all matters pertaining to baseball.” *Id.* at 192.

116. 29 U.S.C. §§ 151–169 (2018).

disputes”¹¹⁷ regarding professional sports league labor disputes rather than subjecting this industry to many different and potentially conflicting state labor laws. It presciently noted that future professional sports league labor disputes “will be national in scope, radiating their impact far beyond individual State boundaries,” and rejected the league’s contention that U.S. labor law is “unsuited to regulate effectively baseball’s international aspects” because “many if not most of the industries subject to the [NLRA] have similar international features.”¹¹⁸ The NLRB ruled that the appropriate unit for purposes of unionization and collective bargaining is “[a]ll persons employed as umpires in the American League of Professional Baseball Clubs, but excluding all other employees, office clerical employees, guards, professional employees and supervisors.”¹¹⁹

In a 1975 labor arbitration proceeding, *National & American League Professional Baseball Clubs v. Major League Baseball Players Ass’n (Messersmith/McNally Arbitration)*,¹²⁰ Arbitrator Peter Seitz determined that a club’s right to renew a player’s expired contract without his consent “for the period of one year on the same terms” pursuant to section 10(a) of the MLB Uniform Player Contract (“reserve clause”) does not confer perpetual rights to his services.¹²¹ He rejected the argument of the baseball leagues and clubs that those “terms” include the club’s right to additional one-year contract renewals for as long as it desires his services.¹²² He concluded that a club could renew the player’s contract for only one year after its expiration and that the player thereafter became a free agent who has the right to enter into a new contract with any MLB club.¹²³ His ruling invalidated the

117. Am. League of Prof’l Baseball Clubs & Ass’n of Nati’l Baseball League Umpires, 180 N.L.R.B. at 191. Even NLRB Member Jenkins, who dissented based on the belief that Congress “harbored no intent to include the labor relations of professional baseball within the reach of the Board’s jurisdiction” when it enacted the NLRA in 1935, recognized the appropriateness of resolving labor disputes involving baseball players at the national level: “The entire league has an interest in the relations between the players and their employers because of the very nature of the game and the need to maintain competition. Thus, there is an urgent need for ultimately settling problems dealing with the players on a league level.” *Id.* at 194.

118. *Id.* at 192.

119. *Id.* at 193.

120. 66 Lab. Arb. Rep. (BNA) 101 (Dec. 23, 1975).

121. *Id.* at 113–15. In doing so, he relied on Ohio (*Cent. N.Y. Basketball, Inc. v. Barnett*, 181 N.E.2d 506 (C.P. Ohio 1961)) and California (*Lemat Corp. v. Barry*, 80 Cal. Rptr. 240 (Ct. App. 1969)) judicial decisions holding that substantially similar language in NBA player contracts did not provide an NBA club with the perpetual right to the player’s services.

122. 66 Lab. Arb. Rep. at 113.

123. *Id.* at 116. The arbitration award in *NFL Players Ass’n v. NFL Management Council (“Dutton”)* (1980) illustrates that *Messersmith/McNally* arbitration award has no binding or precedential effect regarding the duration of restraints on free agency after a player’s contract has

purported perpetual duration of baseball's reserve clause, which was a provision of the January 10, 1903 Cincinnati Peace Compact of the National and American Leagues that had been unilaterally established and consistently adhered to by MLB club owners.¹²⁴ Observing that his "sole duty is to interpret and apply the agreements and undertakings of the parties"¹²⁵ without consideration of whether invalidation of the reserve clause would "do serious damage to the sport of baseball,"¹²⁶ Arbitrator Seitz stated:

I am confident that the dislocations and damage to the reserve system can be avoided or minimized through good faith collective bargaining between the parties The clubs and the players have a mutual interest in the health and integrity of the sport and in its financial returns. With a will to do so, they are competent to fashion a reserve system to suit their requirements.¹²⁷

Two federal court cases arising out of unfair labor practice charges against the Major League Baseball Player Relations Committee (PRC), the MLB clubs' then-existing multi-employer collective bargaining representative, established important federal labor law precedent governing baseball's labor relations as well as the professional sports industry in general.

In *Silverman v. Major League Baseball Player Relations Committee, Inc.* (*Silverman I*), a New York federal district court recognized the exclusive authority and voice of a professional sports league clubs' multi-employer bargaining unit in making strategic decisions and negotiating with the players union.¹²⁸ The court rejected the MLBPA's unfair labor practice charge based on the PRC's refusal to provide requested financial information for all MLB clubs after Commissioner Bowie Kuhn and some club owners publicly expressed concern that escalating player salaries caused by the existing free agency system threatened the financial viability of some teams.¹²⁹ It found

expired in other unionized professional sports. In *Dutton*, Arbitrator Burt Luskin rejected the NFL Players Association's argument based on *Messersmith/McNally* that a club did not have a perpetually renewable option to elect a right of first refusal or draft pick compensation for a player after the year of automatic renewal of his expired contract for 110 percent of his prior year's salary. The arbitrator refused to "infer from the absence of affirmative or negative language that the parties reached an agreement or understanding that would serve to confer total free agent status to a veteran player who had completed a year of ["option"] service" in accordance with a provision in the NFL CBA. See PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS* 285–86 (Thomson Reuters, 4th ed. 2011).

124. 66 Lab. Arb. Rep. at 116.

125. *Id.* at 117.

126. *Id.*

127. *Id.* at 117–18.

128. 516 F. Supp. 588, 594–98 (S.D.N.Y. 1981).

129. *Id.* at 596–98.

that the PRC, which has exclusive authority to establish the clubs' collective bargaining position and to negotiate with the MLBPA, "consistently denied that the clubs' financial status is at issue" in negotiations regarding a new free agency system.¹³⁰ Rather, the PRC asserted only that a club losing a free agent player should receive a replacement player or draft choice from his new club to maintain competitive balance among MLB clubs.¹³¹ Therefore, although federal labor law required the PRC to bargain in good faith by making honest claims, it was not required to provide the requested financial information because during collective bargaining negotiations its representative never stated that any clubs could not afford to pay higher player salaries without a revised free agent system. In the collective bargaining context, the clubs would have a duty to turn over financial information only where their representative claims a current inability to pay.¹³²

In an unrelated subsequent case, *Silverman v. Major League Baseball Player Relations Committee, Inc. (Silverman II)*,¹³³ the Second Circuit broadly characterized mandatory subjects of collective bargaining in the professional sports industry as those that effect players' wages or employment terms, including free agency and reserve issues as well anti-collusion prohibitions, which significantly affect individual player salaries and "what share of [league] revenues go to the clubs or the players."¹³⁴ The court explained:

Free agency and the ban on collusion [among MLB clubs for the services of free agent players] are one part of a complex method—agreed upon in collective bargaining—by which each major league player's salary is determined under the Basic Agreement. They are analogous to the use of seniority, hours of work, merit increases, or piece work to determine salaries in an industrial context

. . . .

. . . Although unions of professional athletes may bargain for uniform benefits and minimum salaries, they do not usually follow their industrial counterparts and seek relatively fixed salaries by job

130. *Id.* at 596.

131. *Id.* at 590.

132. *Id.* at 594–98. The NLRA requires both sides "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (2018). In *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 152–54 (1956), the Supreme Court held that an employer's assertion that it was unable to pay higher wages and refusal of the union request for verifying financial data constitutes the failure to bargain in good faith and is an unfair labor practice.

133. 67 F.3d 1054 (2d Cir. 1995).

134. *Id.* at 1060–62.

description, seniority, or other formulae. Players often play positions requiring very different skills. Moreover, the level of performance and value to a team in attracting fans differs radically among players, with star athletes or popular players being far more valuable than sub-par or nondescript players. Usually, therefore, players unions seek some form of free agency as a relatively simple method of setting individual [player] salaries.¹³⁵

The Second Circuit also ruled that salary arbitration, pursuant to which the salaries of certain players (those whose contracts have expired, but they are not yet eligible for free agency) are determined, is a mandatory subject of collective bargaining.¹³⁶ In dicta, the court stated that “grievance arbitration involving disputes arising under an existing collective agreement . . . is beyond question a mandatory subject of bargaining.”¹³⁷ It affirmed the lower court’s granting of an injunction against MLB’s unilateral elimination of the free agency system, anti-collusion, and salary arbitration provisions of the expired CBA until MLB bargained in good faith with the MLBPA and reached an “impasse.”¹³⁸ At impasse, federal labor law permits a league’s multi-employer collective bargaining representative to unilaterally establish new terms and conditions of employment that constitute mandatory subjects of bargaining.¹³⁹

The *Messersmith/McNally Arbitration* resulted in a collectively bargained free agency system (a mandatory subject of bargaining under *Silverman II*) for players who have accrued six full seasons of credited time on a MLB club roster and whose contracts have expired, which continues to exist today with

135. *Id.* at 1060–61.

136. *Id.* at 1062.

137. *Id.*

138. *Id.* at 1059. An “impasse is . . . a temporary deadlock or hiatus in negotiations, ‘which in almost all cases is eventually broken, through either a change of mind or the application of economic force.’” *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (quoting *Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093, 1093–94 (1979)).

139. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 244 (1996) (“[A]s a general matter, labor law often limits employers to four options at impasse: (1) maintain the status quo, (2) implement their last offer, (3) lock out their workers (and either shut down or hire temporary replacements), or (4) negotiate separate interim agreements with the union.”). During the collective bargaining negotiations giving rise to *Silverman II*, on December 22, 1994, the PRC declared an impasse and stated its intention to unilaterally impose a salary cap and to eliminate salary arbitration. *See Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1058 (2d Cir. 1995). On February 3, 1995, after the MLBPA filed unfair labor practice charges with the NLRB alleging that the parties were not at impasse, the PRC revoked its implementation of these unilateral changes and restored the status quo (i.e., the terms of the expired Basic Agreement were reinstated, which resulted in the NLRB’s dismissal of these particular charges). *See id.*

negotiated modifications over the years.¹⁴⁰ Rather than insisting on unrestricted free agency for all MLB players whose contracts have expired (which would have created a large supply of available players annually and depressed player salaries over time), the MLBPA agreed to a restricted free agency model based on a player's credited MLB service combined with compensation for a club that loses a free agent player. Historically, the specific compensation has been a contentious issue in collective bargaining negotiations and has been modified several times over the years; currently, it is an extra draft pick between the first and second rounds of the MLB player draft for a club who loses a player because he rejects a one-year contract offer and signs a contract with another club.

Major League Baseball is the only major U.S. or North American professional sports league that has never had a team salary cap. The absence of a salary cap enables each club to unilaterally determine its team payroll for player salaries subject to a "competitive balance tax" if it exceeds a certain amount.¹⁴¹ Its free agent system (along with salary arbitration rights for players with three-six years of credited service on an MLB club roster as well as a collectively bargained percentage of players with at least 2.5 years of MLB service days)¹⁴² are substantial factors contributing to an increase in

140. See Mike Axisa, *On This Date 40 Years Ago: Free Agency Comes to MLB*, CBS SPORTS: MLB (Dec. 23, 2015), <https://www.cbssports.com/mlb/news/on-this-date-40-years-ago-free-agency-comes-to-mlb/>. A trilogy of arbitration awards finding that MLB clubs secretly agreed not to sign each other's free agent players after the 1985, 1986, and 1987 baseball seasons in violation of the CBA's "anti-collusion" provision, which were collectively settled for \$280 million in damages (see WEILER ET AL., *supra* note 123, at 264–68), also are a noteworthy part of baseball's labor relations jurisprudence, although no subsequent collusive conduct regarding free agents has been alleged and proven by the MLBPA or any individual MLB players. See Darren Heitner, *Why Major League Baseball May Soon Be Defending a Collusion Case*, FORBES (Feb. 6, 2018, 10:10 AM), <https://www.forbes.com/sites/darrenheitner/2018/02/06/why-major-league-baseball-may-soon-be-defending-a-collusion-case/>.

141. BASIC AGREEMENT, *supra* note 40, at 107. Pursuant to the 2017–2021 MLB CBA, the threshold for each season is \$195 million in 2017, \$197 million in 2018, \$206 million in 2019, \$208 million in 2020, and \$210 million in 2021.

142. Baseball salary arbitration utilizes "final offer arbitration," pursuant to which the club and player each submit a proposed salary amount for a one-year contract without knowing the other side's figure. The arbitration panel must select one of these amounts without explaining its reasoning. The end result of the arbitration is a one-year, nonguaranteed contract (with no bonuses) for this amount. The club may release its rights to the player at any time consistent with the terms of the CBA. See David Berg & Joel M. Androphy, *The Return of Salary Arbitration in Major League Baseball*, <https://www.bafirm.com/publication/return-salary-arbitration-major-league-baseball/> (last visited Dec. 21, 2018).

aggregate team payrolls from \$28,117,680 (twenty-four MLB clubs)¹⁴³ in 1976 (the year of the *Messersmith/McNally Arbitration*) to more than \$4 billion (thirty MLB clubs) for the 2017 season.¹⁴⁴ The highest and average player salaries also have increased exponentially from \$240,000 (Hank Aaron¹⁴⁵) and \$46,863 in 1976,¹⁴⁶ to \$33 million (Clayton Kershaw) and \$4.47 million, respectively, in 2017.¹⁴⁷

Since the NLRB's 1966 certification of the MLBPA as a labor union, there have been five player strikes (1972, 1980, 1981, 1985 and 1994–95) and the MLB club owners have locked out the players three times (1973, 1976 and 1990),¹⁴⁸ which are lawful means of economic coercion by either side to obtain leverage in collective bargaining negotiations.¹⁴⁹ This twenty-two-year period of intermittent labor unrest culminated in a 232-day players' strike resulting in the cancellation of all 1994 postseason games, including the World Series, for the first time since 1904.¹⁵⁰ Since the 1996 season (the 1995 season did not begin until the third week of April, after a new CBA was negotiated¹⁵¹) until the present, MLB is the only major U.S. or North American professional sports league that has not experienced a strike or

143. *1976 Baseball Payrolls*, BASEBALL CHRONOLOGY <http://www.baseballchronology.com/Baseball/Years/1976/Payroll.asp> [<https://web.archive.org/web/20171214050502/http://www.baseballchronology.com/Baseball/Years/1976/Payroll.asp>] (last visited Jan. 8, 2019).

144. Maury Brown, *Here's the 2017 Opening Day Payrolls for All 30 MLB Teams, Total Tops \$4 Billion*, FORBES (April 2, 2017, 11:45 PM), <https://www.forbes.com/sites/maurybrown/2017/04/02/heres-the-2017-opening-day-payrolls-for-all-30-mlb-teams-total-tops-4-billion/>.

145. Michael Hauptert, *MLB's Annual Salary Leaders Since 1874*, SOC'Y FOR AM. BASEBALL RES., <https://sabr.org/research/mlbs-annual-salary-leaders-1874-2012> (last visited Dec. 21, 2018).

146. *1976 Baseball Payrolls*, *supra* note 143.

147. Scott Boeck et al., *MLB Salaries 2017: Earnings Flatten Out, While Clayton Kershaw Leads Pack*, USA TODAY (Apr. 2, 2017, 10:41 PM), <https://www.usatoday.com/story/sports/mlb/2017/04/02/mlb-salaries-payroll-2017/99960994/>.

148. *FAQs*, *supra* note 111.

149. See 29 U.S.C. §§ 157–58 (2018). See generally WILLIAM B. GOULD IV, *BARGAINING WITH BASEBALL* (2011) (discussing detailed history of Major League Baseball labor-management relations and federal labor law's influence in resolving conflicts).

150. Bob Nightengale, *1994 Strike Most Embarrassing Moment in MLB History*, USA TODAY (Aug. 11, 2014, 8:27 PM), <https://www.usatoday.com/story/sports/mlb/2014/08/11/1994-mlb-strike/13912279/>. The first World Series was held in 1903, but it was not played in 1904 because John T. Brush, the owner of the National League champion New York Giants club refused to play the Boston Americans, the champion of the American League, which he deemed to be an inferior baseball league whose best team was not worthy of playing the Giants. *World Series*, U.S. HIST., <http://www.u-s-history.com/pages/h1738.html> (last visited Dec. 21, 2018).

151. Phil Miller, *Rush of MLB Signings Expected, But It Probably Won't Match 1995 Frenzy*, STARTRIBUNE: THE TWINS BEAT (Jan. 27, 2018, 11:34 AM), <http://www.startribune.com/rush-of-mlb-signings-expected-but-it-probably-won-t-match-1995-frenzy/471437094/>.

lockout,¹⁵² which has advanced consumer welfare (i.e., the interests of fans) by enabling all regular and postseason baseball games to be played. During this period, the MLB clubs and the MLBPA have negotiated successive multi-year CBAs, thereby ensuring labor peace through 2021 (the year in which the current MLB CBA expires).¹⁵³ Key provisions of the current CBA to maintain competitive balance among MLB clubs include the Rule 4 Draft governing U.S., Canadian, and Puerto Rican players, which establishes an effective slotting system of player salaries based on their draft position; a hard cap on the aggregate signing bonuses paid by clubs to sign players from other countries (e.g., Dominican Republic, Venezuela) to contracts (which varies by club based on a variety of factors);¹⁵⁴ and a maximum \$20 million posting bid for foreign professional players from countries such as Japan and Korea.¹⁵⁵ On the other hand, unlike all other major U.S. or North American major professional sports leagues, the MLB CBA does not provide for an international player draft, which is an important means of maintaining competitive balance among league clubs.¹⁵⁶

By giving MLB players the option of continuing to play games (and earn their salaries) and challenging on antitrust law grounds employment terms and conditions unilaterally established by MLB clubs, the Curt Flood Act¹⁵⁷ arguably reduces the possibility of a future strike. Before bringing antitrust litigation, the broad scope of the nonstatutory labor exemption recognized by

152. *Pro Sports Lockouts and Strikes Fast Facts*, CNN (June 2, 2018, 10:23 AM), <https://www.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts/index.html>. In 2011 there were NBA and NFL lockouts, which reduced the NBA regular season to sixty-six games per team, but no NFL regular season games were lost. Ross Siler, *The Lesson of the 2011 NFL and NBA Lockouts: Why Courts Should Not Immediately Recognize Players' Union Disclaimers of Representation*, 88 WASH. L. REV. 281, 287 (2013). NHL lockouts caused the loss of the entire 2004–05 season and shortened the 2012–13 regular season to forty-eight games per team. Paul D. Staudohar, *The Hockey Lockout of 2012–2013*, MONTHLY LAB. REV. 1, 2–3, 8 (2013).

153. BASIC AGREEMENT, *supra* note 40.

154. See *International Amateur Free Agency & Bonus Pool Money*, MLB: GLOSSARY, <http://m.mlb.com/glossary/transactions/international-amateur-free-agency-bonus-pool-money> (last visited Dec. 21, 2018).

155. *MLB Ratifies Posting System, Allowing Shohei Ohtani Bids*, USA TODAY (Dec. 1, 2017, 4:09 PM), <https://www.usatoday.com/story/sports/mlb/2017/12/01/apnewsbreak-mlb-approves-japan-deal-allowing-ohtani-bids/108195924/>.

156. See Jorge L. Ortiz, *Why the International Draft Is Hindering MLB's Collective Bargaining Efforts*, USA TODAY (Nov. 24, 2016, 2:03 PM), <https://www.usatoday.com/story/sports/mlb/2016/11/24/mlb-collective-bargaining-agreement-international-draft-lockout/94381330/>.

157. 15 U.S.C. § 26(b) (2018).

the Supreme Court in *Brown v. Pro Football, Inc.*¹⁵⁸ would require termination of the collective bargaining relationship between the MLB players and clubs that has existed since 1966. For termination to occur, the MLBPA would have to disclaim its authority to represent the players in collective bargaining negotiations or be decertified as a union by the NLRB.¹⁵⁹

In 2001, based on his “best interests” of the game power, Commissioner Selig unilaterally established a Minor League Baseball drug testing program for minor league players¹⁶⁰ (non-unionized employees of their respective

158. 518 U.S. 231, 250 (1996) (holding that this exemption immunizes from antitrust challenge employer conduct that “grew out of, and was directly related to, the lawful operation of the bargaining process; involved a matter that the parties were required to negotiate collectively; and concerned only the parties to the collective-bargaining relationship”).

159. In *Brown*, the Supreme Court stated that its

holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.

Id. Unions can be dissolved either by decertification or by a disclaimer of interest. For an explanation, see Scott Burnside, *Legal Expert: Disclaimer vs. Decertification*, ESPN (Dec. 14, 2012), http://www.espn.com/blog/nhl/post/_id/20782/legal-expert-disclaimer-vs-decertification. Decertification is a more formal process involving the NLRB, which requires that at least fifty percent of the members of the players association vote to decertify the union in an NLRB-supervised election. See, e.g., Catherine Meeker, *Defining “Ministerial Aid”: Union Decertification Under the National Labor Relations Act*, 66 U. CHI. L. REV. 999, 1000–02 (1999). If a majority of the players vote to decertify the union, they cannot vote to re-unionize (and engage in collective bargaining with the league) before the lapse of a twelve-month period. 29 U.S.C. §159 (2018). In contrast, a disclaimer of interest is an informal procedure pursuant to which the union leadership disclaims authority to represent the players based on at least fifty percent of them indicating they do not desire such representation. See *Powell v. NFL*, 764 F. Supp. 1351, 1353–55 (D. Minn. 1991). A majority of the players can reauthorize the union to represent them at any time, creating the possibility of stepping into and out of a collective bargaining relationship as desired based on the circumstances, which could constitute an unfair labor practice. See *Retail Assocs., Inc. and Retail Clerks Int’l Ass’n Locals Nos. 128 and 633*, 120 N.L.R.B. 388, 394 (1958) (“The decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis. The element of good faith is a necessary requirement in any such decision to withdraw, because of the unstabilizing and disrupting effect on multiemployer collective bargaining which would result if such withdrawal were permitted to be lightly made. The attempted withdrawal cannot be accepted as unequivocal and in good faith where, as here, it is obviously employed only as a measure of momentary expedience, or strategy in bargaining, and to avoid a Board election to test the union majority.”).

160. Lee Jenkins, *Baseball and Union Set to Work on Drug-Testing Policy*, N.Y. TIMES (Dec. 14, 2004), <https://www.nytimes.com/2004/12/14/sports/baseball/baseball-and-union-set-to-work-on-drugtesting-policy.html>.

Major League Baseball clubs¹⁶¹), but he could not do the same for unionized MLB players. A drug testing program and disciplinary system affects MLB players' working conditions;¹⁶² therefore, it is a mandatory subject of collective bargaining under *Silverman II*, which cannot be unilaterally imposed on players even under the commissioner's generally broad "best interests" of the game of baseball authority.¹⁶³ Federal labor law and the following 1992 labor arbitration award effectively combined to prevent Commissioner Selig (or MLB clubs) from implementing a drug testing program for MLB players banning the use of anabolic steroids and other harmful performance-enhancing substances¹⁶⁴ before 2002, when the MLBPA agreed to its establishment during collective bargaining negotiations.¹⁶⁵

In *In re Arbitration Between Major League Baseball Players Ass'n and Commissioner of Major League Baseball* ("Steve Howe Arbitration"), a three-person arbitration panel chaired by George Nicolau determined that Commissioner Fay Vincent's permanent suspension of Steve Howe for violating MLB's unilaterally established "Baseball's Drug Policy and Prevention Program" was without just cause under the existing MLB CBA, which provided for arbitral review of commissioner discipline of MLB players.¹⁶⁶ Howe had a long history of cocaine abuse resulting in several suspensions by his team or the commissioner, along with numerous unsuccessful efforts to overcome his addiction by counseling and medical treatment.¹⁶⁷ During the arbitration proceeding, Commissioner Vincent testified "there was 'simply no alternative' to his decision; that Baseball had 'done all that [could] be done' for Howe, and that, at this point, baseball's institutional interests, the 'concern that people have for the continuing

161. Marc Normandin, *How Minor League Baseball Players Can Begin Unionizing*, SB NATION (July 12, 2018, 10:00 AM), <https://www.sbnation.com/mlb/2018/7/12/17518102/minor-league-baseball-unions-mlb-garrett-broshuis-mlbpa>.

162. See *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 183 (1989).

163. *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995).

164. The use of controlled substances solely for purposes of enhancing athletic performance, rather than for physician prescribed medically legitimate therapeutic reasons, violates federal law. 21 U.S.C. § 802 (2018).

165. *A Timeline of MLB's Drug-Testing Rules*, USA TODAY (Mar. 28, 2014, 4:55 PM), <https://www.usatoday.com/story/sports/mlb/2014/03/28/a-timeline-of-mlbs-drug-testing-rules/7024351/>.

166. Major League Baseball Arbitration Panel, *In re Arbitration Between Major League Baseball Players Ass'n and Comm'r of Major League Baseball (Grievance 92-7); Suspension of Steven Howe, Panel Decision 94*, in 1 UNDERSTANDING BUSINESS & LEGAL ASPECTS OF THE SPORTS INDUSTRY 401 (Practising Law Inst. 2001).

167. *Suspension of Steven Howe, Panel Decision 94*, *supra* note 166, at 417–25.

integrity of the game' had to prevail."¹⁶⁸ There also was evidence that Howe's underlying psychiatric disorder causing his drug addiction had not been diagnosed or treated prior to his permanent suspension.¹⁶⁹

Arbitrator Nicolau observed that the commissioner's imposition of a lifetime ban on a player precludes any baseball club from ever hiring him:

[T]he Commissioner does not stand in the isolated position of an individual employer. He can bar the employment of a player at any level of the game regardless of the opinion or wishes of any one of a great number of potential employers. That is an awesome power. With it comes a heavy responsibility, especially when that power is exercised unilaterally and not as the result of a collectively bargained agreement as to the level of sanctions to be imposed for particular actions.¹⁷⁰

Stating that "the Commissioner should have looked closely at all the circumstances in order to ascertain and evaluate [Howe's] condition and the adequacy of his treatment before deciding what discipline to impose," Arbitrator Nicolau determined that "[t]hese failings lead me to conclude that the Commissioner's action in imposing a lifetime ban was without just cause."¹⁷¹ He reduced Howe's suspension from employment as a baseball player to 119 days with resulting substantial monetary loss.¹⁷² He reasoned that "[a] penalty of this magnitude should serve as a clear warning that drug use will continue to be treated with severity," while giving Howe "a chance to compete coupled with appropriate treatment and rigorous safeguards will give Howe what he was not adequately given in the past."¹⁷³

In 1994, the MLB clubs' collective bargaining representative proposed a performance-enhancing drug testing policy to the MLBPA, but its leadership staunchly refused to agree to a random, suspicionless drug testing program because of player privacy concerns until 2002. Before then, to comply with federal labor law, the MLB could have unilaterally implemented a drug testing policy only after bargaining in good faith to an impasse with the MLBPA, which some commentators suggested it should have done.¹⁷⁴ Yet

168. *Id.* at 432.

169. *Id.* at 432–37.

170. *Id.* at 448–49.

171. *Id.* at 451.

172. *Id.* at 453.

173. *Id.*

174. See, e.g., Michael J. Cramer & James M. Swiatko, Jr., *Did Major League Baseball Balk? Why Didn't MLB Bargain to Impasse and Impose Stricter Testing for Performance Enhancing Substances?* 17 MARQ. SPORTS L. REV. 29, 48 (2006).

doing so would have been fraught with significant economic and practical risks as well as legal uncertainty.

In an effort to have a unilaterally established drug program by MLB invalidated and judicially enjoined from implementation, MLBPA could have filed unfair labor practice charges with the NLRB, asserting that MLB clubs had not engaged in good faith bargaining and/or that the drug program was established before an impasse in negotiations.¹⁷⁵ Players also could have collectively or individually refused to submit to drug testing, or chosen to strike and not play any games until the drug policy was rescinded by MLB. A continuing player strike or another one soon after the 1994 strike, which caused the loss of the 1994 playoffs and World Series, almost certainly would have caused increased alienation of baseball fans resulting in reduced game attendance in future seasons as well as substantial economic losses to MLB clubs.¹⁷⁶ After the 1998 enactment of the Curt Flood Act, MLB players could have sought to end their union's collective bargaining relationship with MLB and challenged the validity of MLB's drug program on antitrust law grounds.¹⁷⁷

Although mandatory testing was not implemented until the 2004 season (after "survey testing" during the 2003 season revealed that five to seven percent of the players on MLB rosters were using performance enhancing drugs), MLB's current collectively bargained system of drug testing and disciplinary sanctions is the most comprehensive¹⁷⁸ and imposes the toughest sanctions for violations in North American professional team sports. The sanction for a first violation by an MLB player is an eighty game suspension without pay (the time that a player is suspended does not count towards his

175. See *supra* notes 138, 139 and accompanying text.

176. Cramer & Swiatko, *supra* note 174, at 54, 57 (observing that total attendance at MLB games did not reach its pre-1994 strike level until the 2005 season and "it was estimated that the 1994 strike had cost the owners \$500 million in lost revenue in 1994 and \$800 million more in 1995").

177. See *supra* notes 157, 158 and accompanying text. There is no judicial precedent regarding whether a professional sports league's unilaterally imposed performance enhancing drug program would be an illegal agreement among its clubs that unreasonably restrains interstate trade in violation of section 1 of the Sherman Act.

178. Cramer & Swiatko, *supra* note 174, at 49–50. Beginning with the 2012 season, MLB was the first professional league to test players for the use of exogenous human growth hormone (HGH). Subsequently, the NBA and NFL began mandatory testing for HGH. See generally MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 514–17 (4th ed. 2017) (providing a "summary of the major professional sports leagues' respective drug testing policies"); Darren Heitner, *Why NFL's First Positive HGH Tests Deserve More Attention*, FORBES (Sept. 25, 2017, 07:45 AM), <https://www.forbes.com/sites/darrenheitner/2017/09/25/why-nfls-first-positive-hgh-tests-deserve-more-attention/>.

credited MLB service time), which is a proportionately longer suspension than NBA (twenty games), NFL (four games), and NHL (twenty games) players currently must serve for a first violation of their respective league performance enhancing drug policies.¹⁷⁹ An MLB player is not eligible to participate in the playoffs or World Series during the season in which he violates the league's drug testing policy even if his suspension has ended.¹⁸⁰ The sanction for a second positive test is a 162-game suspension (i.e., the length of a full regular season).¹⁸¹ A third positive test for a banned performance enhancing substance results in a lifetime prohibition from playing MLB or Minor League baseball.¹⁸² In 2016, former New York Mets player Jenrry Mejia received a lifetime ban after testing positive for anabolic steroids for the third time.¹⁸³ It is notable that a new MLB season record for total home runs (6,105) was established during the 2017 season, which is significantly more than the previous record of 5,693 set in 2000¹⁸⁴ (during the so-called "Steroids Era").

Like their MLB counterparts, NBA, NFL, and NHL players have chosen to unionize and to collectively bargain the terms and conditions of their employment with their respective league clubs, which are federal labor law rights formally recognized by *American League of Professional Baseball Clubs*. Other major North American professional sports league players also have unionized. On November 6, 1998, the Women's National Basketball Players Association, the first labor union of female professional athletes, was formed to represent the players in collective bargaining negotiations with

179. *Service Time*, MLB: GLOSSARY, <http://m.mlb.com/glossary/transactions/service-time> (last visited Dec. 21, 2018); MITTEN ET AL. *supra* note 178, at 514–17.

180. MAJOR LEAGUE BASEBALL PLAYERS ASSOC., MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM, 44.

181. *Id.* at 37.

182. *Id.* at 38.

183. Tim Rohan, *Mets Pitcher Jenrry Mejia Is First Major Leaguer to Get Lifetime Ban for Doping*, N.Y. TIMES (Feb. 12, 2016), <https://www.nytimes.com/2016/02/13/sports/baseball/mets-reliever-jenrry-mejia-permanently-barred-from-major-league-baseball.html>.

184. Scott Boeck, *2017 MLB Season: 14 Statistics to Sum It Up, from Stanton to Sale to Strikeouts*, USA TODAY (Oct. 1, 2017, 7:37 PM), <https://www.usatoday.com/story/sports/mlb/2017/10/01/2017-mlb-season-home-runs-strikeouts-stanton-judge/720560001/>. For a detailed comparison of leaguwide offensive statistics, including home runs, for the 2002 season (the year before MLB's drug testing program was implemented) and the 2017 season, see Craig Edwards, *How 2017 Compares to the Steroid Era: Part I*, FANGRAPHS (Sept. 27, 2017), <https://www.fangraphs.com/blogs/how-2017-compares-to-the-steroid-era-part-i/>.

WNBA clubs.¹⁸⁵ After an unsuccessful 2002 antitrust suit challenging the league's unilaterally imposed labor restraints,¹⁸⁶ the MLS players unionized.

In *North American Soccer League v. NLRB*, the Fifth Circuit affirmed the NLRB's determination that "a leaguewide bargaining unit" of players is appropriate for purposes of professional sports collective bargaining.¹⁸⁷ This ruling implicitly follows and extends *American League of Professional Baseball Clubs* by effectively requiring league clubs to function as a multi-employer collective bargaining unit:

Notwithstanding the substantial financial autonomy of the clubs, the Board found they form, through the League, an integrated group with common labor problems and a high degree of centralized control over labor relations. In these circumstances the Board's designation of a leaguewide bargaining unit as appropriate is reasonable, not arbitrary or capricious.¹⁸⁸

Consistent with *Silverman II*'s broad definition of mandatory subjects of collective bargaining, a myriad of labor relations issues are negotiated by unions representing NBA, NFL, NHL, MLS, and WNBA players with their respective league clubs. For example, player drafts, team salary caps and competitive balance taxes, free agency restrictions, minimum player salaries, disability, health and insurance benefits, and league drug testing programs are collectively bargained because of their effects on players' wages, hours, and other terms and conditions of employment. In addition, mechanisms for resolving disputes regarding CBA or individual player contract rights, player discipline imposed by the league or club, and other matters affecting players' employment generally are collectively bargained.

IV. SCOPE AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Baseball-related cases also have been instrumental in establishing and defining the scope of professional sports league, club, and player intellectual property rights, particularly under misappropriation, unfair competition, copyright and right of publicity laws, as well as rejecting an antitrust challenge to a league's collective and exclusive licensing of their member clubs' trademarks and pro rata revenue sharing, which is an important means of maintaining competitive balance among league clubs.

185. Tamika Catchings, *A Time for Celebration*, WNBA: IND. FEVER (May 27, 2016), <http://fever.wnba.com/news/a-time-for-celebration/>.

186. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 52, 61, 69, 71 (1st Cir. 2002).

187. *N. Am. Soccer League v. NLRB*, 613 F.2d 1379, 1383 (5th Cir. 1980).

188. *Id.*

Recognizing that the production of sports events requires the expenditure of substantial time, effort, and money, *Pittsburgh Athletic Co. v. KQV Broadcasting Co.* broadly held that the creator of a MLB game has an exclusive property right in its commercial value for a reasonable period of time under state law.¹⁸⁹ This 1938 Pennsylvania federal district court case arose out of the Pittsburgh Pirates' sale of the exclusive rights to broadcast its home games at Forbes Field to General Mills, Inc.¹⁹⁰ The defendant broadcast play-by-play accounts of Pirates games as described by observers from buildings outside of Forbes Field.¹⁹¹ The court determined that the club "by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use thereof for a reasonable time following the games."¹⁹² It ruled that the defendant's unauthorized broadcast of Pirates games constitutes misappropriation, unfair competition, and unlawful interference with the parties' contract rights in violation of Pennsylvania law¹⁹³—an important judicial precedent protecting sports broadcast rights prior to enactment of the Copyright Act of 1976.¹⁹⁴

In *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, the Seventh Circuit held that the telecast of a baseball game is a copyrightable audiovisual work when in a tangible medium of expression (e.g., by being simultaneously recorded).¹⁹⁵ It determined that "[t]he many decisions that must be made during the broadcast of a baseball game concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection similarly supply the creativity required for the copyrightability of the telecasts."¹⁹⁶ The court ruled that the MLB clubs producing the games are presumed to own the copyright to the broadcast of games absent a written agreement to the contrary with the players because their performances in

189. *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 492 (W.D. Pa. 1938).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 494.

194. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.). In *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, the District of Columbia Circuit observed that based on *Pittsburgh Athletic Co.*, "sports clubs did own a property interest in their games and could sell that right as they saw fit," but that "the mere performance of a sport or game could not be copyrighted at common law." *Nat'l Ass'n of Broads. v. Copyright Royalty Trib.*, 675 F.2d 367, 377 n.16 (D.C. Cir. 1982).

195. *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 669 (7th Cir. 1986).

196. *Id.* at 668.

broadcast games are within the scope of their employment, which constitute “works made for hire within the meaning of § 201(b)” of the Copyright Act.¹⁹⁷

Several cases involving baseball players have made a significant contribution to the evolution of the “right of publicity,” which provides a legal remedy for the unauthorized commercial use of an individual’s identity.¹⁹⁸ A 1953 case, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, recognized the right of publicity for the first time. It involved a dispute over the rights to use baseball players’ name and photographs on bubblegum trading cards.¹⁹⁹ The Second Circuit held that New York recognized a common law right of publicity, which is an assignable property right, not simply a non-transferable personal right. The court explained “a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture.”²⁰⁰

Courts subsequently expanded the scope of an individual’s identity or persona protected by state right of publicity laws to encompasses more than one’s name and photograph. In *Uhlaender v. Henricksen*, a Minnesota federal district court ruled that it includes baseball players’ individualized statistics such as batting, fielding, earned run and other averages as well as their respective team, uniform number, and playing position, which enabled MLB players to prevent their unauthorized use in a table game offered for sale by the defendant.²⁰¹ In *Newcombe v. Adolph Coors Co.*, the Ninth Circuit held that Don Newcombe, a well-known former MLB pitcher, has California common law and statutory right of publicity claims against a brewery for using an identifiable likeness of his distinctive pitching style without his permission in a magazine advertisement for one of its products.²⁰² The court observed: “Having viewed the advertisement, we hold that a triable issue of fact has been raised as to whether Newcombe is readily identifiable as the pitcher in the advertisement.”²⁰³

On the other hand, in a series of baseball cases, courts held that the First Amendment of the U.S. Constitution and federal copyright law permit the

197. *Id.* at 670.

198. By common law or statute, a majority of states (but not all of them) now recognize the right of publicity. *See generally* 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY §§ 6:1–6:9 (Westlaw 2d ed. 2016).

199. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867–68 (2d Cir. 1953).

200. *Id.* at 868. *See generally* J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum*, 12 MARQ. SPORTS L. REV. 273 (2001).

201. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282–83 (D. Minn. 1970).

202. *Newcombe v. Adolph Coors Co.*, 157 F.3d 686, 693–94 (9th Cir. 1998).

203. *Id.* at 692.

usage of historical and current accounts of player records and accomplishments as well as video depictions of players' athletic performances that otherwise would violate a state right of publicity law.

In *Gionfriddo v. Major League Baseball*, a group of retired professional baseball players claimed that MLB's unauthorized use of their names and likenesses in for-profit print and video publications providing historical information about them violated their right of publicity.²⁰⁴ Rejecting their claim, the court found that "[t]he public has an enduring fascination in the records set by former players and in memorable moments from previous games, . . . [which] are the standards by which the public measures the performance of today's players."²⁰⁵ Affirming summary judgment for MLB, it concluded that "the public interest favoring the free dissemination of information regarding baseball's history far outweighs any proprietary interests at stake."²⁰⁶

Relying on *Gionfriddo*'s "persuasive" reasoning, in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, the Eighth Circuit ruled that the unauthorized use of MLB players' names and statistics in online fantasy baseball games is protected by the First Amendment.²⁰⁷ The court observed that "the information used in CBC's fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone."²⁰⁸ It ruled that "recitation and discussion of factual data concerning the athletic performance of [players on MLB's website] command a substantial public interest, and, therefore, is a form of public expression due substantial constitutional protection,"²⁰⁹ which effectively overrules *Uhlaender*.²¹⁰

In *Cardtoons, L.C. v. Major League Baseball Players Ass'n*,²¹¹ the Tenth Circuit recognized a First Amendment parody defense to a right of publicity claim challenging the unauthorized production of a series of baseball cards lampooning readily identifiable individual MLB players:

Cardtoons' parody trading cards receive full protection under the First Amendment. The cards provide social commentary on public

204. *Gionfriddo v. MLB*, 114 Cal. Rptr. 2d 307, 311 (Ct. App. 2001).

205. *Id.* at 315.

206. *Id.* at 318.

207. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007).

208. *Id.*

209. *Id.* at 823–24 (quoting *Gionfriddo*, 114 Cal Rptr. 2d at 315).

210. *See supra* text accompanying note 201.

211. 95 F.3d 959 (10th Cir. 1996).

figures, major league baseball players, who are involved in a significant commercial enterprise, major league baseball. While not core political speech (the cards do not, for example, adopt a position on the Ken Griffey, Jr., for President campaign), this type of commentary on an important social institution constitutes protected expression.²¹²

In *Baltimore Orioles*, the Seventh Circuit rejected the MLBPA's claim that MLB clubs' telecasts of games without the players' authorization violated their publicity rights.²¹³ Because the clubs owned the copyright to televised baseball games, the court held that the players' state law publicity rights in their game performances are substantially equivalent to the exclusive rights protected by federal copyright law and are preempted by the Copyright Act.²¹⁴ The court reasoned:

[O]nce a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purpose of preemption under § 301(a). Thus, if a baseball game were not broadcast or were telecast without being recorded, the Players' performances similarly would not be fixed in tangible form and their rights of publicity would not be subject to preemption. By virtue of being videotaped, however, the Players' performances are fixed in tangible form, and any rights of publicity in their performances that are equivalent to the rights contained in the copyright of the telecast are preempted.²¹⁵

The precedent established by the foregoing baseball cases has contributed significantly to the development of the existing legal foundation for the protection of sports-related intellectual property rights, particularly in determining the scope of copyright²¹⁶ and right of publicity²¹⁷ laws. *Baltimore*

212. *Id.* at 969.

213. *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986).

214. *Id.* at 674–76.

215. *Id.* at 675 (citations omitted).

216. *See, e.g.*, *NFL v. Insight Telecomm. Corp.*, 158 F. Supp. 2d 124, 128 (D. Mass. 2001) (ownership of copyright for telecast of NFL games determined by contract among league, clubs, and broadcaster). In *NBA v. Motorola, Inc.*, 105 F.3d 841, 848 (2d Cir. 1997), the Second Circuit held that “athletic events were, and are, uncopyrightable,” noting that *Baltimore Orioles* was “considering the copyright ability [sic] of telecasts—not the underlying games” when stating “the ‘[p]layers’ performances’ contain the modest creativity required for the copyright ability [sic].” *Id.* at 847.

217. *See, e.g.*, *CBS Interactive Inc., v. Nat'l Football League Players Ass'n, Inc.*, 259 F.R.D. 398, 417–18 (D. Minn. 2009) (following *C.B.C.*, unauthorized use of NFL players' names and statistics in connection with a fantasy football game does not violate players' publicity rights);

Orioles clearly defines the respective intellectual property rights ownership of a professional sports league and its clubs vis-à-vis their players in connection with the production of games. Although the existing scope of intellectual property law protection does not broadly encompass all commercial value arising out of the production of games (as originally suggested by *Pittsburgh Athletic Co.* eighty years ago),²¹⁸ federal copyright law currently provides generally adequate legal protection for a professional sports league and its clubs.²¹⁹

Major League Baseball clubs' nationally licensed trademarks are centrally and exclusively licensed through (MLBP); the net licensing royalties it generates are distributed on a pro rata basis to the clubs.²²⁰ Major League Baseball Advanced Media (MLBAM) centrally and exclusively sells subscriptions to watch copyrighted telecasts of out-of-market MLB games online and on cable or satellite television, and it distributes the net revenues pro rata to its member clubs.²²¹ Each MLB club has an equal governance and ownership interest in MLBP and MLBAM and annually receives a pro rata share of their respective net revenues. These two centralized MLB intellectual property rights entities, which collectively license the trademark and Internet rights of all thirty MLB clubs, generate total revenues in excess of the combined amount each club could realize by individually licensing or selling these rights. In other words, MLBP and MLBAM are paradigm examples of the sum (i.e., league aggregation and collective licensing of

Daniels v. FanDuel, Inc., 124 U.S.P.Q.2d (BNA) 1392, 1398 (S.D. Ind. 2017) (dismissing former college football players' claim that FanDuel and DraftKings violated Indiana's right of publicity statute by using their names and likenesses in online fantasy sports contests without their consent because such usage is within the statute's "newsworthiness" and "public interest" exemptions).

218. See *supra* text accompanying notes 189, 190.

219. Courts have ruled that the unauthorized rebroadcast of baseball game highlights, *New Bos. Television, Inc. v. ESPN, Inc.*, 215 U.S.P.Q. (BNA) 755, 757–58 (D. Mass. 1981), and Internet streaming of live professional sports league games, *NFL v. TVRADIONOW Corp.*, 53 U.S.P.Q.2d (BNA) 1831, 1831 (W.D. Pa. 2000), constitute copyright infringement. But foreign copyright laws are not uniform, and there is no worldwide legal system that effectively protects the rights of MLB and other professional leagues and governing bodies against infringements enabled by 21st century technology such as digital piracy of sports telecasts through the internet. Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 259, 274–78 (2006).

220. See *Major League Baseball Properties, Inc.*, COALITION TO ADVANCE PROTECTION SPORTS LOGOS, <http://www.capsinfo.com/index.php/mlb/mlb-main-page> (last visited Dec. 21, 2018).

221. Maury Brown, *The Biggest Media Company You've Never Heard Of*, FORBES (July 7, 2014, 9:43 AM), <https://www.forbes.com/sites/maurybrown/2014/07/07/the-biggest-media-company-youve-never-heard-of/>.

intellectual property rights) exceeding its component parts (i.e., individual club licensing of intellectual property rights).

In 2017, MLBPA and MLBAM (along with MLB TV and MLB's national television contracts) generated revenues of more than \$2 billion (a substantial part of MLB's more than \$10 billion total revenues), which is distributed pro rata to MLB's thirty clubs.²²² As recognized by *Salvino*,²²³ league collective licensing of intellectual property rights and pro rata profit distribution is an important form of revenue sharing, which plays a leading role in maintaining competitive balance among its clubs and enhancing their individual financial viability, especially in Major League Baseball, the only major North American professional league without a team salary cap. Since 2000, the year in which MLBAM was created, there has been a significant degree of competitive balance among MLB clubs. Every team in both the American League and National League has made the playoffs at least once since 2001. The New York Yankees, which won four of five World Series from 1996–2000, have only won one World Series thereafter (in 2009). No MLB team has won consecutive World Series since the 2000 season,²²⁴ which is the longest period in North American major league professional sports history.

CONCLUSION

Baseball jurisprudence has played an important role in professional baseball's historical development, internal governance, and MLB's relationships with its clubs, players and their union, and fans. This article has described and analyzed its effects on the MLB commissioner's "best interests" authority, professional baseball's antitrust exemption and labor relations, and intellectual property rights of MLB, its clubs, and baseball players as well as the sport's competitive balance and fans' welfare. This substantial body of "baseball law" also has helped shape the development and governance of other U.S. and North American major professional sports leagues and their respective corresponding relationships. Similarly, judicial precedent arising out of litigation involving other professional sports leagues has impacted Major League Baseball. For example, the Curt Flood Act²²⁵ almost certainly would not have been enacted by Congress but for the

222. See *supra* notes 220, 221 and accompanying text.

223. See *supra* notes 95, 96 and accompanying text.

224. No National League club has done so since the Cincinnati Reds 1975 and 1976 World Series victories.

225. See *supra* text accompanying notes 77–79.

Supreme Court's landmark decision in *Brown v. Pro Football*.²²⁶ It is very likely that baseball jurisprudence will continue to influence significantly the future evolution of MLB and other professional sports leagues throughout the 21st century.

226. *See supra* notes 158, 159 and accompanying text.