BASEBALL'S ANTITRUST EXEMPTION REPEALED: AN ANALYSIS OF THE EFFECT ON SALARY CAP AND SALARY TAXATION PROVISIONS

TABLE OF CONTENTS

> Well—it's our game; that's the chief fact in connection with it: *America's game*; it has the snap, go, fling of the American atmosphere; it belongs as much to our institutions, fits into them as significantly as *our Constitution's laws*; is just as important in the sum total of our historic life.
>
> Walt Whitman (1819-1892)[1]

INTRODUCTION

A French philosopher once opined that "whoever wants to know the heart and mind of America ha[d] better learn baseball."[2] The game's rich history and lasting tradition have defined American culture for a century and a quarter.[3]

Yet professional baseball in 1995 has reached a decisive juncture in its quest to remain America's pastime. While the product itself remains as exciting as ever—brandishing talents like Ripken, Thomas, Griffey, Bonds, and Maddux; and displaying divine new fields of dreams at Camden Yards, the Jake, the Ballpark at Arlington, and Coors Field—the activities in the boardrooms and courthouses have overtaken the accomplishments on the diamond. A labor dispute culminated in a 232-day players' strike, terminating one season in mid-course[4] and truncating the next.[5] The eventual return to the field was not the result of a momentous agreement or even a cessation of hostilities, but a court order

---

1. GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY at xvii (1994) (emphasis added).

2. Walter T. Champion, Jr., *The Baseball Antitrust Exemption Revisited: 21 Years After* Flood v. Kuhn, 19 T. MARSHALL L. REV. 573 (1994) (quoting Jacques Barzun).

3. *See generally* Flood v. Kuhn, 407 U.S. 258, 260-64 (1972), for a nostalgic discussion by Justice Blackmun of "The Game." Generations of American boys have yearned above all else to someday make it to the big leagues. Recounting his youth, former President Dwight D. Eisenhower poignantly expressed an aspiration which millions shared:

> When I was a boy growing up in Kansas, a friend of mine and I went fishing and as we sat there in the warmth of a summer afternoon we talked about what we wanted to do when we grew up. I told him I wanted to be a real Major League baseball player, a genuine professional like Honus Wagner. My friend said that he'd like to be president of the United States. Neither of us got our wish.

WARD & BURNS, *supra* note 1, at 49.

4. In his critically acclaimed documentary on America's pastime, Ken Burns ironically concluded that "[baseball] is something in the world that I can count on and it's never going to let me down." *Baseball: A Film by Ken Burns* (PBS television broadcast, Oct. 9-19, 1994). The lords of Major League Baseball proved otherwise in 1994.

5. It should be noted that two world wars and the Great Depression did not lead to the cancellation of any games or the disruption of a World Series. To the contrary, the game of baseball during these trying times served to heal and unite all Americans.

to play ball under the old terms (until a new agreement was reached) or not to play at all.[6] Meanwhile, the game is being played under a collective bargaining agreement that expired in December 1993, with the possibility of another strike or lockout looming on the horizon. Astoundingly, twenty-eight owners and 700 players remain unable to reach agreement on how to equitably divvy more than $2 billion in yearly revenues.[7]

As baseball struggles on the field to win back the hearts and minds of Americans, many of the game's pivotal issues are being addressed in Congress and the courts as antitrust and labor law comes to the forefront of America's pastime. This note will explore some of the legal issues facing the game of baseball today. Part I describes the emergence of federal antitrust law and its general application to the world of sports. Part II addresses the labor exemptions to antitrust law which govern sports today. Part III explores the trilogy of United States Supreme Court cases which established and developed baseball's unique antitrust exemption. Part IV examines the *Piazza* and *Butterworth* decisions which narrowed that exemption. Part V describes recent congressional efforts to repeal the exemption. Part VI analyzes the effect a repeal would have on two vital issues currently facing labor and management in baseball's collective bargaining discussions—the expiration of the non-statutory labor exemption, and the legality of salary cap/salary taxation provisions. The note concludes with the assertion that: (1) the non-statutory labor exemption continues beyond an impasse in player-owner negotiations, thereby shielding the owners from antitrust liability; and (2) salary caps unilaterally implemented by owners violate federal antitrust law, but unilateral implementation of "reasonable" salary taxation provisions would be permissible.

I. ANTITRUST IN SPORTS

During the Industrial Revolution of the late 1800s, America's vigorous economic expansion brought concerns that large corporations would take actions, either independently or in concert with others in their industries, to restrain free trade.[8] With the influx of anti-competitive

---

6. Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246 (S.D.N.Y. 1995).

7. A bewildered President Clinton offered similar sentiments at the White House on February 6, 1995: "It's just a few hundred folks trying to figure out how to divide nearly $2 billion. They ought to be able to figure that out." Mark Maske, *Usery's Deadline Extended: Baseball Mediator Will Present Plan to President this Afternoon*, WASHINGTON POST, Feb. 7, 1995, at E1.

8. *See* ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS 15-16 (4th ed. 1994).

behavior in the railroad industry, and the common law's inability to adequately address such conduct, legislation was introduced in Congress to curb the power of railroads and "trusts."[9]

Federal antitrust laws were subsequently enacted to encourage free trade by proscribing anti-competitive behavior involving interstate commerce.[10] The Sherman Antitrust Act of 1890[11] still governs most business transactions today.[12] Section 1 of the Act banned conspiracies designed to restrain trade in interstate commerce,[13] while Section 2 prohibited the monopolization of trade.[14]

Section 1 of the Act is broad enough to render illegal nearly every restraint of trade.[15] However, the United States Supreme Court has determined that only unreasonable restraints of trade fall within the proscription of the Act.[16] Since courts have held that all activities of professional sports teams affect interstate commerce,[17] the antitrust analysis

---

9. *Id.* at 16. "Trusts," in this context, were devices created by attorneys for the Standard Oil Company, whereby "owners of stock in several companies transferred their securities to a set of trustees and received certificates entitling them to a share of the pooled earnings of the jointly managed firms." Consequently, the trustees retained an effective monopoly in the oil industry, enabling them to control the market and artificially set prices. The "trust" label was quickly applied to all suspect business combinations. *Id.* at 16-17; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 80-85 (1992).

10. Latour Rey Lafferty, *The Tampa Bay Giants and the Continuing Vitality of Major League Baseball's Antitrust Exemption: A Review of* Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993), 21 FLA. ST. L. REV. 1271, 1273 (1994) (citation omitted).

11. Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1988)).

12. *Id.*

13. Section 1 of the Sherman Act provides in relevant part:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished . . . .

15 U.S.C. § 1 (1982).

14. Section 2 of the Sherman Act provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished . . . .

15 U.S.C. § 2 (1982).

15. Mackey v. National Football League, 543 F.2d 606, 618 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

16. *Id.* (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)).

17. *See* list of cases *infra* note 53. In 1953, Justice Burton discussed baseball's impact by noting the interstate nature of its capital investments, receipts and expenditures, attendance, radio and television audiences, advertising, and highly organized farm system. Toolson v. New York Yankees, Inc., 346 U.S. 356, 357-58 (1953) (Burton, J., dissenting).

in the sport context focuses on two additional questions: whether there was a contract, combination, or conspiracy; and if so, whether the contract, combination, or conspiracy was an unreasonable restraint of trade.[18]

In order to resolve the combination or conspiracy issue, a determination is made as to whether the sports league is considered a single entity/joint venture or, alternatively, a combination of separate business entities.[19] In sports labor disputes, management contends that its league is a "single entity" because its survival requires a cooperation among its members, which includes a need to work together in promoting the sport.[20] As a consequence, if single entity/joint venture status is afforded, the league's conduct is not typically deemed a combination or a conspiracy.[21] Conversely, labor ordinarily asserts that the league is not a joint venture, contending that the teams are a "combination of entities" which work toward a common goal, each selling a product with a value independent of the products of the others.[22] The question of the status of organized professional sports is difficult to resolve, and is best characterized by the oxymoronic "competitive cohesion," whereby each part (or team) competes with rival teams in some respects and cooperates in others.[23]

If the combination and conspiracy claim in the sports context fails, the party's (ordinarily one or more players') antitrust claim cannot be

---

18. Myron L. Dale & John Hunt, *Antitrust Law and Baseball Franchises: Leaving Your Heart (And The Giants) in San Francisco*, 20 N. KY. L. REV. 337, 342-47 (1993).

19. A joint venture can be defined as "a group which undertakes an economically productive activity in concert in order to overcome the impracticability of any one member's amassing sufficient capital for the project or in order to eliminate the economic waste involved in duplication of effort." Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531, 1536 (1958).

20. John J. Scura, Comment, *The Time Has Come: Ending The Antitrust Non-Enforcement Policy In Professional Sports*, 2 SETON HALL J. SPORTS L. 151, 170 (1992). According to Judge Robert Bork:

> The members of a league cannot compete in the way that members of other industries can. It is neither in the interests of the members of the league nor of the public generally that the more efficient teams should drive out the less efficient. If one team goes out of business, all are endangered. This suggests that the concept of business competition may be irrelevant as applied to the relationships between members of a league.

Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. SEC. ANTITRUST L. 211, 233 (1959).

21. Scura, *supra* note 20, at 170.

22. Dale & Hunt, *supra* note 18, at 344 (citing Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1387-89 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984)).

23. Champion, *supra* note 2, at 574.

maintained.[24] If the combination and conspiracy element is proven, a *prima facie* claim is established upon a showing that the conduct constituted an "unreasonable" restraint of trade.[25] In making this determination, the United States Supreme Court has concluded that one of two inquiries applies: the "rule of reason" test or the "*per se* illegal" test.[26] The rule of reason analysis balances the anti-competitive and pro-competetive effects of a given restraint,[27] whereas the *per se* test treats certain practices that restrain trade as unlawful without inquiry.[28] However, in the context of a professional sports league, courts now hold that the member teams are engaged in a joint venture, and, accordingly, the *per se* test does not apply.[29]

The rule of reason test considers whether the restraint of trade imposed is "justified by legitimate business purposes, and is no more restrictive than necessary."[30] In evaluating the reasonableness of the restraint, courts conduct an extensive factual inquiry into the history, purpose and effect of the restraint, the availability of less restrictive alternatives, and the balance struck between the pro-competitive and anti-competitive effects of the restraint.[31]

Although not addressed in this note, Section 2 of the Sherman Act "prohibits monopolistic endeavors which are intended to preserve market position."[32] In the sports context, a Section 2 claim arises when a league attempts to acquire monopoly power for the purpose of dissuading new teams and leagues from competing against it.[33]

---

24. Dale & Hunt, *supra* note 18, at 342 (citing *Standard Oil*, 221 U.S. at 58).

25. *Id.*

26. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

27. National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 691-92 (1978).

28. *Northern Pac. Ry.*, 356 U.S. at 5.

29. *Mackey*, 543 F.2d at 619; Smith v. Pro Football, Inc., 593 F.2d 1173, 1181 (D.C. Cir. 1978).

30. *Mackey*, 543 F.2d at 620 (citing Chicago Bd. of Trade v. United States, 246 U.S. 231, 237-39 (1918)).

31. *National Soc'y of Professional Engineers*, 435 U.S. at 692.

32. Lafferty, *supra* note 10, at 1274.

33. Dale & Hunt, *supra* note 18, at 351. However, courts have held that "groups attempting to acquire a franchise and join the League do not have standing to sue under Section 2 because they are not seeking to compete with the League." *Id.* at 354. Accordingly, Section 2 only permits causes of action filed by rival leagues or clubs in such leagues. *Id.*

II. LABOR EXEMPTIONS TO ANTITRUST LAW IN PROFESSIONAL SPORTS

A. The Statutory Labor Exemption

During the nineteenth century, labor unions and their activities were viewed as conspiracies in restraint of trade.[34] Consequently, the unintended result of enacting federal antitrust laws was that the development of labor unions was restricted.[35]

During the first half of the twentieth century Congress enacted two measures which addressed this issue by creating a statutory labor exemption from antitrust laws.[36] The Clayton Act of 1914 established that labor is not an article of commerce and that labor organizations are not proscribed by antitrust laws.[37] The Norris-LaGuardia Act of 1932 afforded greater protection for unions and declared a federal policy in favor of organized labor.[38] This statutory exemption "insulate[d] [from antitrust laws] inherently anticompetitive collective activities by employees because they are favored by federal labor policy."[39] However, because the drafters of these provisions focused on the "adversarial nature of the labor-management relationship, they did not adequately address the complex situations" that can develop during the collective bargaining process.[40]

---

34. Lafferty, *supra* note 10, at 1279-80 (citing ROBERT A. GORMAN, BASIC TEXT OF LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 621 (1976)).

35. Mitch Truelock, *Free Agency in the NFL: Evolution or Revolution?*, 47 SMU L. REV. 1917, 1920 (1994).

36. Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 803 (1945).

37. Clayton Act, Pub. L. No. 212, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12-27, 44; 29 U.S.C. §§ 52-53 (1988)); Kieran M. Corcoran, *When Does the Buzzer Sound?: The Non-Statutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1049 (1994). Labor unions belonging to the American Federation of Labor persuaded President Woodrow Wilson and his chief advisor on antitrust and labor issues, future associate justice of the Supreme Court Louis Brandeis, to include a new Section 6 which stated

> the *labor of a human being is not a commodity or article of commerce.* Nothing contained in the anti-trust law shall be construed to forbid the existence and operation of labor . . . organizations, . . . nor shall such organizations . . . be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

PAUL C. WEILER & GARY R. ROBERTS, CASES, MATERIALS, AND PROBLEMS ON SPORTS AND THE LAW 166 (1993) [hereinafter SPORTS AND THE LAW] (emphasis added).

38. Norris-LaGuardia Act, Pub. L. No. 64, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101-15 (1988)); Corcoran, *supra* note 37, at 1049. The act was authored by then Harvard Law Professor and future associate justice of the Supreme Court Felix Frankfurter. SPORTS AND THE LAW, *supra* note 37, at 166.

39. Bridgeman v. N.B.A., 675 F. Supp. 960, 964 (D.N.J. 1987) (citing Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)); *see* 15 U.S.C. §§ 12-27, 44 (1988); 29 U.S.C. §§ 52-53 (1988); 29 U.S.C. §§ 101-15 (1988).

40. Corcoran, *supra* note 37, at 1050.

B. The Non-Statutory Labor Exemption

In 1935, Congress passed the National Labor Relations Act (NLRA), which established a federal policy fostering the collective bargaining process.[41] The NLRA sanctions collective bargaining by mandating that labor and management have a "mutual obligation . . . [to] confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."[42]

However, in so doing, Congress created a policy dichotomy in the law: whereas employee-imposed restraints on management during the collective bargaining process satisfied labor law, such restrictions may be found to unreasonably restrain trade in violation of antitrust law.[43] To rectify this conflict, the United States Supreme Court established the non-statutory labor exemption, holding that collective bargaining under the labor laws superseded a conflicting antitrust policy favoring unfettered competition.[44] The exemption immunizes from antitrust scrutiny certain agreements reached between labor and management in the collective bargaining process.[45]

While the purpose of the NLRA was to encourage collective bargaining and the purpose of the non-statutory labor exemption was to protect labor in that process, sports leagues and team owners have shielded themselves from antitrust attacks by means of this exemption.[46] Because most sports players are unionized and most labor-management agreements are collectively bargained, the non-statutory labor exemption has removed most significant antitrust issues in professional sports from court review.[47]

The antitrust labor exemption was initially recognized in the player

---

41. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 435 (1935) (codified as amended as 29 U.S.C. §§ 151-66 (1988)); *see* Corcoran, *supra* note 37, at 1050.

42. 29 U.S.C. § 158(d) (1988).

43. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621-22 (1975).

44. *See id.* The Court held that in certain limited areas labor policy can only be effectuated if antitrust policy is superseded. *Id.* The exemption was first recognized in *Amalgamated Meat Cutters, Butcher Workmen of North America v. Jewel Tea Co.*, where the Court concluded:

> Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act . . . .

Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965).

45. *Connell Constr.*, 421 U.S. at 622.

46. Scura, *supra* note 20, at 162.

47. *Id.* at 162-63 (citation omitted).

restraint context in *Mackey v. National Football League*.[48] The Eighth Circuit in *Mackey* determined that a bargaining agreement is eligible for antitrust immunity under the non-statutory labor exemption if three elements are satisfied: (1) the restraint of trade primarily affects only the parties to the agreement; (2) the agreement concerns a mandatory subject of collective bargaining;[49] and (3) the agreement is the product of bona fide, arms-length bargaining.[50]

Despite the frequent application of the non-statutory labor exemption, players' associations in many sports have been able to gain significant concessions from owners. The associations derive their strength from both collective bargaining and their ability to utilize antitrust laws in instances where the exemption is inapplicable.[51] Nevertheless, collective bargaining remains the sole recourse available to professional baseball players in the resolution of disputes with owners due to the continuing vitality of the sport's unique antitrust exemption.[52]

III. MAJOR LEAGUE BASEBALL'S ANTITRUST EXEMPTION

Major League Baseball (MLB) remains the only professional sports entity which enjoys an exemption from federal antitrust laws.[53] The origin and continuing vitality of MLB's antitrust exemption was established in a trilogy of United States Supreme Court decisions handed down between 1922 and 1972.[54] Professional baseball was exempted from the Sherman Act in the landmark decision *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, where the Court found

---

48. Mackey v. N.F.L., 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Lafferty, *supra* note 10, at 1281.

49. Under the NLRA, mandatory matters include all subjects related to "wages, hours, and other terms and conditions of employment," while permissive matters are ones that arise outside the scope of the mandatory subject matter. 29 U.S.C. §§ 151-66 (1988).

50. *Mackey*, 543 F.2d at 614.

51. Lafferty, *supra* note 10, at 1281.

52. *Id.*

53. All other professional sports which have litigated the issue have been held subject to the Sherman Antitrust Act. *See* Radovich v. National Football League, 352 U.S. 445 (1957) (Football); United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955) (Boxing); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 665 F.2d 222 (8th Cir. 1981) (Tennis); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973) (Golf); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (Hockey); Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956) (Basketball).

54. Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972). *See* Lafferty, *supra* note 10, at 1274.

that the business of baseball did not constitute interstate commerce.[55]

In *Federal Baseball Club*, the Baltimore team, a member of the Federal League of Professional Baseball Players, was attempting to compete with the National League of Professional Baseball Clubs.[56] The Baltimore club brought an action against the National League clubs, alleging that they "destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all of those clubs except the plaintiff to leave their League . . . ."[57] Although not extensively addressed by the Court, the Baltimore club also alleged that baseball's "reserve system" effectively controlled the market of qualified baseball players in the country, and thereby impeded the development of competition among professional baseball leagues.[58]

Justice Holmes, writing for a unanimous Court in *Federal Baseball Club*, found that "[t]he business [in question] is giving exhibitions of base ball [sic], which are purely state affairs."[59] While accepting that these competitions are between clubs from different cities and states, the fact that 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."[60] The Court held that the transportation is a "mere incident" to the exhibition, which although it is made for money, "would not be called trade or commerce in the commonly accepted use of the words."[61] The personal effort involved in the transportation is "not related to production, [and therefore] is not a subject of commerce."[62] Holmes illustrated the distinction between the business of baseball and interstate commerce by noting that "a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does

---

55. *Federal Baseball Club*, 259 U.S. at 200; *see* Lafferty, *supra* note 10, at 1274-75.

56. *Federal Baseball Club*, 259 U.S. at 207.

57. *Id.*

58. National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc., 269 F. 681, 683 (D.C. Cir. 1920), *aff'd*, 259 U.S. 200 (1922); Neal R. Stoll & Shepard Goldfein, *The Narrowing of Baseball's Exemption*, 210 N.Y. L.J. 3 (Dec. 21, 1993). This issue is critical to decisions seven decades later, when the reserve system became the crux of the distinction maintained in Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993), and Butterworth v. National League of Professional Baseball Clubs, 644 So. 2d 1021 (Fla. 1994). *See* discussion *infra* Part IV.A-B. These two cases narrowed professional baseball's exemption, asserting that since the issue in *Federal Baseball Club* was the "reserve clause," and since the basis for that decision (baseball is not interstate commerce) was subsequently reversed, the precedential effect of the exemption is limited to the reserve clause. *Piazza*, 831 F. Supp. at 420; *Butterworth*, 644 So. 2d at 1022.

59. *Federal Baseball Club*, 259 U.S. at 208.

60. *Id.* at 209.

61. *Id.* (citation omitted).

62. *Id.*

not engage in such commerce because the lawyer or lecturer goes to another State."[63] Accordingly, the Court held that the business of baseball is "not an interference with commerce among the States."[64]

Over the years, the Supreme Court has twice reconsidered the issue of MLB's antitrust exemption. Both times the Court relied on precedent to uphold the exemption and leave any abrogation to Congress.[65] In *Toolson v. New York Yankees*, George Toolson brought an action against the Yankees, challenging baseball's reserve system as a violation of federal antitrust statutes.[66] Mr. Toolson was under contract with the Yankees' farm club in Newark when he was assigned, against his wishes, to Binghamton.[67] Toolson refused to report and, in accordance with league rules, was placed on the "ineligible list," effectively blacklisting him from any other baseball team.[68]

Without a reexamination of the underlying issues, the *per curiam* opinion of the *Toolson* Court reaffirmed the existence and scope of baseball's antitrust exemption.[69] The Court, while following the holding in *Federal Baseball Club*, did not rely on the Court's "interstate commerce" reasoning in that decision.[70] Rather, the Court based its judgment on several other factors: (1) congressional awareness of the *Federal Baseball Club* decision coupled with legislative inaction; (2) the baseball industry's development during the previous thirty years, "on the understanding that it was not subject to existing antitrust legislation;" (3) a reluctance to abrogate *Federal Baseball Club* with the consequential "retrospective effect;" and (4) a declared desire that, if there are evils in this field, any remedy should be adopted by legislative fiat.[71]

In his dissent in *Toolson*, Justice Burton attacked the underlying basis of the majority's opinion, contending that the Court in *Federal Baseball Club* "did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt

---

63. *Id.*

64. *Id.*

65. Lafferty, *supra* note 10, at 1276.

66. *See* Toolson v. New York Yankees, Inc., 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd*, 200 F.2d 198 (9th Cir. 1952), *aff'd per curiam*, 346 U.S. 356 (1953).

67. *Id.* at 93.

68. *Id.*; *see* Edmund P. Edmonds, *Over Forty Years in the On-Deck Circle: Congress and the Baseball Antitrust Exemption*, 19 T. MARSHALL L. REV. 627, 635 (1994).

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

70. Stoll & Goldfein, *supra* note 58, at 3.

71. *Id.*; *Toolson*, 346 U.S. at 357.

from the Sherman Act."[72] To illustrate professional baseball's impact on interstate commerce, the dissent offered the 1952 report by the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, which stated: "'[O]rganized baseball' is a combination of approximately 380 separate baseball clubs, operating in 42 different States, the District of Columbia, Canada, Cuba, and Mexico . . . ."[73] Finally, Justice Burton disagreed with the majority's assumption that Congress' failure to act demonstrates an "implied exemption," and he instead proffered that Congress had enacted "no express exemption [to] organized baseball from the Sherman Act."[74]

The Court heard the last leg of the baseball trilogy in the 1972 case of *Flood v. Kuhn*.[75] Curt Flood was a star center fielder for the St. Louis Cardinals during the 1950s and 1960s.[76] In a career spanning twelve seasons, Flood had a .293 lifetime batting average, collected seven Gold Glove Awards for his defensive prowess, and served as team co-captain from 1965-69.[77] In October 1969, Flood was traded to the Philadelphia Phillies without his consent.[78] The ballplayer's request that he be made a "free agent" and be granted "liberty to strike his own bargain" with any team was subsequently denied by the commissioner of baseball.[79] Flood filed suit in 1970, against the commissioner of baseball,[80] challenging the reserve clause under federal antitrust laws.[81]

---

72. *Toolson*, 346 U.S. at 360 (Burton, J., dissenting). Further, Justice Burton contends that Justice Holmes, who drafted *Federal Baseball Club*, "realized that the then incidental interstate features of organized baseball might rise to a magnitude that would compel recognition of them independently . . . ." *Id.* at 360-61 (citing Hart v. B.F. Keith Vaudeville Exchange, 262 U.S. 271, 274 (1923)).

73. *Id.* at 358 (citing H.R. Rep. No. 2002, 82d Cong., 2d Sess. 4, 5 (1952)).

74. *Id.* at 364.

75. *Flood*, 407 U.S. at 258.

76. *Id.* at 264.

77. *Id.* From 1962 to 1965, Flood batted .305, and averaged 198 hits, 8 homeruns, 100 runs, 66 RBIs, 30 doubles, and 11 stolen bases per year. THE BASEBALL ENCYCLOPEDIA: THE COMPLETE AND OFFICIAL RECORD OF MAJOR LEAGUE BASEBALL 904 (8th ed. 1990).

78. *Flood*, 407 U.S. at 265.

79. *Id.* Flood wrote Commissioner Bowie Kuhn on December 24, 1969, asserting that:

> After 12 years in the Major Leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent to laws of the United States and of the several states.

WARD & BURNS, *supra* note 1, at 411.

80. The other defendants were the presidents of the two baseball leagues and the 24 major league clubs. *Flood*, 407 U.S. at 265.

81. *Id.* Flood refused to play for Philadelphia in 1970, despite a hefty $100,000 salary offer, and chose instead to sit out the year. After the 1970 season, Philadelphia sold its rights to Flood to the Washington Senators. He played for only three weeks in 1971, leaving the team because he was dissatisfied with his performance. He never played professional baseball again, retiring at the age of

In writing for the 5-3 majority,[82] Justice Blackmun's opinion was a "red, white and blue tribute to baseball sprinkled with nostalgia and poetry."[83] Blackmun quoted the district court's opinion, stating:

> Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage . . . .
>
> Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. . . . [I]t would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial or profit considerations. The game is on higher ground; it behooves every one to keep it there.[84]

If the antitrust laws were to be applied to baseball, Blackmun believed that the game's "unique position as the national pastime would be undermined."[85]

The United States Supreme Court in *Flood* once again upheld *Federal Baseball Club*, declaring that the exemption is an established aberration that rests on "baseball's unique characteristics and needs."[86] The Court specifically found that professional baseball was in fact engaged in interstate commerce, and the reserve system's[87] exemption was an

---

33. *Id.* at 266.

82. *Id.* at 258. Justice Lewis Powell recused himself from the case due to his stock holdings in Anheuser-Busch, Inc., whose principal owner, August Busch, Jr., also owned baseball's St. Louis Cardinals. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 223 (1979). Chief Justice Warren Burger wrote a concurring opinion. *Flood*, 407 U.S. at 285-86 (Burger, C.J., concurring).

83. Champion, *supra* note 2, at 577. While ostensibly analyzing the abortion cases in the justices' library in preparation for his landmark opinion in *Roe v. Wade*, Blackmun was actually, in the eyes of Justice Brennan, "playing with baseball cards" in his search for players with the requisite statistics to be included in the opinion. *Id.* at 578; WOODWARD & ARMSTRONG, *supra* note 82, at 224. The *Flood* opinion included 88 celebrated names of the diamond. *Flood*, 407 U.S. at 262-63; Champion, *supra* note 2, at 578.

84. *Flood*, 407 U.S. at 266-67 (citing Flood v. Kuhn, 309 F. Supp. 793 (S.D.N.Y. 1970)).

85. WOODWARD & ARMSTRONG, *supra* note 82, at 224. Justice Potter Stewart, who voted with the *Flood* majority and had assigned the opinion to Blackmun, had more than a passing interest in the game of baseball. In October of the following year, Stewart, an avid Cincinnati Reds fan, was scheduled to hear oral arguments during a Reds-Mets playoff game. Determined not to miss the action, Stewart requested that his law clerks pass him batter-by-batter bulletins. One notice read: "Kranepool flies to right, Agnew resigns." GEORGE F. WILL, MEN AT WORK: THE CRAFT OF BASEBALL 1 (1990).

86. *Flood*, 407 U.S. at 282.

87. The specific reference to the "reserve system" again raises the question of precedential effect (i.e., scope of the exemption). *See supra* note 58 and accompanying text; *see also infra* Part IV.A-B.

"anomaly . . . confined to baseball."[88] Even though this aberration may have been considered "unrealistic, inconsistent, or illogical," it had been established for half a century and was "fully entitled to the benefit of *stare decisis*."[89] The Court also found that *Toolson*'s concerns regarding congressional inactivity and retrospective application remained pertinent.[90] The Court ultimately affirmed *Federal Baseball Club* and *Toolson* based on *stare decisis*, stating that any remedy must arise from "congressional, and not judicial, action."[91]

IV. NARROWING BASEBALL'S ANTITRUST EXEMPTION: THE *PIAZZA* AND *BUTTERWORTH* DECISIONS

While the Court's trilogy of baseball decisions established an antitrust exemption, the lower courts have narrowed its scope by holding that contracts between baseball entities such as leagues, teams, or player associations and third parties will not be immune from antitrust scrutiny.[92]

In 1992, Pamela Postema, baseball's only female umpire, filed a common law restraint of trade action, maintaining that the sport's exemption was limited and did not preclude her claim.[93] The United States District Court for the Southern District of New York agreed, holding that the antitrust immunity was confined to MLB's reserve clause and its league structure, and did not extend to its employment relationship with umpires since that is not a "unique characteristic or need of the game."[94] Additionally, the United States District Court for the Southern District of Texas held that a radio broadcasting contract was not central enough to the

---

88. *Flood*, 407 U.S. at 282.

89. *Id.*

90. *Id.* at 283.

91. *Id.* at 285. In his dissent in *Flood*, Justice Douglas termed *Federal Baseball Club* a "derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream." *Id.* at 286 (Douglas, J., dissenting). Douglas further noted that "[i]f congressional inaction is our guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation." *Id.* at 287. Justice Marshall, in his *Flood* dissent, stated that the "antitrust laws . . . are as important to baseball players as they are to football players, lawyers, doctors, or members of any other class of workers." *Id.* at 292 (Marshall, J., dissenting).

92. Gary Roberts, *On the Scope and Effect of Baseball's Antitrust Exclusion*, 4 SETON HALL J. OF SPORTS L. 321, 325 (1994).

93. Postema v. National League of Professional Baseball Clubs, 799 F. Supp. 1475, 1488 (S.D.N.Y. 1992).

94. *Id.* at 1489.

game of baseball to be shielded by the antitrust exemption.[95]

Because *Federal Baseball Club*, *Toolson*, and *Flood* all involve the reserve clause,[96] the next logical step in the erosion of baseball's exemption would be a further narrowing of the exemption's coverage from both its league structure and reserve system to the reserve system only.[97]

A. Piazza v. Major League Baseball

In 1993, the United States District Court for the Eastern District of Pennsylvania became the first federal court to specifically limit major league baseball's antitrust exemption to its reserve system.[98] In *Piazza v. Major League Baseball*,[99] a partnership of Tampa Bay/St. Petersburg investors (Tampa Bay) filed suit against MLB, contending that their efforts to purchase and relocate the San Francisco Giants were thwarted by the league in violation of antitrust law.[100]

The action was initiated after the investors[101] executed a letter of intent in August 1992, with Robert Lurie, then owner of the Giants, to purchase the club for $115 million.[102] A competing $100 million offer to keep the Giants in San Francisco was subsequently presented by other investors.[103] Although the offer was $15 million less than that tendered by Tampa Bay, MLB formally rejected the Tampa Bay proposal on November 10, 1992.[104] The Tampa Bay investors alleged that MLB "monopolized the market for Major League Baseball teams and that Baseball . . . [unlawfully] placed direct and indirect restraints on the purchase, sale,

---

95. Henderson Broadcasting Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 265 (S.D. Tex. 1982). *See* Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3d Cir. 1981) (finding that merchandiser's contracts with individual players were subject to antitrust laws but were not an unreasonable restraint of trade or a conspiracy to monopolize); Twin City Sportserve, Inc. v. Charles O. Finley & Co., 365 F. Supp. 235 (N.D. Cal. 1972) (holding that a corporation unreasonably restrained trade by procuring a long-term, exclusive contract for concession services at games in return for the use of credit by MLB owners).

96. Baseball's reserve clause "centers in the uniformity of player contracts; the confinement of a player to a club that has him under contract; the assignability of a player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum." Flood v. Kuhn, 407 U.S. 258, 259 n.1 (1972).

97. Champion, *supra* note 2, at 581.

98. Lafferty, *supra* note 10, at 1284.

99. Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993).

100. *Id.* at 421-22.

101. The partnership was comprised of Vincent Piazza and Vincent Tirendi, who were both Pennsylvania residents, and four residents of the state of Florida. *Id.* at 422.

102. *Id.*

103. *Id.* at 423.

104. *Id.*

transfer, relocation of, and competition for such teams."[105] In its motion to dismiss, MLB claimed that it was immune from antitrust liability in accordance with *Federal Baseball Club* and its progeny.[106]

The *Piazza* court reexamined the exemption granted by the United States Supreme Court and found "that the *Flood* Court viewed that the disposition in *Federal Baseball* [*Club*] and *Toolson* [was] limited to the reserve system."[107] In reaching this decision, Judge Padova maintained that, based on the *Flood* Court's characterization of its task, the scope of *Flood* and its predecessors was limited: "[f]or the third time in 50 years the Court is being asked specifically to rule that professional baseball's *reserve system* is within the reach of antitrust laws."[108] Additionally, Padova noted that the *Flood* Court "refer[red] to the reserve clause at least *four* times."[109]

Furthermore, the *Piazza* court held that since the *Flood* Court "exercised its discretion to invalidate the *rule* of *Federal Baseball* [*Club*] and *Toolson*"—that is, finding that professional baseball affects interstate commerce—"no rule from these cases binds the lower courts as a matter of *stare decisis*."[110]

For these reasons, the *Piazza* court therefore concluded that MLB's antitrust exemption was limited to the league's reserve system.[111] Because the parties agreed that the reserve system was not at issue in the case,[112] the court held that the exemption was inapplicable and denied MLB's motion to dismiss.[113] Finally, Judge Padova added that "although teams, as business entities engaged in exhibiting baseball games, are undoubtedly a unique necessity to the game, the transfer of ownership interests in such entities may not be so unique."[114]

---

105. *Id.* at 424.

106. *Id.* at 421.

107. *Id.* at 436.

108. *Id.* (quoting *Flood*, 407 U.S. at 259) (emphasis in original).

109. *Id.* at 437 (emphasis in original).

110. *Id.* at 438.

111. *Id.*

112. *Id.*

113. *Id.* at 421.

114. *Id.* at 441. The *Piazza* court determined that the test is whether "the market for ownership interests in existing baseball teams . . . is central to the unique characteristics and needs of baseball exhibitions." *Id.* at 440.

B. Butterworth v. National League of Professional Baseball Clubs

In October 1994, the Florida Supreme Court addressed the scope of the antitrust exemption in *Butterworth v. National League of Professional Baseball Clubs,*[115] which also arose as a result of the offer by Tampa Bay investors to purchase and relocate the San Francisco Giants.[116] While two of the investors resided in Philadelphia and challenged MLB's action in federal court in Pennsylvania,[117] the remaining investors resided in Florida.[118] After the more lucrative offer by the Tampa Bay investors was rejected, Florida Attorney General Robert Butterworth issued antitrust civil investigative demands (CIDs) to the National League of Professional Baseball Clubs (National League).[119] The National League's petition to have the CIDs set aside, based upon baseball's antitrust exemption, was granted by the Circuit Court for Osceola County.[120] Florida's Fifth District Court of Appeal affirmed the decision and certified the antitrust exemption question to the Florida Supreme Court as one of "great public importance."[121]

The Florida Supreme Court reviewed the United States Supreme Court's baseball trilogy, closely examining the language and findings of the recent *Flood* decision.[122] Justice Harding, writing for the 5-1 majority, found that the *Flood* decision was the third "specifically to rule that professional baseball's *reserve system* was within the reach of the federal antitrust laws."[123] Justice Harding noted that the *Toolson* Court followed *Federal Baseball Club*'s rationale, because "baseball's development between 1922 and 1953 [was based] 'upon the understanding that the *reserve system* [was] not subject to existing federal antitrust laws.'"[124]

---

115. Butterworth v. National League of Professional Baseball Clubs, 644 So. 2d 1021 (Fla. 1994).

116. *Id.* at 1022.

117. *See Piazza*, 831 F. Supp. at 420; *see also supra* Part IV.A.

118. *Butterworth*, 644 So. 2d at 1022.

119. *Id.*

120. Butterworth v. National League of Professional Baseball Clubs, 622 So. 2d 177, 177 (Fla. Dist. Ct. App. 1993).

121. *Id.* at 178.

122. *Butterworth*, 644 So. 2d at 1023-25.

123. *Id.* at 1024 (citing *Flood*, 407 U.S. at 259).

124. *Id.* (quoting *Flood*, 407 U.S. at 274).

Harding added that among the eight specific findings of the *Flood* Court, the opinion "twice described the exemption as applying to the 'reserve system.'"[125]

The *Butterworth* court maintained that *Flood* rejected the rationale of *Federal Baseball Club* when it declared that "'professional baseball is a business . . . engaged in interstate commerce.'"[126] In doing so, the *Butterworth* court held that the *Flood* decision repudiated the "very reason that the Court recognized such an exemption in *Federal Baseball* [*Club*, thereby] seriously undercut[ting] the precedential value of both *Federal Baseball* [*Club*] and *Toolson*."[127] While admitting that the *Piazza* decision was against the great weight of federal case law regarding the scope of the exemption, the Florida Supreme Court maintained that these prior cases reached decisions without a "comprehensive analysis of *Flood* and its implications."[128] Based upon the language and findings in *Flood*, the *Butterworth* court agreed with the *Piazza* court's conclusion that baseball's antitrust exemption extends only to the reserve system.[129]

In the concurring opinion in *Butterworth*, Judge Overton maintained that "any judicially created exemption must be strictly construed in its application because it grants a benefit not available to [other professional sports]," adding that the United States Supreme Court should take jurisdiction to finally resolve this question.[130] Senior Justice McDonald, in the lone dissenting opinion, contended that the exemption is an "'established aberration' in the law which is entitled to the benefit of stare decisis."[131] McDonald accepted that the exemption does not apply to all activities that have an "attenuated relation" with the business of baseball.[132] However, he asserted that "where professional baseball is played and with whom, is a fundamental consideration of professional baseball and at the heart of its business activity."[133] Accordingly, Justice McDonald in his dissent concluded that ownership and location of franchises fall "within the ambit of baseball's antitrust exemption."[134]

The United States District Court for the Eastern District of

---

125. *Id.* (citing *Flood*, 407 U.S. at 282-83).
126. *Id.* (quoting *Flood*, 407 U.S. at 282).
127. *Id.* at 1025.
128. *Id.*
129. *Id.*
130. *Id.* at 1026 (Overton, J., concurring).
131. *Id.* (McDonald, J., dissenting) (citing *Flood*, 407 U.S. 258).
132. *Id.*
133. *Id.*
134. *Id.*

Pennsylvania in *Piazza* and the Florida Supreme Court in *Butterworth* have raised the question of the scope of baseball's antitrust exemption. While both courts held the exemption inapplicable to decisions regarding franchise relocation,[135] MLB has not been found civilly or criminally liable in either action since there has yet to be a trial on the merits.[136] Regardless of the outcomes, these two cases, the recent players' strike, and the continuing labor-management dispute have refocused attention in both the courts and Congress as to the scope and efficacy of baseball's antitrust exemption.

V. CONGRESSIONAL EFFORTS TO REPEAL BASEBALL'S ANTITRUST EXEMPTION

The United States Congress has closely monitored the effects of baseball's antitrust exemption since legislation was initially introduced in 1949.[137] The 1949 measure, introduced by Congressmen A. S. "Syd" Herlong and Wilbur Mills, was not an effort to repeal the judicially created exemption but to etch *Federal Baseball Club* in stone by granting a legislative exemption and legalizing the reserve clause.[138] Since that time, Congress has considered scores of bills on a range of related topics, but the exemption has not been modified.[139]

With the expiration of MLB's collective bargaining agreement in December 1993, and with the players and owners at a stalemate, the 103d Congress in 1993-94 considered seven measures regarding baseball's exemption.[140] These bills may be categorized generally into four groups: (1) an absolute repeal of baseball's antitrust exemption;[141] (2) a temporary or limited repeal of the exemption under special circumstances;[142] (3) the

---

135. *See Piazza*, 831 F. Supp. at 420; *Butterworth*, 644 So. 2d at 1021.

136. The *Piazza* case was subsequently settled when National League owners agreed to apologize and pay the plaintiffs $6 million. SPORTS AND THE LAW (1995 CASE SUPPLEMENT), *supra* note 37, at 55. More importantly to the residents of Tampa Bay/St. Petersburg, MLB in March 1995 granted new franchises to St. Petersburg and Phoenix to begin play in 1998. *Id.* No further action has been taken in *Butterworth* since the Florida Supreme Court denied a rehearing on November 17, 1994.

137. *See* Edmonds, *supra* note 68, at 633 (discussing dozens of bills introduced in Congress during the past 45 years).

138. *Id.*

139. *Id.* at 632-60. It should be noted that an exemption enacted in 1961, for the broadcasting of certain sporting events, still remains in effect today. Sports Broadcasting Act of 1961, Pub. L. No. 87-331 (1961) (codified at 15 U.S.C. § 1291).

140. *See infra* notes 141-44.

141. H.R. 108, 103d Cong., 1st Sess. (1993); S. 500, 103d Cong., 1st Sess. (1993).

142. S. 2380, 103d Cong., 2d Sess. (1994); H.R. 4965, 103d Cong., 2d Sess. (1994); H.R. 4994, 103d Cong., 2d Sess. (1994).

creation of a national commission to "oversee and regulate" the league;[143] and (4) the removal of MLB from the sports broadcasting antitrust exemption.[144]

The absolute repeal measures included a finding that the business of organized professional baseball "affects interstate commerce" and that the repeal would not apply to conduct occurring prior to the date of enactment.[145] The temporary or limited repeal measures apply in circumstances where one party "unilaterally" imposes new terms and conditions on the other.[146] These provisions were intended to "encourage serious negotiations"[147] and effectively prohibit the owners from imposing the salary cap or other player restraint rules without the consent of the players' union. The third category created a national commission to "oversee and regulate" MLB and provided it with the power to take any action it deemed in the "best interests of baseball."[148] This power includes, but is not limited to, conducting binding arbitration, setting ticket prices, controlling expansion and franchise relocation, overseeing stadium financing, regulating television revenues, and implementing revenue sharing.[149] The final category removes professional baseball from the antitrust exemption applicable to certain sports broadcasting contracts.[150]

While none of the seven measures were voted on by the House or Senate in 1993-94, it appears that the 104th Congress, which convened on January 3, 1995, may vote on a baseball antitrust proposal this session.[151] Fourteen bills[152] were introduced in 1995, regarding the exemption, whose

---

143. S. 2401, 103d Cong., 2d Sess. (1994).

144. H.R. 1549, 103d Cong., 1st Sess. (1993).

145. H.R. 108, 103d Cong., 1st Sess., §§ 1, 4 (1993); S. 500, 103d Cong., 1st Sess., §§ 2, 3 (1993). These provisions preclude antitrust liability for conduct by MLB which occurred prior to enactment, an issue which was also a concern of the Supreme Court. *See* Flood v. Kuhn, 407 U.S. 258, 283 (1972); Toolson v. New York Yankees, 346 U.S. 356, 357 (1953).

146. S. 2380, 103d Cong., 2d Sess., § 27(a) (1994); H.R. 4965, 103d Cong., 2d Sess., § 27(a) (1994); H.R. 4994, 103d Cong., 2d Sess., § 27(a) (1994).

147. *See* H.R. 4965, 103d Cong., 2d Sess. (1994) (preamble); H.R. 4994, 103d Cong., 2d Sess., § 2 (1994); S. 2380, 103d Cong., 2d Sess. (1994) (preamble).

148. S. 2401, 103d Cong., 2d Sess., §§ 2, 4. (1994).

149. *Id.* at § 4. The Commission would be composed of five members appointed by the President of the United States, would have subpoena power, as many as ten staff members, and would be appropriated $1.5 million. *Id.* at §§ 3, 4, 7, and 9.

150. H.R. 1549, 103d Cong., 1st Sess. (1993) (referring to the Sports Broadcasting Act of 1961, 15 U.S.C. § 1291).

151. Mike Dodd, *Congress Introduces Antitrust-Repeal Bills*, USA TODAY, Jan. 5, 1995, at 1C.

152. H.R. 45, 104th Cong., 1st Sess. (1995); H.R. 105, 104th Cong., 1st Sess. (1995); H.R. 106, 104th Cong., 1st Sess. (1995); H.R. 120, 104th Cong., 1st Sess. (1995); H.R. 365, 104th Cong., 1st Sess. (1995); H.R. 386, 104th Cong., 1st Sess. (1995); H.R. 735, 104th Cong., 1st Sess. (1995); H.R. 749, 104th Cong., 1st Sess. (1995); H.R. 1612, 104th Cong., 1st Sess. (1995); H.R. 2022,

short titles include the "National Pastime Preservation Act of 1995,"[153] the "Baseball Fans and Communities Protection Act of 1995,"[154] and the "National Commission on Professional Baseball Act of 1995."[155]

The measures introduced in the 104th Congress are more comprehensive than those offered in the previous session. The 1995 bills may be categorized generally into six groups: (1) an absolute repeal of baseball's antitrust exemption;[156] (2) a repeal of the exemption, with various exclusions;[157] (3) the application of antitrust law upon a party's imposition of "unilateral terms and conditions" (with some exceptions);[158] (4) the application of antitrust law to any restraint pertaining to the location of minor league franchises;[159] (5) the creation of a national commission to "oversee and investigate" the league;[160] and (6) the removal of baseball from the antitrust exemption applicable to certain sports broadcasting contracts.[161]

The absolute repeal measures, which were refiled from the previous session, include a finding that the business of organized professional baseball "affects interstate commerce" and that the repeal would not apply to conduct occurring prior to the date of enactment.[162] The second

---

104th Cong., 1st Sess. (1995); S. 15, 104th Cong., 1st Sess. (1995); S. 415, 104th Cong., 1st Sess. (1995); S. 416, 104th Cong., 1st Sess. (1995); S. 627, 104th Cong., 1st Sess. (1995).

153. S. 15, 104th Cong., 1st Sess. (1995).

154. H.R. 45, 104th Cong., 1st Sess. (1995); H.R. 120, 104th Cong., 1st Sess. (1995); H.R. 365, 104th Cong., 1st Sess. (1995).

155. H.R. 735, 104th Cong., 1st Sess. (1995).

156. *See infra* note 162 and accompanying text.

157. *See infra* notes 163-64 and accompanying text.

158. *See infra* notes 165-72 and accompanying text.

159. H.R. 2022, 104th Cong., 1st Sess., § 2 (1995).

160. H.R. 735, 104th Cong., 1st Sess. (1995). This omnibus measure is similar to the bill offered in the 103d Congress, each granting the commission the power to take action it deems in the "best interests of baseball." *Id.* at § 4. *See* S. 2401, 103d Cong., 2d Sess. (1994) and *supra* notes 148-49. However, the 1995 measure limits the commission's authority to "oversee and investigate," in contrast to the 1994 bill which grants it the power to "oversee and regulate." *Id.* Notwithstanding this limitation, the scope of the 1995 measure is more expansive, as it enables the commission to intervene in contract negotiations between the owners and players and to issue orders to temporarily stay various acts or practices. H.R. 735, 104th Cong., 1st Sess., §§ 4, 5 (1995). Furthermore, rather than allocating funding from the Treasury, the 1995 bill requires that MLB "pay to the Treasury of the United States . . . each calendar year a fee in the amount of two-tenths of 1 per centum of the aggregate dollar amount of combined team revenues received during each preceding calendar year . . . " *Id.*

161. H.R. 105, 104th Cong., 1st Sess. (1995) (referring to the Sports Broadcasting Act of 1961, 15 U.S.C. § 1291).

162. H.R. 106, 104th Cong., 1st Sess., § 1 (1995); H.R. 749, 104th Cong., 1st Sess., § 1 (1995). It should be noted that two other 1995 measures provide for an absolute repeal, but each additionally declares that the bill does not affect the exemption applicable to certain sports broadcasting

category consists of bills which repeal the antitrust exemption but exclude: (1) the sports broadcasting exemption and the rules governing minor leagues[163] and (2) the sports broadcasting exemption and the rules governing both the minor leagues and franchise relocation.[164]

The third category of measures applies antitrust law, with some exceptions, upon a party's imposition of "unilateral terms and conditions."[165] These provisions attempt to address the crux of baseball's current labor dispute—the unilateral imposition of terms (i.e., salary caps/salary taxation provisions)[166] and the non-statutory labor exemption.[167] Three such bills apply antitrust law solely in instances where a party imposes "unilateral terms and conditions of employment in restraint of trade," making exceptions for the minor leagues and sports broadcasting.[168] However, these measures do not affect "any Federal statute relating to labor relations,"[169] which presumably preserves the non-statutory labor exemption from antitrust law.[170] The final measure on this issue is even more comprehensive, because it applies antitrust law to each aspect of labor relations and precludes the application of the non-statutory exemption to any "term or condition" which is *"unilaterally imposed . . . and differs substantially* from the provisions of the basic agreement . . . that expired on December 31, 1993."[171] The inapplicability of the non-statutory labor exemption would be truly significant, for Congress would be denying

---

contracts. *See* Sports Broadcasting Act of 1961, 15 U.S.C § 1291; *see* S. 15, 104th Cong., 1st Sess., § 3 (1995); H.R. 386, 104th Cong., 1st Sess., § 3 (1995). Accordingly, this calls into question whether H.R. 106 and H.R. 749 also incorporate the sports broadcasting exemption.

163. S. 416, 104th Cong., 1st Sess. (1995).

164. S. 627, 104th Cong., 1st Sess. (1995); H.R. 1612, 104th Cong., 1st Sess. (1995).

165. H.R. 45, 104th Cong., 1st Sess., § 27(a) (1995); H.R. 120, 104th Cong., 1st Sess., § 27(a) (1995); H.R. 365, 104th Cong., 1st Sess., § 27(a) (1995).

166. The salary cap proposal was in fact unilaterally imposed by the Major League Executive Council on December 23, 1994. *Major League Baseball Implements Salary Cap Proposal*, MAJOR LEAGUE BASEBALL-OFFICE OF THE COMMISSIONER NEWS RELEASE, at 1 (Dec. 23, 1994) [hereinafter MLB NEWS RELEASE].

167. *See* discussion *infra* Part VI.A-B.

168. H.R. 45, 104th Cong., 1st Sess., § 27(a) (1995); H.R. 120, 104th Cong., 1st Sess., § 27(a) (1995); H.R. 365, 104th Cong., 1st Sess., § 27(a) (1995). These measures state that the scope of "terms and conditions" does not affect the ability of the players to strike or the owners to lockout the players. H.R. 45 § 27(d); H.R. 120 § 27(d); H.R. 365 § 27(d).

169. H.R. 45, 104th Cong., 1st Sess., § 27(a) (1995); H.R. 120, 104th Cong., 1st Sess., § 27(a) (1995); H.R. 365, 104th Cong., 1st Sess., § 27(a) (1995).

170. *See* discussion *infra* Part VI.A.

171. S. 415, 104th Cong., 1st Sess. (1995) (emphasis added). Additionally, the measure also grants exceptions for the minor leagues and sports broadcasting and defines the scope of "terms and conditions" as not affecting the ability of the players to strike or the owners to lockout the players. *Id.* at § 28(b)(2).

MLB a shield which currently protects other professional sports.[172]

On August 3, 1995, the Senate Judiciary Committee approved the Major League Baseball Antitrust Reform Act of 1995, S. 627,[173] by a vote of 9 to 8.[174] The provision provides for a repeal of the antitrust exemption but prohibits antitrust application to any rules governing franchise relocation and the minor leagues.[175] Senator Orrin Hatch, who serves as chairman of the Senate Judiciary Committee and was the bill's lead sponsor, stated that the measure brings together the competing approaches of several pieces of legislation.[176] Hatch maintained that the measure "does not impose a big-government solution to baseball's problems. On the contrary, it would get government out of the way by eliminating a serious government-made obstacle to resolution of the labor difficulties in baseball."[177]

VI. EFFECT OF A REPEAL OF BASEBALL'S ANTITRUST EXEMPTION: AN ANALYSIS OF SALARY CAP AND SALARY TAXATION PROVISIONS

As Congress debates legislation which would repeal or narrow baseball's antitrust exemption and the courts deliberate on issues concerning the scope of that exemption, an initial question must be addressed: how will professional baseball be affected by a repeal of the game's seventy-three-year-old antitrust exemption? This inquiry will be considered in the context of two critical issues: the expiration of the non-statutory labor exemption from antitrust law and the antitrust implications of salary cap and salary taxation provisions.

A. Expiration of the Non-Statutory Labor Exemption

Various forms of player restraints in sports, such as reserve clauses and the rookie draft, have been found to be "unreasonable restraints of

---

172. *See* discussion *infra* Part VI.A.

173. *See supra* note 164 and accompanying text.

174. *Senate Judiciary Committee Passes Baseball Antitrust Bill*, SENATE JUDICIARY COMMITTEE NEWS RELEASE, Aug. 3, 1995, at 1 [hereinafter JUDICIARY COMMITTEE NEWS RELEASE].

175. S. 627, 104th Cong., 1st Sess., § 27(b)(1-2) (1995). The measure does not affect the antitrust exemption applicable to certain sports broadcasting contracts. *Id.* at § 27(b)(3) (referring to 15 U.S.C. § 1291, commonly known as the Sports Broadcasting Act of 1961). The House Judiciary Committee approved legislation similar to S. 627 last fall. Mark Maske, *Senate Takes on Baseball: Panel Votes to Curb Antitrust Exemption*, WASHINGTON POST, Aug. 4, 1995, at F1.

176. JUDICIARY COMMITTEE NEWS RELEASE, *supra* note 174, at 1.

177. *Id.*

trade" in violation of antitrust laws.[178] However, when these restrictions are the product of a collective bargaining agreement (C.B.A.) between the players' union and the member clubs, these practices are immune from antitrust scrutiny due to the non-statutory labor exemption.[179] Additionally, where a C.B.A. has expired and the parties are unable to reach agreement on a new contract, the United States Supreme Court has held that the expired terms may be extended by the employer in order to "foster[] a non-coercive atmosphere that is conducive to serious negotiations on a new contract."[180] After the parties have bargained to an impasse, an employer does not violate labor law by extending the existing terms or "by making unilateral changes that are reasonably comprehended within [the] pre-impasse proposals."[181]

This, however, begs the question—while such conduct is not a violation of federal labor law, does the applicability of labor law preclude an antitrust analysis? In other words, if a sports league unilaterally imposes a player restraint after the expiration of its C.B.A., does the non-statutory labor exemption immunize that restraint from antitrust liability? If so, how long after the expiration of the C.B.A. does this immunity extend?

1. The Four Standards

The United States Supreme Court has never addressed the expiration of the non-statutory labor exemption, and lower courts have given the question little consideration prior to 1987.[182] Between 1987 and 1991, various federal courts proposed four distinct points[183] after the expiration of the C.B.A. at which antitrust immunity for a player restraint expires: (1) immediately upon the "expiration" of the C.B.A.;[184] (2) at a bargaining

---

178. *See, e.g.*, Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

179. *Mackey*, 543 F.2d at 614; *see* discussion *infra* Part VI.A. The Eighth Circuit in *Mackey* determined that a bargaining agreement is eligible for antitrust immunity under the non-statutory labor exemption if three elements are satisfied: (1) the restraint of trade primarily affects only the parties to the agreement; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement is the product of bona-fide arms-length bargaining. *Id.*

180. Laborers Health and Welfare Trust Fund for N. California v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.6 (1988) (citation omitted).

181. *Id.* at 544 n.5.

182. Corcoran, *supra* note 37, at 1059.

183. *Id.* at 1060; *see* Jonathan S. Shapiro, *Warming the Bench: The Non-Statutory Labor Exemption in the National Football League*, 61 FORDHAM L. REV. 1203, 1217 (1993).

184. *See* Brown v. Pro Football, Inc., 782 F. Supp. 125, 131-32 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995).

"impasse";[185] (3) when an employer continues to impose a restriction with no "reasonable belief" that the practice or close variant of it will be incorporated into the next C.B.A.;[186] or (4) at some point beyond impasse when there is no longer an "ongoing collective bargaining relationship."[187]

The first approach was defined by the United States District Court for the District of Columbia in *Brown v. Pro Football, Inc.*, which held that the labor exemption expired concurrently with the expiration of the C.B.A.[188] Judge Lamberth[189] in *Brown* held that the National Football League's (NFL) non-statutory labor exemption expired in 1987 along with the 1982 C.B.A., and therefore the league could not rely on the exemption to insulate itself from antitrust liability.[190]

The *Brown* court asserted that ending the exemption at the expiration of the C.B.A. would prevent the terms from extending in "perpetual limbo" and provide a "bright line" rule around which the parties could negotiate.[191] Lamberth further stated that by extending the exemption "courts actually deprive labor of their right to contract as to an integral contract term: duration."[192] Finally, the *Brown* court declared that the judiciary should not extend the exemption beyond the expiration of the C.B.A. because that issue is "properly left to Congress to resolve."[193]

A second approach, adopted by the United States District Court for the District of Minnesota in *Powell v. National Football League*,[194] maintains that the non-statutory labor exemption extends beyond the expiration of the C.B.A. to that point at which the parties have reached a bargaining impasse.[195] Impasse has been defined by the United States

---

185. *See* Powell v. National Football League, 678 F. Supp. 777, 789 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

186. *See* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 967 (D.N.J. 1987).

187. *See* Powell v. National Football League, 930 F.2d 1293, 1303-04 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

188. *Brown*, 782 F. Supp. at 131-32. The case concerned a 1989 NFL proposal to allow teams to establish six-player "development squads" with fixed weekly salaries. *Id.* at 127. While the players' association opposed the plan because the designated players would be unable to negotiate their own salary terms, the league nonetheless unilaterally implemented development squads in 1989. *Id.* at 128.

189. The author of this note had the honor to serve as a Legal Intern to Judge Lamberth in 1994.

190. *Id.* at 131-34; *see* Shapiro, *supra* note 183, at 1217.

191. *Brown*, 782 F. Supp. at 132, 134.

192. *Id.* at 134. The court added that the right to contract is "one of the most fundamental rights established under the NLRA." *Id.* (citation omitted).

193. *Id.* at 134 n.7.

194. *Powell*, 678 F. Supp. at 777. The player restraints at issue were the right of first refusal/compensation system and the NFL Player Contract. *Id.* at 779.

195. *See* Shapiro, *supra* note 183, at 1218-19 n.112 (listing numerous articles in support of the impasse point).

Supreme Court as the juncture "at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless."[196]

Parties have a continuing obligation under labor law to bargain in good faith until impasse,[197] and the lower court in *Powell* reasoned that the exemption should be extended to that juncture to ensure that an incentive remains to continue honest negotiations.[198] The court concluded that extending the exemption to impasse respects the continuing duty to bargain under labor law while it "enhances prospects that the parties will reach a compromise on the issue."[199]

A third approach was recognized by the United States District Court for the District of New Jersey in *Bridgeman v. National Basketball Association*.[200] The court held that the exemption extends beyond the expiration of the C.B.A. for "as long as the employer continues to impose [the challenged] restriction *unchanged*, and *reasonably believes* that the practice or a close variant of it will be incorporated into the next collective bargaining agreement."[201]

The *Bridgeman* court, in rejecting the impasse standard,[202] declared that an impasse is "not equivalent to the end of negotiations, or the loss of hope that any of the practices subject to negotiation will be incorporated in a new agreement."[203] The court concluded that "[a]s long as the NBA

---

196. Laborers Health and Welfare Trust Fund for N. California v. Advanced Lightweight Concrete Co., 484 U.S. 539, 543 n.5 (citations omitted). However, the *Powell* court also noted that impasse is "a recurring feature in the bargaining process . . . [and] is only 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.'" *Powell*, 678 F. Supp. at 788 n.19 (citing Charles D. Bonanno Linen Service v. N.L.R.B., 454 U.S. 404, 412 (1982)). While impasse "signifies a stalemate in negotiations," it is "not equivalent to termination of the collective bargaining relationship." *Powell*, 678 F. Supp. at 788.

197. 29 U.S.C. § 158 (a)(5), (d) (1988); *see* NLRB v. Katz, 369 U.S. 736, 742-43 (1962).

198. *Powell*, 678 F. Supp. at 787.

199. *Id.* at 789.

200. *Bridgeman*, 675 F. Supp. at 960.

201. *Id.* at 967 (emphasis added). The challenged restraints at issue were the college player draft, the salary cap, and the right of first refusal. *Id.* at 961.

202. The court noted that, depending on the facts in the case, the exemption may expire "before, during, or after impasse." *Id.* at 967.

203. *Id.* at 966. The court reasoned that some of the challenged restraints may be incorporated into the succeeding C.B.A., adding:

> In fact, the history of collective bargaining in the NBA is punctuated by interim periods between agreements during which the league maintained the status quo and continued to negotiate with the players. This suggests that there is at least a possibility that some of the provisions in the most recent expired agreement will be reenacted in the same form in a future agreement.

Id. at 965.

has a reasonable belief that a practice may be included in the agreement being negotiated, it is not imposing the practice unilaterally; rather, the restriction is deemed a product of arm's-length negotiations."[204]

A final approach extends the exemption to some point "beyond impasse" provided an "ongoing collective bargaining relationship" exists.[205] This approach was established by the Court of Appeals for the Eighth Circuit in *Powell v. National Football League*, which reversed the district court's decision[206] to terminate the exemption at impasse.[207]

The Eighth Circuit in *Powell* definitively rejected the impasse standard, asserting that it "treats a lawful stage of the collective bargaining process as misconduct by defendants, and in this way conflicts with federal labor laws that establish the collective bargaining process, under the supervision of the National Labor Relations Board, as the method for resolution of labor disputes."[208] Judge Gibson, writing for a 2-1 majority, asserted that a bargaining relationship existed because the parties could employ a variety of remedies after impasse: bargain further, exert economic force (strikes, lockouts), and pursue unfair labor practice claims before the National Labor Relations Board (NLRB).[209] Holding that all agreements conceived in an "ongoing collective bargaining relationship" are protected from antitrust challenges, the Eighth Circuit concluded that "as long as there is a *possibility* that proceedings may be commenced before the Board, or until *final resolution* of Board proceedings and *appeals* therefrom, the labor relationship continues and the labor exemption applies."[210]

---

204. *Id.* at 967. This quote begs the question—according to the *Bridgeman* court's definition of "unilateral" imposition, would the exemption not protect the NBA if it imposed (after the expiration of the C.B.A.) a "new" restraint based upon a "reasonable belief" that this restraint would eventually be included in the next C.B.A.?

205. *Powell*, 930 F.2d at 1303.

206. *See supra* notes 194-99 and accompanying text.

207. *Powell*, 930 F.2d at 1304.

208. *Id.* at 1302. Additionally, the collective bargaining process may in fact benefit from an impasse in negotiations:

> Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement.

Charles D. Bonanno Linen Service, Inc. v. NLRB, 243 N.L.R.B. 1093, 1094 (1979), *enforced*, 630 F.2d 25 (1st Cir. 1980), *aff'd*, 454 U.S. 404 (1982).

209. *Powell*, 930 F.2d at 1302.

210. *Id.* at 1303-04 (emphasis added). The dissent in *Powell* suggested that the holding would force players to abide by certain provisions forever or decertify as a union and abandon their bargaining rights. *Id.* at 1306 (Heaney, J., dissenting). The players acted as the dissent suggested, choosing on December 5, 1989, to decertify and reorganize "as a voluntary professional trade

2. State of the Law After *Williams* and *Brown*

While federal courts over a four-year period had proposed four distinct points at which the non-statutory labor exemption expires, the United States Courts of Appeals for the Second Circuit and the D.C. Circuit in 1995 clarified a heretofore unresolved body of law.[211]

On January 24, 1995, the Court of Appeals for the Second Circuit concurred with its brethren from the Eighth Circuit, stating that the "application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it."[212] Judge Winter, writing for a unanimous court in *National Basketball Association v. Williams*, held that the "antitrust laws do *not prohibit employers* from bargaining jointly with a union, *from implementing their joint proposals in the absence of a C.B.A.*, or from using economic force to obtain agreement to those proposals. What limits on such conduct that exist are found in the labor laws."[213] The Second Circuit concluded by asserting that "there appears to have been a longstanding if unspoken assumption that multiemployer collective bargaining was not subject to the antitrust laws for largely the reasons later stated [by the Supreme Court]. We hold only that what doubts may have existed about that assumption were erased by the passage of federal labor laws."[214]

---

association with the hope of greater success in litigation through individual player suits against the league for antitrust violations." Shapiro, *supra* note 183, at 1221-22. Shortly after decertification, eight players brought suit challenging the NFL's Plan B free agent system. The court agreed that the players were no longer represented in collective bargaining and "no longer part of an 'ongoing collective bargaining relationship' with the [league]," and thus, the "non-statutory labor exemption [had] ended." Powell v. National Football League, 764 F. Supp. 1351, 1358-59 (D. Minn. 1991) (citing *Powell*, 888 F.2d at 568). In September 1992, a jury found that the player restraint violated antitrust laws and awarded damages to four of the eight named plaintiffs. McNeil v. National Football League, No. 4-90-476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992). In a negotiated settlement, the NFL paid approximately $115 million to players adversely affected by Plan B, and the players association immediately reconstituted as a union and negotiated a seven-year C.B.A. with the league. SPORTS AND THE LAW (1995 CASE SUPPLEMENT), *supra* note 37, at 59.

211. *See* National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995); Brown v. Pro Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995).

212. *Williams*, 45 F.3d at 692-93 (citing *Powell*, 930 F.2d at 1293). The declaratory judgment action was brought by the NBA, which sought to obtain assurance of the continued legality of its salary cap, college draft, and right of first refusal system. *Id.* at 686.

213. *Id.* at 693 (emphasis added). The court hypothesized that:

> [I]f, after expiration of the C.B.A., a group of printers were to agree to seek to limit wage increases to 5% and the union demanded 10%, the employers could shield themselves from antitrust liability only by implementing the 10% raise . . . . This is not collective bargaining as intended by Congress. Indeed, it is not bargaining at all.

Id.

214. *Id.* (citations omitted).

On March 21, 1995, the Court of Appeals for the D.C. Circuit concurred with the previous decisions in the Eighth and Second Circuits, holding "that the nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process . . . ."[215] In *Brown v. Pro Football, Inc.*, the D.C. Circuit, in reviewing recent Supreme Court opinions, derived two principles to guide its application of the non-statutory labor exemption: "First, the exemption must be *broad enough in scope to shield the entire collective bargaining process* established by federal law."[216] "Second, the case for applying the exemption is strongest where a *restraint on competition operates primarily in the labor market and has no anti-competitive effect on the product market.*"[217]

In writing for the 2-1 majority in *Brown*, Judge Edwards overturned the lower court,[218] holding that the exemption "waives antitrust liability for restraints imposed on competition through the collective bargaining process," including those unilaterally imposed after an impasse in negotiations, "*so long as such restraints operate primarily in the labor market characterized by collective bargaining.*"[219] Accordingly, because the fixed salary in *Brown* "operate[d] as a restraint on competition in the labor market, specifically, the market for Developmental Squad player services . . . [and] had no effect on the product market[,]" the court found that the restraint was immune from antitrust liability based on the non-statutory labor exemption.[220]

---

215. *Brown*, 50 F.3d at 1056.

216. *Id.* at 1051 (emphasis added). The court justified the preeminence of labor law over antitrust law by explaining:

> [O]nce collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation—a paradigm that itself contemplates collusive activity on the parts of both the employees and employers. Stubborn adherence to antitrust principles in such a market can only result in "a wholesale subversion" of federal labor policy.

Id. at 1055 (citation omitted).

217. *Id.* at 1051 (emphasis added).

218. Brown v. Pro Football, Inc., 782 F. Supp. 125 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C.Cir. 1995).

219. *Brown*, 50 F.3d at 1056 (emphasis added).

220. *Id.* at 1056-57. In dissent in *Brown*, Judge Wald maintained that terms unilaterally imposed by employers after impasse should not be exempt from antitrust scrutiny, because such a rule would "preserve[] the symmetry, mutuality, and balance of the collective bargaining process as crafted by Congress over the last 60 years . . . ." *Id.* at 1070-71 (Wald, J., dissenting). Wald concluded that "[w]ith time running out in a bitterly fought scoreless tie, this court would allow the owners an unearned critical fifth down." *Id.* at 1071. On appellees' suggestion for a rehearing *en banc*, Wald, who dissented in the denial of the petitioners' request, commented that "the case involved a significant issue of statutory accomodation between two premier pieces of legislation incorporating our national policies on labor relations and competition and as such merits final resolution by the Supreme Court."

The *Brown* court added that the exemption "requires employees involved in labor disputes to chose whether to invoke the protections of the NLRA or the Sherman Act. *If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions.*"[221] Finally, the D.C. Circuit found that, since the league's restraint was not unilaterally imposed until after an impasse in negotiations and was reasonably comprehended within its pre-impasse proposals, the league's action was a "lawful part of the collective bargaining process established by the NLRA."[222]

The recent decisions of the Second Circuit in *Williams* and the D.C. Circuit in *Brown* have enormous ramifications on Major League Baseball. Upon the heels of the Eighth Circuit decision in *Powell*, all federal courts of appeal which have addressed this question are in accord—while federal labor law trumps federal antitrust law during every aspect of the collective bargaining process, the non-statutory labor exemption shields both parties from antitrust liability so long as the parties continue to maintain a collective bargaining relationship. Under these decisions, a repeal of baseball's antitrust exemption would have no effect on the current collective bargaining process.

As noted by MLB's acting Commissioner Bud Selig, upon becoming aware of the *Williams* decision, "[t]he unanimous decision by the courts validates the owners' position that the special exemption is irrelevant to the current dispute. It holds that antitrust laws don't apply to labor

---

Id.

221. *Id.* at 1057 (emphasis added). After the decision in *Brown*, Dick Berthlesen, a lawyer for the NFL Players Association, stated that his union would recommend an appeal to the United States Supreme Court, "[i]t gives joint employers the right to do anything they want . . . . The only choice [we have] is to shut down an industry by striking." *Antitrust Ruling Could Be a Boost For Owners*, USA TODAY, Mar. 22, 1995, at 7C. Realizing the potentiality for decertification, the D.C. Circuit in *Brown* added: "We do not mean to encourage this practice, but we believe that employees, like all other economic actors, must make choices." *Brown*, 50 F.3d at 1057.

222. *Brown*, 50 F.3d at 1056-57; *see also Laborers Health*, 484 U.S. at 543-44 n.5 (defining impasse as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless"). This finding calls into question the strategy of baseball owners after an impasse in negotiations was allegedly reached in December 1994. Rather than unilaterally impose the more "reasonable" salary taxation provision, which had been the parties' focus for several weeks, the owners reverted back to the more restrictive salary cap provision, which at that stage had been removed from the bargaining table. Furthermore, the "reasonableness" of the salary taxation provision is evinced by the fact that the players were not *per se* opposed to the scheme (but rather to the proposed rate) and that the more stringent salary cap provisions were adopted by the players' colleagues in the NFL and NBA. The *Brown* court's finding on labor law leads one to surmise that, had baseball owners unilaterally imposed the salary taxation provisions rather than the caps and had the players filed unfair labor practice charges, the *Silverman* court may have instead declined to issue the injunction restoring the terms of the expired C.B.A. *See* Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246 (S.D.N.Y. 1995).

disputes."[223] Additionally, it upholds on antitrust grounds the owners' ability to unilaterally impose salary caps upon impasse. However, were baseball's collective bargaining relationship to cease (i.e., the players choose to decertify their union and give up the protections available under labor law[224]), would salary caps and salary taxation provisions be deemed violative of antitrust laws?

B. Salary Caps/Salary Taxation and Antitrust Law

Salary cap provisions in professional sports establish maximum team salaries based on a predetermined percentage of the defined gross revenues[225] of the league.[226] As defined gross revenues of the league increase, the players' salaries increase at a rate proportional to the predetermined percentage.[227] Salary caps in sports are part of a complex "player/owner revenue sharing" arrangement whereby the players receive a guaranteed share in aggregate league revenues and the owners of large market franchises (i.e., moneymaking franchises), whose profits would presumably increase by virtue of the cap, distribute revenue to club owners

---

223. Larry Whiteside, *Baseball Owners Get a Legal Boost: NBA Union's Appeal on Antitrust Denied*, BOSTON GLOBE, Jan. 25, 1995, at 77.

224. The benefits available to employees under federal labor law include:

> recognition of organized workers as a bargaining unit, thereby giving them bargaining strength; establishment of mandatory subjects of bargaining; protection of the right to strike; allowance for the possibility of negotiated grievance procedures and pooled benefit plans; and judicial enforcement of collective bargaining agreements. Further, it establishes a significant list of employer actions that, if taken, constitute unfair labor practices for which employees and unions may seek redress before the NLRB.

Brown, 50 F.3d at 1057.

225. Calculating the defined gross revenue and ascertaining an equitable predetermined percentage are the significant issues in the design and implementation of a salary cap. *See generally* SPORTS AND THE LAW, *supra* note 37, at 302-03.

226. *See id.* at 300; *see also* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 961-62 (D.N.J. 1987). The term "salary cap" in this context is a misnomer, because it "actually functions more to give players a guaranteed *share* in aggregate league revenues than to set a fixed *cap* on the dollar amount that must be spent on player salaries." SPORTS AND THE LAW, *supra* note 37, at 300 (emphasis in original). The implementation of salary cap provisions can generally be summarized as follows: the league and players association would calculate the total annual revenues of all clubs (exclusive of a few sources such as concessions and parking), multiply that figure by a predetermined percentage, and divide the net figure by the number of clubs in the league. That final number would constitute the amount each team must spend on player salaries. *See id.* (describing the NBA's now expired 1983 C.B.A.). For example, assume that there are 25 teams in a league, and the cap establishes that players receive 50% of the league's defined gross revenue and that those revenues in a given year are $1 billion. Thus, owners would then pay $500 million in salaries to the players or $20 million per team.

227. *See* National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1073 (S.D.N.Y. 1994), *aff'd* in part, 45 F.3d 684 (2d Cir. 1995); MLB NEWS RELEASE, *supra* note 166, at 2.

in the smaller markets.[228]

While yet to be adopted in the professional sports context, a salary taxation system would subject teams with payrolls above a specified amount to a tax,[229] with revenues generated from the provision earmarked for small market clubs.[230] These arrangements attempt to address the owners' desire for cost containment and the players' resistence to an absolute cap on salaries.[231]

1. Case Law in Other Sports

Whereas salary cap provisions are a relatively new concept in professional sports, having first been incorporated into the NBA's C.B.A. in 1983,[232] substantive antitrust case law on this issue is sparse. Furthermore, since salary caps were included in the NBA's C.B.A. in 1983 and the NFL's C.B.A. in 1993, most actions challenging such provisions on antitrust grounds have been dismissed by virtue of the non-statutory labor exemption.[233]

The initial challenge to salary cap provisions in professional sports

---

228. *See Williams*, 857 F. Supp. at 1073; MLB NEWS RELEASE, *supra* note 166, at 1-2, 6-7. When the salary cap/revenue sharing plan was briefly implemented by MLB in December 1994, the owners asserted that it was necessary to "[r]estore and maintain competitive balance" among the teams and to "[p]reserve the financial stability of individual teams and the industry as a whole." MLB NEWS RELEASE, *supra* note 166, at 5. Conversely, the players contended that the proposal would unjustifiably burden them with the costs of revenue sharing by capping player salaries. The funds large market owners would redistribute were, in essence, dollars they would have spent on salaries. MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION PRESS RELEASE, Dec. 23, 1994, at 1-2.

229. Determining the "specified amount" and an equitable "tax" rate are the significant issues in the design and implementation of a salary taxation provision.

230. Hal Bodley, *Baseball Compromise in the Offing*, USA TODAY, Aug. 8, 1994, at C1. Two variants on this concept were proposed during MLB's collective bargaining negotiations. In November 1994, the club owners introduced a "sliding scale" tax, whereby team salaries higher than the average payroll level would be subject to a luxury tax, with graduated rates up to and exceeding 100%. Hal Bodley, *Latest Proposal Merely a Starting Point*, USA TODAY, Nov. 18, 1994, at 8C. In February 1995, the owners submitted a "two-tiered tax" proposal, whereby team payrolls considerably above the mean would be subject to a higher tax rate. Hal Bodley, *Owners Ax Cap as Talks Resume*, BURLINGTON [VT] FREE PRESS, Feb. 2, 1995, at C1.

231. Mark Maske, *Baseball Talks Remain at an Impasse, No Progress on Payroll Taxation System: Charge of Unfair Labor Practice is Dismissed*, WASHINGTON POST, Dec. 21, 1994, at F1. A salary taxation provision would operate as follows: assuming a $40 million/team player payroll credit and a tax rate of 25% on salaries above that level, if a club spent $50 million on its payroll, $10 million (the credit excess) would be subject to a 25% tax, thereby requiring the team to contribute $2.5 million to a fund earmarked for small market clubs.

232. *See* Steve Patterson, *The National Basketball Association Salary Cap, Dead or Alive?*, 19 T. MARSHALL L. REV. 535, 535-36 (1994).

233. *See* Wood v. N.B.A., 809 F.2d 954 (2d Cir. 1987); discussion *supra* Part VI.A.

occurred in *Wood v. N.B.A.*[234] Leon Wood, a member of the gold medal winning 1984 U.S. Olympic basketball team,[235] was a first round draft pick of the Philadelphia 76ers in 1984. With a dearth of funds available under the cap at the time, the 76ers offered him a one-year contract at $75,000.[236] Contending he would have received a significantly higher salary but for the cap provision, Wood brought a civil action against the NBA in 1984, challenging the salary cap and college draft provisions of the C.B.A. on antitrust grounds.[237]

The lower court's decision in *Wood*, affirmed by the Second Circuit Court of Appeals in 1987, held that since the C.B.A. was effectual and had incorporated the cap provision, the non-statutory labor exemption precluded the action if the agreement met the three criteria put forth in *Mackey*.[238] The *Wood* court found that the 1983 C.B.A. was (1) the result of "bona fide arms-length negotiations," which (2) concerned "mandatory subjects" of collective bargaining,[239] and (3) "affect[ed] only the parties" to the agreement.[240] Accordingly, without addressing the legality of the salary cap provision, the *Wood* court held that the non-statutory labor exemption precluded relief under antitrust law.[241]

In 1987, another action was brought against the NBA, challenging the legality of the salary cap, the college draft, and the right of first refusal.[242] In *Bridgeman v. N.B.A.*, Junior Bridgeman and seven other players filed

---

234. Wood v. N.B.A., 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

235. *Wood*, 809 F.2d at 956.

236. *Wood*, 602 F. Supp. at 526. Shortly after bringing suit, Wood signed a four-year contract with the 76ers for $1.02 million, including a $135,000 signing bonus. *Wood*, 809 F.2d at 958.

237. *Wood*, 602 F. Supp. at 527. The action also encompassed a challenge to the NBA's ban on player corporations, which is beyond the scope of this note. *Id.*

238. *Id.* at 528-29 (citing Mackey v. National Football League, 543 F.2d 606, 614-15 (8th Cir. 1976)).

239. Mandatory subjects include all matters relating to "wages, hours, and other terms of employment." *Id.* (citing 29 U.S.C. § 158(d); N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958)).

240. *Id.* (citing *Mackey*, 543 F.2d at 614-15). One of Wood's contentions was that the agreement affected outside parties, since he was in college when it was adopted. The Court of Appeals held that he nonetheless would be considered an "employee" as defined by the NLRA. *Wood*, 809 F.2d at 960. *See* J.I. Case Co. v. N.L.R.B., 321 U.S. 332, 333-35 (1944) (individuals entering the bargaining unit during the life of the agreement are bound by its terms).

241. *Wood*, 602 F. Supp. at 529. The Second Circuit Court of Appeals asserted that, if this claim succeeded, federal labor policy would "essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes." *Wood*, 809 F.2d at 961. Additionally, the court stated that the proper action in response to discrimination against new employees under a C.B.A. is for breach of duty of fair representation. *Id.* at 962.

242. Bridgeman v. N.B.A., 675 F. Supp. 960, 961 (D.N.J. 1987). The right of first refusal stipulation provided teams with the option to match offers given to their veteran free agents, thereby enabling the teams to retain their rights. *Id.* at 962.

suit immediately upon the 1987 expiration of the 1983 C.B.A.[243] Again, without reviewing the lawfulness of the player restraints involved, the court held that the labor exemption extended beyond the expiration of the C.B.A. and continued to shield both parties from antitrust liability.[244]

An antitrust action was initiated five years later against professional football in *McNeil v. N.F.L.*[245] Freeman McNeil and seven other professional football players[246] filed suit challenging, among other things,[247] the unilateral imposition of a "wage scale" under the "Plan B" system.[248] The proposed scope and effect of the wage scale went considerably beyond that of a salary cap, because it "eliminate[d] all individual contract negotiations with players as of February 1, 1993, and . . . establish[ed] a wage scale setting the price for all NFL players' services."[249] The wage scale provision, however, was never implemented by the league.[250] Consequently, the *McNeil* court only considered the other facets of Plan B which were actually imposed, namely the right of first refusal/compensation system.[251] Nonetheless, the court did note that

---

243. *Id.*

244. *Id.* at 967. Additionally, the court stated that the NBA justified the salary cap in 1983, on the grounds that a majority of teams were losing money as a result of rising player salaries and benefits. In an effort by the league to unilaterally implement the cap in 1983, the court noted that:

> [t]he players responded by filing a lawsuit challenging the legality of the proposed practice. . . . A Special Master appointed to hear disputes under the *Robertson* settlement agreement determined that the salary cap would violate the terms of the settlement agreement, and therefore could not be imposed absent a modification of that agreement.

Id. at 962. However, the special master's determination relates to the terms of the settlement agreement, not existing law, and therefore provides little guidance.

245. McNeil v. N.F.L., 790 F. Supp. 871 (D. Minn. 1992).

246. *Id.* at 875. Having no success challenging player restraints under antitrust laws because of the non-statutory labor exemption, in 1991, the players elected to carry out their only available recourse—decertification of the union. In so doing, they relinquished the protection of federal labor law and were forced to bring this action individually rather than collectively. Powell v. N.F.L., 764 F. Supp. 1351, 1353-54 (D. Minn. 1991).

247. The players challenged the teams' right of first refusal and compensation system, which provided teams with the option to match offers given to their veteran free agents, thereby enabling the teams to retain their rights. Additionally, if the team chose not to match the offer, the acquiring team had to provide compensation. *McNeil*, 790 F. Supp. at 875-77.

248. *Id.* at 875-76.

249. *Id.* The league's draconian wage scale proposal would have amended the C.B.A. to "eliminate all references to individual player bargaining and to establish a League-wide wage scale." *Id.* at 878 (citing the NFL's 1988 wage scale proposal).

250. *Id.* at 877.

251. *See id.* The issue of whether the right of first refusal/compensation rules under Plan B were a violation of antitrust laws was tried by a jury in 1992. *Id.* In applying the player restraint balance (*see infra* Part VI.B.3.), the jury struck down the league's rules, finding that: (1) they had a "substantially harmful effect on competition" in the relevant market for player services; (2) and while

"if implemented, the proposed wage scale would likely violate § 1 of the Sherman Act" and would "likely injure plaintiffs by eliminating their ability to engage in individual salary negotiations with their NFL employers . . . ."[252]

In 1992, a judgment in another player restraint case was rendered against professional football.[253] In *Brown v. Pro Football, Inc.*, an antitrust action was brought by Anthony Brown and other players against the NFL in response to the league's unilateral implementation of "development squads" at fixed individual salaries[254] of $1000 per week.[255] After finding that the non-statutory labor exemption had expired,[256] the court applied the "rule of reason" balancing test to the player restraint.[257] The *Brown* court held that the balancing test need not be applied in this context because the three "legitimate business purposes" proffered by the league had no justifiable "procompetitive virtues."[258]

More importantly, and pertinent to MLB's justification of the salary cap, the *Brown* court found that the justification to "promote competitive

---

they did "significantly contribute to the competitive balance in the NFL"; (3) they were "more restrictive than reasonably necessary." *Id.* The jury awarded damages to four of the eight players, ranging from $50,000 to $240,000 (which was trebled in accordance with antitrust law). McNeil v. N.F.L., No. 4-90-476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992) (special verdict form).

252. *McNeil*, 790 F. Supp. at 877.

253. Brown v. Pro Football, Inc., No. 90-1071, 1992 WL 88039 (D.D.C. Mar. 10, 1992), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995).

254. While a "fixed salary" is certainly more restrictive than a "salary cap," the practical effect of a cap is a drag on salaries, which makes an antitrust analysis of a fixed salary system relevant.

255. *Brown*, 1992 WL 88039, at *1. Under the plan, each NFL team was able to sign up to six rookies and free agents as "development players," who conceptually would serve as reserves to the 45 active and two inactive players on each roster. Such a scheme ran counter to the C.B.A. which had previously expired. *Id.* at *1-2.

256. Brown v. Pro Football, Inc., 782 F. Supp. 125, 139 (D.D.C. 1991). This decision was reversed in 1995, by the D.C. Circuit Court of Appeals, which effectively reversed all six *Brown* decisions rendered by the lower court. Brown v. Pro Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995) (reversing 782 F. Supp. 125; 1992 WL 88039; 812 F. Supp. 237; 821 F. Supp. 20; 839 F. Supp. 905; 846 F. Supp. 108).

257. *Brown*, 1992 WL 88039, at *9-10. While the reversal by the Court of Appeals on other grounds effectively nullified this opinion, the appellate court did not address the lower court's application of the rule of reason balancing test. *See Brown*, 50 F.3d at 1041. Therefore, this note analyzes the factors considered by the *Brown* court in applying that test.

258. *Brown*, 1992 WL 88039, at *9-10. Specifically, the court struck each proffered justification: 1) "enhanc[ing] competition in the labor market for professional football players" was not shown to relate to the development squad concept; 2) "creat[ing] otherwise unavailable football employment opportunities" did not provide a justification for a salary restraint; and 3) "promot[ing] competitive balance in the league" was irrelevant to the analysis. *Id.*

balance" in the league was not relevant to the rule of reason analysis.[259] The court relied on *Smith v. Pro Football, Inc.*, a case challenging the NFL's college draft, in which the Circuit Court for the District of Columbia held that the draft is "'procompetitive,' if at all, in a very different sense from that in which it is anticompetitive."[260] Accordingly, finding the justification irrelevant and its imposition not necessary to achieve the proffered basis, the *Brown* court granted summary judgment against the NFL on the question of antitrust liability.[261]

The sole case analyzing salary cap provisions from an antitrust prospective is *N.B.A. v. Williams*.[262] The NBA sought a declaratory judgment to obtain assurance of the continued legality of its salary cap, college draft, and right of first refusal system.[263] Charles Williams and several other players counterclaimed, maintaining that the non-statutory labor exemption did not extend beyond impasse and that the aforementioned restraints violated antitrust laws.[264]

The *Williams* court held that the exemption in fact extended beyond impasse and, alternatively, that the action also failed because the salary cap provision did not constitute an antitrust violation.[265] The court found that, under the rule of reason analysis, "it *appear[ed]* that the Players ha[d] failed to show that the alleged restraints of trade [were] on balance unreasonably anti-competitive."[266] The district court concluded by declaring that the "pro-competitive effects of the . . . practices, in

---

259. *Id.* at *10 (citing Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978)). While, as previously noted, nullification of this decision by the Court of Appeals was based on the application of the non-statutory labor exemption, and not on the lower court's rule of reason analysis, Judge Wald noted in her dissent that

> [t]he district court may have erred in ruling such alleged procompetitive benefits 'irrelevant' and granting summary judgment to the players on the question of antitrust liability. Although the majority does not reach this question, I would be inclined to remand for further proceedings on the question of antitrust liability under the rule of reason analysis.

Brown, 50 F.3d at 1060 n.3 (Wald, J., dissenting).

260. *Brown*, 1992 WL 88039, at *10 (citing *Smith*, 593 F.2d at 1186).

261. *Brown*, 1992 WL 88039, at *10. After a week-long trial in 1992 on the issue of damages, a jury awarded $10 million to the 235 development squad players, an assessment which was trebled to $30 million in accordance with antitrust law. SPORTS AND THE LAW, *supra* note 37, at 204. However, the Court of Appeals in 1995 reversed the trial court on another ground, which effectively nullified the jury's decision on damages. *Brown*, 50 F.3d at 1057-58.

262. N.B.A. v. Williams, 857 F. Supp. 1069 (S.D.N.Y. 1994), *aff'd* in part, 45 F.3d 684 (2d Cir. 1995).

263. *Williams*, 857 F. Supp. at 1071.

264. *Id.* at 1071-73.

265. *Id.* at 1079.

266. *Id.* (emphasis added).

particular the maintenance of competitive balance, may outweigh their restrictive consequences. Indeed, the salary cap seems to operate as a mechanism to distribute 53 percent defined gross revenue to the Players."[267] The appeal of the *Williams* case did not address the salary cap issue, limiting its scope of review to the applicability of the non-statutory labor exemption.[268]

In summation, there is little applicable case law extensively analyzing salary cap provisions from an antitrust prospective. The two most relevant cases are the *Williams* and *Brown* decisions.[269] However, the *Brown* court's antitrust holding was nullified by the appellate court's reversal on other grounds.[270] Furthermore, while the *Brown* decision overturned a "fixed salary" provision on antitrust grounds, such an arrangement affixing a certain salary for a group of individuals (in this case, the developmental squad) and denying them all bargaining rights is considerably more restrictive than a general cap on team salaries.[271] Accordingly, the district court's holding in *Brown* does not extend to the salary cap context. The *Williams* decision, which upheld on antitrust grounds the use of a salary cap in professional basketball, is directly relevant to the issue at hand. Its precedent-setting capacity, however, is limited by its own degree of analysis.[272] First, while the district court addressed the salary cap on antitrust grounds, its judgment was based on the non-statutory labor exemption.[273] Additionally, the court's defense of salary caps could be characterized as tepid, noting that it "*appeared* that the players ha[d] failed to show that the . . . restraint was unreasonably anti-competitive" and that the system actually "*seems*" to distribute revenue to the players.[274] Moreover, the level of analysis was cursory as best, encompassing a mere five sentences.[275]

---

267. *Id.* "It may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL. The *protection of mutual interests* of both the players and the clubs may indeed require this." *Id.* (quoting Mackey v. N.F.L., 543 F.2d 606, 623 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977))(emphasis added).

268. *Williams*, 45 F.3d at 693 (affirming on extension of the non-statutory labor exemption beyond impasse).

269. *See Williams*, 857 F. Supp. at 1069; *Brown*, 1992 WL 88039.

270. *See Brown*, 50 F.3d at 1041.

271. *See generally Brown*, 1992 WL 88039, at *1-2. In theory, for example, under a "salary cap" a starting second baseman on one team could attain a salary several times higher than another team's starting second baseman. However, with a "fixed salary," all starting second basemen would receive the same wage.

272. *See Williams*, 857 F. Supp. at 1079.

273. *Id.* at 1078.

274. *See generally id.* at 1079 (emphasis added).

275. *Id.*

Finally, since a professional sport has yet to adopt a salary taxation provision, no case law exists as to its antitrust ramifications. In all, the antitrust law implications of salary cap and salary taxation provisions remain unresolved and can be answered only through an analysis of market power and the application of the player restraint standard.

2. Antitrust Theory and Monopsony Power

To resolve the legal implications of salary cap and salary taxation provisions, a closer examination of the intellectual underpinnings of antitrust law is necessary.

The primary purpose of antitrust law is proscribing excessive market power, whether controlled by a single firm or a group of firms that jointly acquire such power through anticompetitive agreements.[276] There are two general consequences of such power: (1) a restriction of output and consequent diversion of resources into less efficient uses; and (2) a transfer of wealth.[277] There is a dispute among economic theorists as to whether antitrust law should concern itself with the transfer of wealth.[278] Conservative "Chicago school" theorists maintain that antitrust law "should not be concerned with who enjoys the fruits of society's output but only with maximizing the total value of that output."[279] More populist theorists contend that, whereas Congress was concerned with the exploitation of consumers when it enacted the antitrust laws, transfers of wealth from generally less wealthy to generally more wealthy individuals should properly be a focus of antitrust enforcement.[280] Notwithstanding this question, both schools agree that the former harm—"restriction of output and consequent diversion of resources into less efficient uses"—is properly a focus of antitrust law.[281]

Since the primary purpose of antitrust law is proscribing excessive market power, it is necessary to define the relevent market. Ordinarily, in instances where market power is wielded excessively, the power is exerted by businesses operating in the product market—selling their goods and services to consumers.[282] This is categorized as "monopoly" power.[283]

---

276. *See* SPORTS AND THE LAW, *supra* note 37, at 128.

277. *Id.* at 128-29.

278. *Id.* at 129.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 128; Scott J. Foraker, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 171 (1985).

However, the opposite arrangement occurs in the professional sports context. In this situation, the market power is wielded by the buyers (team owners) of the service (labor), while the sellers (players) have few if any options regarding where or with whom they may market their talents.[284] This is categorized as "monopsony" power.[285] For this reason, professional athletes oppose reserve clauses and the draft, as they serve to limit players' options to a single team.[286] This creates monopsony market power, whereby teams can force players to accept salaries that are less than they would receive in a market where all teams could bid for all players.[287] The effects of this market are similar to those resulting from a monopolistic market: either a transfer of wealth occurs from sellers to buyers (the opposite holds true with monopoly power) or the seller tends to restrict the amount of the good or service sold.[288]

There is, however, an additional distinction between these two markets which directly affects an antitrust analysis of salary caps and salary taxation provisions. Whereas excess market power wielded by monopoly sellers exploits the broader population of consumers, excess power wielded by a firm purchasing goods or services for production may actually lower the cost and enhance the quality of the output for the benefit of secondary consumers (fans), "who . . . invariably outnumber the producers of any one product."[289] If this transpired in a professional sports context, the resultant transfer of wealth would occur from the generally *much* more wealthy player to the generally *much* less wealthy fan.

The First Circuit Court of Appeals heard a case based on similar facts in 1984, where the market's dominant buyer required sellers to accept a fee schedule which would effectively reduce prices for the consumer.[290] In *Kartell v. Blue Shield of Massachusetts*, the First Circuit held that Blue Shield, the dominant provider of health insurance in the state, did not violate antitrust law by implementing a ban on the practice of balance billing. Under the challenged practice, the insurer refused to reimburse doctors for treating subscribers if the doctors billed additional charges to

---

283. SPORTS AND THE LAW, *supra* note 37, at 129-30. *See* Foraker, *supra* note 282, at 171.

284. SPORTS AND THE LAW, *supra* note 37, at 129-30.

285. *Id.*; *see also* Foraker, *supra* note 282, at 171; Charles D. Marvine, *Baseball's Unilaterally Imposed Salary Cap: This Baseball Cap Doesn't Fit*, 43 U. KAN. L. REV. 625, 654 (1995).

286. SPORTS AND THE LAW, *supra* note 37, at 130.

287. *Id.* at 129-30.

288. *Id.* at 128-29.

289. *Id.* at 129.

290. Kartell v. Blue Shield of Massachusetts, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985).

subscribers.[291] Writing for the unanimous court, Judge Stephen Breyer, now associate justice of the United States Supreme Court, stated:

> [T]he prices at issue here are low prices, not high prices. Of course, a buyer, as well as a seller, can possess significant market power; and courts have held that *agreements* to fix prices—whether maximum or minimum—are unlawful. Nonetheless, the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high*, not too low. And, the relevant economic considerations may be very different when low prices, rather than high prices, are at issue. These facts suggest that *courts at least should be cautious—reluctant to condemn too speedily*—an arrangement that, on its face, appears to bring low price benefits to the consumer.[292]

The First Circuit in *Kartell* appeared to imply that, if excess monopsony power results in reduced prices for consumers, a lesser standard of review applies in an antitrust analysis of the challenged restraint.[293] The monopsonistic relationship between the parties in the professional sports context, as well as the holding in *Kartell*, will both be factors in the ensuing antitrust analysis under the player restraint standard.

3. The Rule of Reason Test in the Player Restraint Context

Whereas professional sports leagues are aptly characterized as "joint ventures"[294] of the member teams, the legality of player restraints imposed by the clubs is determined in accordance with the "rule of reason" standard.[295] That antitrust standard and the factors used in its application were introduced and developed in a series of United States Supreme Court decisions this century.[296]

The High Court first enunciated the rule of reason test in 1911, in *Standard Oil Co. v. United States*, which held that only unreasonable restraints of trade violate the Sherman Antitrust Act.[297] In subsequent

---

291. *Id.* at 933-34.

292. *Id.* at 930-31 (emphasis added) (citation omitted).

293. *See id.*; SPORTS AND THE LAW, *supra* note 37, at 130.

294. *See supra* notes 19-29 and accompanying text.

295. *See* Mackey v. National Football League, 543 F.2d 606, 623 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Smith v. Pro Football, Inc., 593 F.2d 1173, 1182 (D.C. Cir. 1978). *See also supra* notes 26-31 and accompanying text.

296. *See* National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 690-92 (1978); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958); Chicago Bd. of Trade v. United States, 246 U.S. 231, 237-39 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 57-59 (1911).

297. *Standard Oil*, 221 U.S. at 66.

cases, the Court found that the focus of the inquiry was whether the restraint imposed was justified by legitimate business purposes.[298] The Court further asserted that the "true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[299] In making this determination, the trier of fact must consider all the relevant circumstances, including "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[300] Limiting the scope of proffered justifications, the Supreme Court added that the rule "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason."[301] The purpose of the analysis, the Court concluded, "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of the industry."[302]

The landmark antitrust case in the player restraint context is *Mackey v. N.F.L.*[303] John Mackey and several other professional football players brought an action challenging a league rule which allowed the commissioner to compel a club acquiring a free agent to compensate the free agent's former team.[304] Affirming the trial court's decision, the Eighth Circuit analyzed the competitive effects of the proffered justifications.[305] Judge Lay, writing for the unanimous court in *Mackey*, found that the rule limited the players' freedom of movement, because it acted to "significantly deter[] clubs from . . . signing free agents . . . [and] significantly decrease[d] players' bargaining power in contract

---

298. *See Chicago Bd. of Trade*, 246 U.S. at 238-39 (finding that the history and purpose of the Call rule shows it is a reasonable regulation of business consistent with antitrust law).

299. *Id.* at 238.

300. *National Soc'y of Professional Engineers*, 435 U.S. at 692.

301. *Id.* at 688.

302. *Id.* at 692.

303. *Mackey*, 543 F.2d at 606.

304. *Id.* at 609. The "Rozelle Rule," which was unilaterally implemented in 1963, essentially provided that when a player's contractual obligation to a team expired and he signed with a different club, the signing club was obligated to compensate the player's former team. If the two clubs were unable to conclude mutually satisfactory arrangements, the commissioner could award compensation in the form of one or more players and/or draft choices as he deemed fair and equitable. *Id.* at 609 n.1. Although the rule was subsequently incorporated into successive C.B.A.s, the court held that it was not shielded by the non-statutory labor exemption because it was not the product of "bona fide arm's-length bargaining." *Id.* at 623.

305. *Id.* at 620-22. The non-jury trial lasted 55 days, received the testimony of 63 witnesses, admitted in excess of 400 exhibits, and generated a trial transcript of over 11,000 pages. Mackey v. N.F.L., 407 F. Supp. 1000, 1002 (D. Minn. 1975).

negotiations, which consequently lowered their salaries."[306]

Finding anticompetitive effects, the *Mackey* court then analyzed three procompetitive justifications for the restraint.[307] The Court of Appeals found that the restraint was unacceptable since: (1) recoupment of player development costs were not justified because these costs are ordinary to business, and therefore not compensable; (2) ensuring player continuity was unjustified because of the league's high, natural turnover rate; and (3) there was no proven decline in the level of play, thus remedial measures were unnecessary.[308] However, the *Mackey* court did declare that the NFL had a "*strong and unique interest in maintaining competitive balance* among its teams."[309]

While the Eighth Circuit found that maintaining competitive balance was a legitimate purpose,[310] the *Mackey* court nonetheless struck the restraint, finding that it was "significantly more restrictive than necessary," and therefore its justification did not outweigh its anticompetitive effects.[311] In reaching this conclusion, the court asserted that the provision was overly broad in its application, denying the freedom of movement to average and below average players who would have no effect on competitive balance in the league.[312] The court further found that the provision was unlimited in duration, serving as a perpetual restriction throughout the players' careers, and was unaccompanied by procedural safeguards, such as notification of players when teams express interest in acquiring their services.[313]

---

306. *Mackey*, 543 F.2d at 620.

307. *Id.* at 621.

308. *Id.*

309. *Id.* (emphasis added). The lower court in *Smith* stated that:

> "Competitive balance" means in essence that all of the league's teams are of sufficiently comparable playing strength that football fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching the games, thus supporting the teams' television and gate revenues.

Smith v. Pro Football, Inc., 420 F. Supp. 738, 745 (D.D.C. 1976), *aff'd in relevant part*, 593 F.2d 1173 (D.C. Cir. 1978).

Competitive balance was also a primary justification for MLB's implementation of the salary cap provision in December 1994. MLB NEWS RELEASE, *supra* note 166, at 5.

310. Notably, it did not make a determination as to whether the restraint was "essential" to the maintenance of competitive balance in the N.F.L. *Mackey*, 543 F.2d at 622.

311. *Id.*

312. *Id.*

313. *Id.* While not discussed by the Eighth Circuit Court of Appeals, the trial court added that the rule was more restrictive than necessary when "viewed in conjunction with" other anticompetitive practices, "[such as] the Draft; the Standard Player Contract; the Option; and the Tampering rule." *Mackey*, 407 F. Supp. at 1008. The jury in *McNeil* was also instructed to view the restraint in conjunction with other rules and practices. *See* McNeil v. National Football League, No. 4-90-476,

The rule of reason antitrust standard and its applicable factors were again articulated in *Smith v. Pro Football, Inc.* in 1978.[314] James "Yazoo" Smith brought an unreasonable restraint of trade claim arising out of the NFL player draft and its surrounding restrictions.[315] The D.C. Circuit also applied the rule of reason standard but found the balancing test inapplicable to the circumstances of the case.[316] Writing for the majority in *Smith*, Judge Wilkey initially considered the player draft's "anticompetitive evils," finding the draft to be "concededly anticompetitive in purpose" and "severely anticompetitive in effect."[317] It forced the seller to deal with one buyer and "utterly strip[ped] [the players] of any measure of control over the marketing of their talents."[318] Consequently, the court concluded that the draft had the predictable effect of depressing the salary levels of the finest college players.[319]

The *Smith* court found that the anticompetitive evils affected competition in the economic sphere, tending to reduce economic competition among the teams (buyers) for the services of the players (sellers).[320] In contrast, the procompetitive virtues of maintaining competitive balance only operated in the sports context (i.e., on the playing field), roughly equalizing the level of talent on each team.[321] For this reason, the court held that "it is impossible to 'net them out' in the usual rule-of-reason balancing."[322]

1992 WL 315292, at *4 (D. Minn. Sept. 10, 1992) (jury instructions on special verdict form).

314. *Smith*, 593 F.2d at 1173.

315. *Id.* at 1174-76. Smith was an All-American college football player who was selected by the Washington Redskins as the 12th overall pick in the 1968 NFL Draft. Shortly thereafter he signed a one-year contract which paid him $50,000, including a bonus and incentives. He alleged that, but for the draft, which permitted him to negotiate only with the Redskins, he would have signed a considerably more lucrative contract. Smith's career prematurely ended when he suffered a serious neck injury in the final game of the 1968 season. *Id.*

316. *Id.* at 1186-87.

317. *Id.* at 1187.

318. *Id.* at 1185.

319. *Id.* at 1186.

320. *Id.*

321. *Id.*

322. *Id.* *But see* NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984); National Basketball Association v. Williams, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994), *aff'd* in part, 45 F.3d 684 (2d Cir. 1995); *McNeil*, 1992 WL 315292, at *1 (all weighing the "competitive balance" justification in rule of reason balancing test).

The *Smith* court noted the difficulty in balancing the sport's anticompetitive evils and its procompetitive virtues, which would require the proverbial "apples and oranges" comparison. SPORTS AND THE LAW, *supra* note 37, at 137. Justice Antonin Scalia, recognizing the difficulty of balancing incommensurate interests, has cogently stated: "[i]t is more like judging whether a particular line is longer than a particular rock is heavy." Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

Having struck the player draft because it lacked a justifiable procompetitive virtue, the *Smith* court nonetheless noted that there also existed significantly less anticompetitive alternatives to the draft, including: reducing the rounds of the draft to enable less-talented players to negotiate in the free market;[323] permitting more than one team to draft each player; allowing a player to negotiate with the team of his choice if the team that drafted him failed to make an acceptable offer; conducting a second draft each year for players who were unable to reach an agreement; and eliminating the draft entirely and implement revenue sharing.[324]

Finally, the United States District Court for the District of Minnesota enumerated in its jury instructions all the applicable factors in the rule of reason standard in the player restraint context.[325] In *McNeil v. N.F.L.*, Judge Doty, who has presided over several major cases challenging player restraints in the NFL,[326] declared that the player(s) challenging the practice have the burden of proving that it has a substantial effect on the relevant market (i.e., the competition for professional football players' services in the United States) and these detrimental effects outweigh any virtues of that competition.[327] The application of this balancing test involves a shifting of the burden of proof.[328]

Initially, the player(s) have the burden of proving "substantially harmful" anticompetitive effects of the challenged practice.[329] In reaching that determination, the *McNeil* court instructed the jury that it may consider any of the following factors: (1) the effect on the bargaining power of players in contract negotiations; (2) the impact on the ability of players to sell their services; (3) the effect on the ability of clubs to sign players; (4) the impact on salaries of players; (5) the effect on the players' ability to move to another club; (6) the existence of the league's monopoly power; and (7) the effect when considered in conjunction with other rules.[330]

---

323. The trial court suggested that the rounds of the draft could have been reduced from 17, as it was in 1968, to as few as two, and would still sufficiently provide for the distribution of the most talented players. *Smith*, 420 F. Supp. at 746-47. In fact, in 1993, the NFL player draft was reduced to seven rounds. SPORTS AND THE LAW, *supra* note 37, at 152.

324. *Smith*, 593 F.2d at 1187-88.

325. *McNeil*, 1992 WL 315292, at *1-7 (special verdict form). The player restraint involved was the Plan B right of first refusal/compensation system.

326. *See* Powell v. N.F.L., 678 F. Supp. 777 (D. Minn. 1988); Jackson v. N.F.L., 802 F. Supp. 226 (D. Minn. 1992); White v. N.F.L., 836 F. Supp. 1458 (D. Minn. 1993).

327. *McNeil*, 1992 WL 315292, at *3.

328. *Id.* at *4.

329. *Id.* at *1, 3.

330. *Id.* at *3-4.

In applying these factors, Judge Doty stated that if the player(s) have shown substantially harmful anticompetitive effects, the league has the burden of proving that the practice is "justified by a legitimate business purpose and [is] *reasonably necessary* to achieve that purpose."[331]

To establish the first prong of that test—the legitimate business purpose—the league must demonstrate that the restraint actually made a "significant contribution to the establishment or maintenance of competitive balance."[332] In making this determination, the court instructed the jury that it may consider such factors as: (1) the purpose of adopting the rule; (2) the impact on the teamwork of the clubs and their ability to train players; (3) the effect on the operation of other rules; (4) the impact on the allocation of player talent; and (5) the effect on the attractiveness of the product to the fans.[333]

If the league meets the first prong of the test, it must still satisfy the second prong[334]—that the restraint is "no more restrictive than *reasonably necessary*."[335] The *McNeil* court illuminated this standard by adding that the league was *not* required to prove that the restraint is the least restrictive alternative necessary to establish or maintain competitive balance, but rather that it is "reasonably necessary."[336] To that end, the court may consider player reservation systems in other professional sports and their comparability to the circumstances in the present case.[337]

Finally, the *McNeil* court instructed that if the league has satisfied both prongs of its burden (i.e., a legitimate business purpose that is no more restrictive than reasonably necessary), the player(s) have the final burden of proving that the harmful effects outweigh[338] any beneficial

---

331. *Id.* at *4 (emphasis added).

332. *Id.*

333. *Id.* at *3, 5.

334. Some have questioned whether the "less restrictive alternative" concept is an element that must be satisfied by the league to avoid liability or is simply an additional factor to be considered in the analysis. SPORTS AND THE LAW, *supra* note 37, at 152.

335. *McNeil*, 1992 WL 315292, at *5 (emphasis added).

336. *Id.*

337. *Id.*

338. It should be noted that while Judge Doty declared in his jury instructions that the players shouldered the final burden of proving that the restraint's harmful effects outweigh any beneficial effects, no such balancing question was provided for the jury on the special verdict form. *Compare id.* at *3 (Instruction No.24) *with id.* at *1 (special verdict form). While the *McNeil* court may have erred on this matter, it nonetheless proved harmless as jurors found the restraint more restrictive than reasonably necessary. *Id.* at *1 (special verdict form).

effects on that competition.[339]

While the *Mackey, Smith, and McNeil* courts have utilized slightly different approaches, the rule of reason standard in the player restraint context involves an evaluation of the anticompetitive and procompetitive effects, the alternative methods to achieving its purpose, and a balancing of competing effects.[340]

4. Application of the Player Restraint Standard

Having elucidated the rule of reason antitrust standard and the applicable factors in a player restraint context, this note now analyzes salary cap/salary taxation provisions under this test. This entails a determination of whether unilateral implementation of such proposals by Major League Baseball would be "unreasonable restraints" of trade in violation of federal antitrust laws.[341]

Although the Supreme Court has addressed antitrust issues on numerous occasions since the passage of the Sherman Act, it has offered little insight into what constitutes "unreasonable restraints" in the professional sports context. The courts of appeal in *Mackey* and *Smith*, although striking various restraints under the rule of reason standard, were nonetheless willing to accept that owners in professional sports may collectively take some actions to restrain players' freedom of movement

---

339. *Id.* at *3. In applying the player restraint standard, the jury in September 1992 struck down the league's rules, finding that they: 1) had a substantially harmful effect on competition in the relevant market for player services; 2) substantially contributed to the competitive balance in the NFL; and 3) were more restrictive than reasonably necessary. *Id.* at *1.

340. *See Mackey*, 543 F.2d at 621-22 (players have initial burden of proving "substantial" anticompetitive effect; burden shifts to league to demonstrate that restraint is "essential to the maintenance of competitive balance" and is "no more restrictive than necessary"); *Smith*, 593 F.2d at 1183 (players have initial burden of proving that restraint is "significantly anticompetitive in purpose or effect;" burden shifts to league to demonstrate "legitimate business purpose[] whose realization serves to promote competition;" if each burden is met, then the "anticompetitive evils . . . must be carefully balanced against its procompetitive virtues . . . . A restraint is unreasonable if it has the net effect of substantially impeding competition."); *McNeil*, 1992 WL 315292, at *1, 3 (players have initial burden of proving "substantially harmful effect;" burden shifts to league to demonstrate that restraint "significantly contribute[s] to competitive balance" and is "no more restrictive than reasonably necessary;" final burden shifts back to players to show "harmful effects . . . outweigh any beneficial effects."). *But see supra* note 338, which calls into question whether the *McNeil* court shifts final burden to players.

341. *See generally* National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 694-95 (1978). Again, this analysis presumes the inapplicability of the non-statutory labor exemption. *See supra* Part VI.A.

without violating antitrust law.[342]

To successfully challenge a salary cap/revenue sharing system[343] on antitrust grounds, it must initially be established that the restraint has a substantial anticompetitive effect on the market for player services.[344] While the salary cap scheme impacts the applicable market, it is considerably less restrictive than other provisions which were previously examined by various federal courts.[345] Unlike previous restraints, a salary cap grants players essentially unrestricted free agency, complete freedom of movement, and the ability to sell their services to employers (teams) of their choosing.[346] A cap on club payroll actually restricts the teams rather than the players. Upon receipt of an offer from a club, the player's current team would have no opportunity to restrict his movement, because it would have no right to compensation for his loss or the opportunity to match offers to retain his services. Viewed in conjunction with the revenue sharing provision, a small market team would have additional capital to adequately barter for players whose services it desires.

Nonetheless, the practical effect of this system would be a significant restriction on the owners' ability to sign players when their clubs are at or near the cap, resulting in a drag on player salaries.[347] Furthermore, after the phase-in is complete and the cap is entirely operative, all teams would perpetually approach the ceiling, further restricting the players' ability to

---

342. *See* Mackey v. National Football League, 543 F.2d 606, 623 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) ("It may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this."); Smith v. Pro Football, Inc., 593 F.2d 1173, 1187 (D.C. Cir. 1978) ("Given the joint venture status of the NFL clubs, we do not foreclose the possibility that some type of player [restraint] might be defended as serving 'to regulate and promote . . . competition in the market for players' services.'").

343. The system furnishes players a guaranteed share of defined gross revenues (DGR), establishes maximum team salaries based on the DGR, and redistributes revenue from large market teams to those in smaller markets. *See supra* notes 225-28 and accompanying text.

344. *See* McNeil v. National Football League, No. 4-90-476, 1992 WL 315292, at *1, 3 (D. Minn. Sept. 10, 1992).

345. All restraints previously considered either completely removed or severely restricted the players' access to the buyer market. *See* Brown v. Pro Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995) (fixed wage for certain players); National Basketball Association v. Williams, 45 F.3d 684 (2nd Cir. 1995) (college draft; right of first refusal); Wood v. National Basketball Association, 809 F.2d 954 (2d Cir. 1987) (college draft); *Smith*, 593 F.2d at 1173 (college draft); *Mackey*, 543 F.2d at 606 (compensation system); *McNeil*, 1992 WL 315292, at *1 (right of first refusal/compensation system); Bridgeman v. National Basketball Association, 675 F. Supp. 960 (D.N.J. 1987) (college draft; right of first refusal).

346. *McNeil*, 1992 WL 315292, at *3-4 (listing factors in anticompetitive analysis).

347. *See id.*

sell their services.[348] Accordingly, the salary cap is sufficiently anticompetitive to shift the analysis as to whether the league's business purposes are legitimate and no more restrictive than reasonably necessary.[349]

Major League Baseball has proffered two related justifications for the salary cap/revenue sharing proposal: to restore competitive balance[350] among the teams, and to preserve the financial stability of the individual clubs and the industry as a whole.[351]

The Supreme Court in *National Collegiate Athletic Ass'n v. Board of Regents* held that the NCAA's "interest in maintaining a competitive balance among amateur athletic teams is *legitimate and important.*"[352] Furthermore, the Eighth Circuit in *Mackey* recognized a professional sports league's "*strong and unique* interest in maintaining competitive balance among its teams."[353]

To determine whether salary caps "significantly contribute to [the

---

348. *See generally id.*; *Smith*, 593 F.2d at 1185-86. This scenario was recently evident with the effectuation and phase-in of the NFL's cap in 1993. *See* NFL Collective Bargaining Agreement 1993-2000, at 77 (1993) [hereinafter NFL C.B.A.]. During the first 10 months under the agreement, because teams had ample latitude under the cap, average salaries escalated from $488,000 to $737,000. However, during the ensuing eight months, as owners ran out of room under the cap, salaries leveled off and notable veterans were forced into retirement. Steve Marantz, *Asked and Answered; A Strike May Be All But Inevitable, But It is Far From a Textbook Case*, SPORTING NEWS, Aug. 8, 1994, at 14. *But see* Patterson, *supra* note 232, at 536-37 (declaring that average yearly NBA salaries have risen from $325,000 to $1.25 million since the salary cap was implemented in 1984).

349. *See McNeil*, 1992 WL 315292, at *4 (describing burden shift). Furthermore, based on a history of exploitation by the league, commencing with the imposition of the lifetime reservation system in the 1800s through the recent $280 million collusion settlement with the players, courts may be suspicious of all restraints imposed by MLB. *See* Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. SPORTS L. 287, 307 (1994) (noting damages in collusion settlement).

350. Competitive balance, as instructed to the jury by the *McNeil* court, means

> that all of the NFL teams are of sufficiently comparable strength that football fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching the games.

McNeil, 1992 WL 315292, at *4.

351. MLB NEWS RELEASE, *supra* note 166, at 5.

352. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 117 (1984) (emphasis added). The Court's holding calls into question the prior assessment of the D.C. Circuit that "competitive balance" was not a relevant justification under the rule of reason analysis because the restraint was "procompetitive . . . in a very different sense from that in which it [was] anticompetitive." *Smith*, 593 F.2d at 1186; *see also* Brown v. Pro Football, Inc., Civ. A. No. 90-1071, 1992 WL 88039, at *10 (D.D.C. Mar. 10, 1992) (citation omitted).

353. *Mackey*, 543 F.2d at 621 (emphasis added); *see Williams*, 857 F. Supp. at 1079; *McNeil*, 1992 WL 315292, at *1-2 (both supporting competitive balance justification).

maintanence] of competitive balance"[354] in the context of professional baseball, the court must initially consider the procompetitive effects of the restraint by assessing the "facts peculiar to the business . . . and the reasons why it was imposed."[355] The intent of a salary cap/revenue sharing system, from the league's perspective, is to preclude large market teams from amassing a disproportionate share of talented players and to furnish small market clubs with the financial resources necessary to bid for those players, thereby enhancing competitive balance among the teams and fostering fan interest.[356] The necessity of the proposal developed out of a recent divergence among baseball fans. Whereas interest in professional baseball continues to flourish locally, a growing and inexplicable indifference for the game has developed nationally.[357] For instance, while interest in Boston continues to grow in their beloved Red Sox, Bostonians' interest in viewing a Dodger-Giant game has diminished through the years.[358]

As a consequence, baseball's national media contract, which had grown sixteen-fold between 1976 and 1990 to over $350 million annually, was reduced by approximately thirty percent in 1994-1995.[359] But while national revenue shared equally by the twenty-eight clubs has diminished, large market teams with inherent demographic advantages have signed exceptionally lucrative local television contracts, from which all proceeds remain with the individual clubs. In 1992, for example, the New York Yankees received $46 million for the rights to televise its games, while the small market Milwaukee Brewers received a mere $4.8 million.[360] In 1994, the Yankees' projected overall revenue was $94.8 million, in

---

354. *McNeil*, 1992 WL 315292, at *1. *Compare McNeil with Mackey*, 543 F.2d at 621 (restraint must be "essential to the maintenance of competitive balance") and *Smith*, 593 F.2d at 1183 (restraint must have a "legitimate business purpose[] whose realization serves to promote competition").

355. *See National Soc'y of Professional Engineers*, 435 U.S. at 692 (describing the application of the rule of reason standard in antitrust cases).

356. *See generally McNeil*, 1992 WL 315292, at *5 (listing factors to be considered in the maintenance of competitive balance analysis).

357. Former House Speaker Tip O'Neil's adage "all politics is local" might now be true in the game of baseball as well. *See generally* TIP O'NEIL, MAN OF THE HOUSE 6 (1987).

The indifference of fans on the national level may be partly a consequence of the propagation of cable channels, which offer multiple games and other sporting events daily and thereby lessens the significance to the fans of individual baseball games.

358. This does not seem to be the case with professional football or basketball, where non-regional games remain appealing to viewers.

359. *See generally* Zimbalist, *supra* note 349, at 300; Kevin E. Martens, *Fair or Foul: The Survival of Small-Market Teams in Major League Baseball*, 4 MARQUETTE SPORTS L.J. 323, 355-56 (1994) (both anticipating a reduction of approximately 30%).

360. Martens, *supra* note 359, at 355.

contrast to $37.3 million for that of the small market Pittsburgh Pirates.[361]

This growing disparity has, as might be expected, resulted in a commensurate gap in team salaries. In 1993, the San Diego Padres expended only $12.2 million on player salaries, allowing for $35.5 million in other operating expenses and profit. During that same season, the Yankees paid its players $54.2 million, or $42 million more than the Padres, yet over $53 million remained for operating expenses and profit.[362]

This widening gap in revenues and a corresponding divergence in team payrolls will skew the allocation of player talent,[363] which will adversely affect MLB's competitive balance. Critics of the salary cap contend, however, that the competitive balance justification relies on the erroneous assumption that higher team payrolls leads to success on the field.[364] They maintain that the cap is unnecessary to achieve competitive balance since balance was realized following the advent of free agency in the 1970s and still remains strong today.[365] However, because the decrease in national broadcasting revenue and the sizable increase in local broadcasting revenue in large markets has only recently developed, the critics' data does not accurately reflect the state of the game in 1995. The effects of the clubs' revenue disparities are just now beginning to be actualized. The 1995 Montreal Expos, for instance, unable to maintain its payroll as a result of diminishing revenues, lost to free agency or traded at bargain rates arguably its four best players.[366] Consequently, its record dropped from a major league best 74-40 in 1994, to a dismal 66-78 in 1995. Furthermore, while these player "fire sales," which also occurred in Kansas City and Milwaukee in 1995, are in the financial best interests of clubs in the short term, they serve to diminish fan interest in the long term.

A salary cap/revenue sharing system would reverse this destructive trend. The scheme precludes large market teams from amassing a disproportionate share of talented players and furnishes small market clubs

---

361. Marvine, *supra* note 285, at 659 n.295.

362. Marantz, *supra* note 348, at 14.

363. *See McNeil*, 1992 WL 315292, at *5 (listing factors to be considered in the maintenance of competitive balance analysis).

364. *See* Christopher D. Cameron & J. Michael Echevarria, *The Ploys of Summer: Antitrust, Industrial Distrust, and the Case Against a Salary Cap for Major League Baseball*, 22 FLA. ST. U. L. REV. 827, 871-76 (1995); Marvine, *supra* note 285, at 655-57.

365. *See* Marvine, *supra* note 285, at 657. In support of this assertion, commentators note that 20 of baseball's 26 franchises captured at least one division title of the 40 available between 1983 and 1992. Cameron & Echevarria, *supra* note 364, at 853. Furthermore, 12 different franchises won the 13 World Championships played between 1978 and 1990. BASEBALL ENCYCLOPEDIA, *supra* note 77, at 2723-60.

366. Outfielders Marquis Grissom and Larry Walker and pitchers Kent Hill and John Wetteland.

with the financial resources necessary to bid for those players, thereby enhancing competitive balance and fostering fan interest. Therefore, MLB's salary cap/revenue sharing provision is essential to the maintenance of competitive balance under the rule of reason analysis.[367]

Major League Baseball's second justification for a salary cap/revenue sharing system is the preservation of financial stability of the individual clubs and the industry as a whole.[368] The league's stability may be a justifiable player interest since some restraints are in the "mutual interest[] of both the players and the clubs."[369] A salary cap/revenue sharing provision serves the players' interests because it furnishes them with guaranteed profit sharing and still grants them essentially unrestricted free agency. The system also provides for increased revenue sharing among the owners, which enables small market owners to adequately compete for players' services. Finally, the provision protects the players' jobs by strengthening the financial stability and vitality of each club.

Notwithstanding these virtues, the financial stability justification probably would be rejected under the rule of reason analysis. Since the cap provision would exclude certain teams (those unable to make reasonable offers for player services because of cap restraints) from the market for players' services, it is thus "so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system[s]."[370]

For the aforementioned reasons, "competitive balance" remains MLB's only defensible justification for the salary cap/revenue sharing provision. Furthermore, the system's procompetitive virtues are essential to the maintenance of competitive balance under the rule of reason standard.

Prior to balancing the restraint's anticompetitive evils against its procompetitive virtues, a finding must be made as to whether the restraint is no more restrictive than reasonably necessary to achieve its stated purpose.[371] A salary cap/revenue sharing scheme, if implemented by MLB, would be struck down at this stage of the rule of reason analysis since there in fact exists a less restrictive, viable alternative—a salary

---

367. *See Mackey*, 543 F.2d at 621 (stating rule of reason standard). *But see supra* note 340 and accompanying text.

368. MLB NEWS RELEASE, *supra* note 166, at 5.

369. *See Mackey*, 543 F.2d at 623.

370. United States v. General Motors Corp., 384 U.S. 127, 146 (1966). *See* Marvine, *supra* note 285, at 655-56; D. Albert Daspin, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95, 122-23 (1986).

371. *See supra* notes 331-39 and accompanying text.

taxation/revenue sharing system. A salary taxation provision would subject teams with payrolls above a specified amount to a tax, with revenues generated from the provision earmarked for small market clubs.[372] A taxation system is less restrictive than a cap, erecting *no absolute barrier* which may thwart an owner's ability to sign a player. Theoretically, each player could sign with any club at any dollar amount.

While a salary taxation provision is less restrictive than a cap, other alternatives must be evaluated to ascertain whether the tax is more restrictive than reasonably necessary to achieve competitive balance. In making that determination, the trier of fact may consider alternative player restraint systems employed in other sports.[373] The NFL's C.B.A., adopted in 1993, incorporates a "hard" salary cap which establishes uniform team salary limits based on a percentage of the sport's defined gross revenues (DGR).[374] The NBA's C.B.A., adopted in 1995, contains a "soft" salary cap which also establishes uniform team limits based on the sport's DGR, but allows for sizeable loopholes to exceed that ceiling.[375] The NHL's C.B.A., adopted in 1995, employs a mixture of restricted free agency (first refusal and draft compensation rights), salary arbitration, and a rookie salary cap.[376]

Whereas all three major professional sports have incorporated assorted salary cap and restricted free agency provisions into their respective C.B.A.s, each limits freedom of movement to a greater degree than does

---

372. *See* discussion *supra* notes 229-31 and accompanying text.

373. *McNeil*, 1992 WL 315292, at *5.

374. *See* Marantz, *supra* note 348, at 14. While each sport defines gross revenue differently, the NFL cap is fixed at 64% of the DGR. While the NFL's C.B.A. establishes no obvious loopholes, it does, however, provide that any "signing bonus shall be prorated [for salary cap purposes] over the term of the Player Contract." NFL C.B.A., *supra* note 348, at 81. Hence, individual owners have beaten their own cost control system by giving players more in up front bonus money and less in yearly salary. Will McDonough, *The Idea of a Cap is Exceedingly Farcical*, BOSTON GLOBE, Mar. 5, 1995, at 56. Due to this loophole, 13 of the NFL's 30 teams are exceeding the cap in 1995. Larry Weisman, *Free Agency Drives Players' Salaries Up*, USA TODAY, Sept. 29, 1995, at 6C. For instance, whereas each team has a $42.05 million ceiling in salaries and benefits per year, the 1995 Dallas Cowboys distributed $40.2 million in bonuses alone, enabling it to circumvent the cap by $25.05 million. *Id.*; Peter King, *Inside the NFL: He's Baaaack!*, SPORTS ILLUSTRATED, Nov. 6, 1995, at 114.

375. *See* Marantz, *supra* note 348, at 14. Provisions of the NBA's six-year agreement include: a salary cap fixed at 53% of DGR; a limited "luxury tax" triggered if salaries exceed 63% of league revenues; a rookie salary cap based on draft position; a reduction in the college draft from 2 rounds to 1; and a cap waiver for re-signing free agents. Jackie MacMullan, *NBA Deal, Duel Looming: Pact is Agreed Upon as Dissent Mounts*, BOSTON GLOBE, June 22, 1995, at 35.

376. *NHL, NHLPA Reach Collective Bargaining Agreement: Regular Season Will Begin on January 20*, NATIONAL HOCKEY LEAGUE NEWS RELEASE, Jan. 13, 1995, at 1-5. The NHL's agreement expires on September 15, 2000. *Id.* at 1.

a salary taxation proposal. However, some federal courts and commentators have submitted that competitive balance in baseball could be achieved through other less restrictive alternatives, such as: 1) revenue sharing between owners, without salary restraints;[377] 2) abolishing salary arbitration;[378] 3) a non-protected player pool;[379] and 4) minor leaguers as free agent compensation.[380] While the latter three proposals would be considerably less anticompetitive than a salary taxation provision, they are limited in scope and would be insufficiently effective at establishing competitive balance.

The revenue sharing alternative, however, would make substantial strides toward achieving competitive balance, but revenue sharing without more is impractical and cannot reasonably be expected to achieve that objective. For instance, as earlier noted, the 1994 Yankees' projected overall revenue was over $57 million more than that of the 1994 Pirates.[381] If, as suggested, MLB used revenue sharing alone to equalize teams' bargaining power in the acquisition of player services, does that suggest that "George III"[382] should annually furnish the Pirates with over $28 million? While revenue sharing among owners presumably must be part of any solution, revenue sharing without more is not a reasonably viable alternative. Moreover, it is not required that the challenged restraint be the "least restrictive alternative necessary to establish or maintain competitive balance," but rather the test is whether the challenged restraint is "reasonably necessary" to achieve that objective.[383] Thus, while the aforementioned proposals would be less restrictive than a salary taxation/revenue sharing system, each would fail to achieve the justified objective of establishing competitive balance in the league.

Upon finding that a player restraint is essential to the maintenance of competitive balance[384] and is no more restrictive than reasonably necessary, the rule of reason analysis then requires that the anticompetitive

---

377. *See Smith*, 593 F.2d at 1188; Marvine, *supra* note 285, at 658-60; Foraker, *supra* note 282, at 177-78; Alexander H. Butterman, *Baseball's Antitrust Exemption and an Owner Imposed Salary Cap: Can They Coexist?*, 12 ENT. & SPORTS L. 3, 10 (1994).

378. *See generally* Tim Kurkjian & Tom Verducci, *Time Is Running Out*, SPORTS ILLUSTRATED, Mar. 20, 1995, at 40.

379. *See* Marvine, *supra* note 285, at 658; Foraker, *supra* note 282, at 177-78.

380. *See* Foraker, *supra* note 282, at 177.

381. Marvine, *supra* note 285, at 659 n.295; *see supra* note 361 and accompanying text.

382. Otherwise known as George M. Steinbrenner III, principal owner of the New York Yankees. *See generally* WARD AND BURNS, *supra* note 1, at 443-47.

383. *McNeil*, 1992 WL 315292, at *5. *Compare McNeil with Mackey*, 543 F.2d at 621 (restraint must be "no more restrictive than necessary").

384. "Competitive balance" is a proffered purpose for both salary taxation and salary cap provisions.

and procompetitive effects be balanced to ascertain the restraint's net effect on competition.[385] At this juncture, it becomes necessary to outline a definitive salary taxation/revenue sharing proposal.[386] This note suggests the following six-year blueprint:

(1) *Luxury Tax.* Assuming an average player payroll of $40.7 million[387] and their salaries targeted to 54% of the DGR,[388] the targeted goal could be achieved by implementing a two-tiered tax: 20% on payrolls between $40.7 and $45.7 million and 60% on payrolls above $45.7 million;[389]
(2) *Reassessment.* After the second and fourth years, a special arbitrator, to be mutually appointed by the owners and players, shall reassess the sport's DGR[390] to determine what percentage has gone to player salaries. If the players have received less than 52%, the special arbitrator shall reduce both tax rates to levels he estimates would apportion 54% to the players during the succeeding two years; if they receive greater than 60%, he shall increase both rates to levels he estimates would apportion 54% to

---

385. *Compare Smith*, 593 F.2d at 1183 (holding that the anticompetive and procompetitive effects must be "carefully balanced," and that "[a] restraint is unreasonable if it has the 'net effect' of substantially impeding competition.") [and] *McNeil*, 1992 WL 315292, at *3 (declaring that party challenging restraint must show "harmful effects . . . outweigh any beneficial effects on that competition,") *with Mackey*, 543 F.2d at 621-22 (declaring that the issue is whether the restraint is "essential to the maintenance of competitive balance, and is no more restrictive than necessary," without reference to a balancing of effects).

386. Whereas only "unreasonable" restraints on competition are proscribed by antitrust law, *National Soc'y of Professional Engineers*, 435 U.S. at 694-95, it would seem clear that *some* form of taxation (e.g., 1% on team salaries which are 50% above the mean) would not be "unreasonable."

387. Kurkjian & Verducci, *supra* note 378, at 40.

388. Which lies between 58% of the DGR, which the players received in 1994, and 50% of the DGR, the level proposed by the owners. Marantz, *supra* note 348, at 14.

389. This level also falls between those proposed by the parties when salary taxation provisions were discussed during the winter of 1995. At that time, the owners suggested a 75% tax on amounts between $35 and $42 million and a 100% tax on those above $42 million; the players proposed a separate tax system with rates ranging from 5% to 25%. William J. Usery, the federal mediator appointed by President Clinton to expedite a settlement, recommended rates of 50%-60% for the lower tier and 75% for the higher one. The players unequivocally rejected Usery's proposal. *See* Chris Haft, *Usery's Plan Echoes the Owners'*, USA TODAY, Feb. 8, 1995, at 3C.

390. To accurately do so, the owners must finally agree to open their books. Notwithstanding this concession, it remains difficult to determine the sport's DGR because of potential hidden revenues from cross ownership. This problem occurs when a team owner also owns the television and/or radio station which broadcasts its games, and the team receives an artificially low rights fee in relation to the actual value of its broadcasts. *See* Marantz, *supra* note 348, at 14; Zimbalist, *supra* note 349, at 296-97. Seventeen of the 28 clubs have had cross ownership ties with broadcasters since 1986. *Id.* at 297. Under the proposed blueprint, where cross ownership exists, the special arbitrator must determine the fair market value of each team's broadcasting rights (which, in theory, could be determined without access to the teams' financial records).

the players during the succeeding two years;[391]
(3) *Limited Revenue Sharing.* Whereas tax revenues would be earmarked for the small market clubs, it may be unnecessary to implement a comprehensive revenue sharing provision. Nonetheless, a revenue sharing plan must be effectuated during the first year to reestablish a balance, and its efficacy should be reviewed after the third year;
(4) *Free Agency.* Unrestricted for players with at least three years of major league service;
(5) *Arbitration.* Abolished;
(6) *Minimum Salaries.* Escalating over six years to $300,000;
(7) *Exceptions.* Tax rates for re-signing free agents reduced by 50% at each level (i.e., 10% at the lower tier and 30% at the higher one);[392] tax rates waived for replacing disabled players during the regular season;
(8) *Commissioner.* The owners shall appoint a commissioner within six months and restore in him or her all power to do what is in the "best interests" of the sport. Additionally, the commissioner shall not be removed prior to the expiration of his term without the consent of a majority of players;
(9) *Ticket Prices.* No team shall raise ticket prices during the first two seasons; during the final four seasons, no prices shall be raised higher than the increase in the preceding year's consumer price index.

In order to evaluate the interests involved, the rule of reason standard dictates a balancing of the proposal's anticompetitive evils with its procompetitive virtues.[393]

This proposed salary taxation/revenue sharing system is an appropriate response to the widening gap in team revenues and the corresponding divergence in team payrolls, which, if left unchecked, would have adverse long-term effects on the allocation of player talent.

---

391. *See* Kurkjian & Verducci, *supra* note 378, at 40 (proffering similar reassessment plan).

392. This provision attempts to address a problem that developed in the NBA in 1993. The NBA's then C.B.A. provided that players who permissibly terminated their contracts were granted free agent status and that the salary cap was waived for teams re-signing their veteran free agents. To circumvent the cap, free agents who signed with new teams which were at or near the cap's ceiling simply incorporated clauses in their contracts granting them rights to unilaterally terminate the contracts after one year, at which point they would be veteran free agents whose teams were not restricted by the cap. *See* SPORTS AND THE LAW (1995 CASE SUPPLEMENT), *supra* note 37, at 125-26; Bridgeman v. N.B.A. (*In re* Chris Dudley), 838 F. Supp. 172, 184 (D.N.J. 1993) (upheld the special master's ruling that the agreements did not violate the salary cap, by finding that "such player contracts are within the contemplation of the parties as reflected in [their settlement agreement]"). Because this proposal reduces rather than eliminates the tax rate, it would serve as a disincentive to owners who might otherwise be inclined to circumvent the tax provision.

393. *Smith*, 593 F.2d at 1183.

The scheme is procompetitive in its effect because it deters large market teams from amassing a disproportionate share of talented players. With its revenue sharing component, the scheme furnishes small market clubs with the financial resources necessary to bid for the services of those players. Accordingly, the system greatly enhances competitive balance among the teams, thereby fostering fan interest.

While the anticompetitive effect of the proposed salary taxation/revenue sharing system is a drag on player salaries, the scheme erects no absolute barrier which would thwart an owner's ability to sign a player or inhibit that player's ability to sell his services to the team of his choosing.[394] This proposal is accompanied by procedural safeguards[395] to limit its adverse effects, including a special arbitrator's reassessment of the DGR every two years, a proper accounting of broadcasting contracts where cross ownership exists, and requisite player approval in the dismissal of the commissioner. By reducing the tax rates for re-signing free agents and waiving the rates for replacing disabled players, the plan's narrowed scope also limits its anticompetitive effect.[396] The scheme's adverse impact is further tempered by its employment in conjunction with other rules, such as the increase in guaranteed minimum salary and the abbreviated term for securing free agency status.[397]

Evidence of the proposed salary taxation/revenue sharing system's reasonableness is also derived from the fact that its tax rates are much lower, and thereby much less restrictive, than those recommended by William Usery, the impartial federal mediator appointed by President

---

394. Although the NFL's "hard" salary cap provides only one significant loophole, 13 of the league's 30 clubs in 1995 are spending in excess of the cap, circumventing it with large bonuses prorated over the life of the contract. In the aftermath of the implementation of free agency and salary caps in the NFL in 1993, teams are spending 72% more in salaries and benefits in 1995 than they did in 1992 ($42.05 million/team in 1995 versus $24.5 million/team in 1992). *See* Weisman, *supra* note 374, at 6C. In September 1995, Dallas Cowboys owner Jerry Jones significantly exceeded the cap when he contracted to pay part-time player Deion Sanders $35 million over 7 years, on the basis of Jones' willingness to sacrifice his profit margin to ensure the Cowboys' success on the field. *See id.*; *see generally* Larry Weisman, *Big-time Spender Jones Second in Salaries*, USA TODAY, Oct. 5, 1995, at 9C (disclosing the Cowboys' revised spending level in the aftermath of the "Prime Time" sweepstakes).

Is there any reason to believe George Steinbrenner, Ted Turner, et al. won't operate like their colleagues in the NFL, thereby limiting the anticompetive effects of a salary taxation/revenue sharing system?

395. *See Mackey*, 543 F.2d at 622 (criticizing the Rozelle Rule for lack of procedural safeguards).

396. *Id.* (listing the restraint's overly broad nature as a factor which made it "significantly more restrictive," and thereby more anticompetitive).

397. *See McNeil*, 1992 WL 315292, at *4 (stating that the existence of other rules may be considered when determining the restraint's impact).

Clinton to expedite a settlement.[398] Furthermore, the players' colleagues in the NFL and NBA have each agreed to salary caps as part of their respective C.B.A.s, thereby demonstrating the reasonableness of a less restrictive salary taxation provision.[399]

Additionally, the suggested system generates defined benefits for the American consumer. Although the scheme's vertical restraint on labor diminishes (intrabrand) competition among the clubs for player services, it nonetheless fosters a more equitable allocation of player talent, thereby yielding a superior baseball product which is more competitive in the (interbrand) entertainment market.[400] In 1977, the United States Supreme Court suggested that the increased competition in the interbrand market may outweigh any associated antitrust concerns, expressing that: "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason."[401]

Finally, in addition to a higher quality product, the American consumer may also be the beneficiary of price reductions as a corollary of professional baseball's monopsonistic market.[402] The proposed taxation provision would restrict the escalation in salaries, thereby enabling owners to freeze ticket prices during the first two seasons and limit adjustments thereafter to no greater than the increase in the preceding year's consumer price index.[403] The First Circuit Court of Appeals, in an antitrust challenge wherein the market's dominant buyer required sellers to accept a fee schedule which effectively would reduce consumer prices, asserted that "courts should at least be cautious—reluctant to condemn too speedily—an arrangement that, on its face, appears to bring low price benefits to the consumer."[404] A salary taxation restraint effectuated concurrently with a restriction in ticket prices would result in a modest

---

398. *See supra* notes 387-89 and accompanying text.

399. The NBA players' association agreed to a salary cap provision in each of its last 3 C.B.A.s. *See* Wood v. National Basketball Association, 809 F.2d 954, 956-57 (2d Cir. 1987) (1983 C.B.A.); SPORTS AND THE LAW (1995 CASE SUPPLEMENT), *supra* note 37, at 126 (1988 Bridgeman Settlement Agreement); MacMullan, *supra* note 375, at 35 (1995 C.B.A.). Even after a favorable verdict against the NFL on antitrust grounds in 1992, the NFL players' association nonetheless agreed to a salary cap provision as part of the litigation's settlement aggreement in 1993. *See McNeil*, 1992 WL 315292, at *1; SPORTS AND THE LAW (1995 CASE SUPPLEMENT), *supra* note 37, at 59.

400. *See* SPORTS AND THE LAW, *supra* note 37, at 137.

401. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-55 (1977) (citation omitted).

402. *See* discussion *supra* Part VI.B.2.

403. *See supra* notes 386-92 and accompanying text.

404. Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 930-31 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985) (citation omitted); *see supra* notes 290-93 and accompanying text.

transfer of wealth from the generally *much* more wealthy player to the generally *much* less wealthy baseball fan.[405]

Accordingly, under the rule of reason balancing test the anticompetitive evils of the proposed salary taxation/revenue sharing system do not outweigh its procompetitive virtues. As previously established, the scheme is essential to the maintenance of competitive balance and is no more restrictive than necessary. For the aforementioned reasons, the unilateral implementation of the proposed salary taxation/revenue sharing system by Major League Baseball would not be deemed an unreasonable restraint of trade in violation of antitrust law.

CONCLUSION

The United States Supreme Court in 1922 declared that professional baseball was not interstate commerce and thus established the game's unique antitrust exemption. As Congress considers repealing the exemption three quarters of a century later, it should initially explore the effect such action would have on the game of baseball today. This inquiry must address two critical issues: the expiration of the non-statutory labor exemption from antitrust law and the antitrust implications of salary cap and salary taxation provisions. This note demonstrates that a repeal of baseball's antitrust exemption would have little bearing on the current player-owner dispute.

First, based upon decisions by the courts of appeal in *Powell*, *Williams*, and *Brown*, the non-statutory labor exemption continues beyond an impasse in negotiations, thereby shielding Major League Baseball from antitrust liability. Second, even if the players choose to decertify their union and relinquish protections available to it under labor law, the league may still unilaterally implement player restraints that are not deemed unreasonable restraints of trade in violation of antitrust law.

Under the rule of reason standard, a salary cap/revenue sharing system is unreasonable even though it is essential to the maintenance of competitive balance, because there exists a less restrictive alternative—a salary taxation/revenue sharing system. A reasonable salary taxation scheme, such as the one proposed,[406] erects no absolute barrier restricting players from selling their services and addresses the growing competitive imbalance which has resulted from a widening gap in team revenues. The proposed salary taxation scheme's anticompetitive evils do not outweigh its procompetitive virtues, and, therefore, it is not an unreasonable

405. *See* SPORTS AND THE LAW, *supra* note 37, at 129.

406. *See* discussion *supra* notes 386-92 and accompanying text.

restraint in violation of antitrust law.

Finally, it is hoped that Major League Baseball's labor dispute is ultimately settled by mutual assent of the parties rather than by legislative or judicial action. The game of baseball will recaptivate this country's spirit[407] only if the sport is contested less in the halls of Congress and the courts and more on America's majestic fields of dreams.

*Thomas C. Picher**

---

407. That captivation was poignantly expressed during Annie Savoy's opening address in the film *Bull Durham*:

> I believe in the church of baseball. I've tried all of the major religions and most on the minor ones. I've worshiped Buddha, Allah, Brahma, Vishnu, Siva, trees, mushrooms, and Isadora Duncan. I know things. For instance, there are 108 beads in a Catholic's rosary and there are 108 stitches in a baseball. When I learned that, I gave Jesus a chance. But it just didn't work out between us. The Lord laid too much guilt on me. I prefer metaphysics to theology. You see, there's no guilt in baseball. And it's never boring. . . . It's a long season and you gotta trust it. I've tried 'em all, I really have, and the only church that truly feeds the soul, day in, day out, is the church of baseball.

WARD & BURNS, *supra* note 1, at 189 (citation omitted).

* The author would like to dedicate this piece to his father, Robert Picher, long-time Clerk of the Vermont House of Representatives, without whose tireless encouragement of academic scholarship this note would not have been possible.