LABOR LAW | ANTITRUST COLLECTIVE BARGAINING SOCIAL JUSTICE

Beethoven's Symphony No. 5 of Professional Sports

Brandi C. Granderson *

INTRODUCTION

The beginning of *Beethoven's Symphony No. 5* (*Fifth Symphony*)[1] is possibly the most striking opening to a musical motif only consisting of four notes.[2] The melody of "*dun dun dun DUNNNN"* builds with tempo and volume to a climactic restatement, leaving the listener in suspense.[3] Many people have encountered the ripping climax of notes in films and commercials.[4]

Music researchers believe the melody of the *Fifth Symphony* inevitably draws an inference to fate knocking at the front door.[5] Undoubtedly, the classical music piece seemingly represents a heroic struggle. The melody's climax leads the listener to a realm

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* Juris Doctor, University of Mississippi School of Law, (2022); Master of Business Administration, *High Honors,* Jackson State University, (2013); Bachelor of Arts, *Magna Cum Laude,* Clark Atlanta University, (2001). The author dedicates this legal note to her father James K. Granderson. For more than 22 years, Ms. Granderson's father served as an Union Representative for United Automobile Workers (UAW). Mr. Granderson worked tirelessly for the people he represented during his time with Delphi Automotives. Mr. Granderson's love for preserving the rights of working-class Americans directly cultivated Ms. Granderson's desire to practice employment and labor law. Ms. Granderson also wants to especially give thanks to the Faculty and Staff at the University of Mississippi School of Law for their support and compassion over the years.

[1] Ludwig van Beethoven, Symphony No. 5 in C minor (1804 – 1808)

[2] See Gaby Reucher, Beethoven's Fifth Symphony: The truth about the 'symphony of fate', DW.com (Sept. 13, 2018), https://www.dw.com/en/beethovens-fifth-symphony-the-truth-about-the-symphony-of-fate/a-45472113, (last visited Apr. 27, 2021).

[3] Id. (emphasis added).

[4] See generally Beethoven's Fifth: The World's Most Famous Symphony, Houston Symphony (July 9, 2018), https://houstonsymphony.org/beethoven-5-famous-symphony.

[5] Id.; see also Reucher, supra note 2.

where grief and joy embrace into sound.[6] What is strikingly profound, the *Fifth Symphony* is written when Beethoven is seemingly hard of hearing.[7]

The underlying emotion of Beethoven's musical compositions is similar to the labor strife between players and owners. From a historical perspective, players and owners accuse each other of being "deaf" to each other's needs and concerns at the negotiating table while wrestling with the fate of each player's career and the league's seasonal revenue. Beneath the surface, however, the conflict between antitrust and labor law presents a unique battleground for labor negotiations in professional sports, mirroring the sounds of grief and joy experienced in the *Fifth Symphony*.[8]

In recent and past years, labor negotiations, legislation centering around labor, and matters intersecting with antitrust and social justice are the *'legal titans'*[9] possibly changing the future landscape of professional sports. This legal note examines the anticipated role of political influence and the judicial review of matters regulating the world of professional sports. In addition, it will uncover whether administrative agencies or specific branches of government are more efficient in regulating matters concerning sports. Moreover, the Note will explore topics surrounding the impact of antitrust law in sports and varying economic implications around collective bargaining.

The Note covers six sections analyzing the legal titans' impact across professional sports. In addition, the Note historically examines legal controversies surrounding judicial, congressional, and political intervention in sports while dissecting the emotional war between the law, judicial interpretation, professional athletes,

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[6] Beethoven's Fifth*: The World's Most Famous Symphony,* supra note 4.

[7] See Reucher, supra note 2.

[8] See Gabe Feldman, Collective Bargaining in Professional Sports: The Duel Betw een Players and Owners and Labor Law and Antitrust Law*,* Oxford Handbooks (Feb. 2 018), https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190465957.001.000 1/oxfordhb-9780190465957-e-10, (last visited Apr. 27, 2021).

[9] The Editors of Encyclopedia Britannica, Titan*,* Encyclopedia Britannica (Mar. 12, 2020), https://www.britannica.com/topic/Titan-Greek-mythology, (last visited Apr. 27, 2021) ([T]he Titans rebelled against their father, who had shut them up in the underworld (Tartarus). Under the leadership of Cronus they deposed Uranus and set up Cronus as their ruler. But one of Cronus' sons, Zeus, rebelled against his father, and a struggle then ensued between them.) (emphasis added).

and league executives. Section I covers labor law and antitrust principles, the harmonization of labor and antitrust law, and their impact on professional sports. Section II deep dives into collective bargaining and its role in professional sports. Section III covers the responsibility and influence of unions, the National Labor Relations Act (NLRA),[10] and Board. Section IV discusses lockouts and labor deals within different leagues of professional sports. Lastly, Sections V and VI speak to the influence of social justice and political pressure, the development of legislation swaying particular infrastructures within professional sports, and gives preliminary recommendations that may help ease future negotiations in professional sports.

I. LABOR LAW AND ANTITRUST
THE SLOW 'STRIKING' MOVEMENT OF FEDERAL LAW IN SPORTS:

Attempts to Harmonize Economic Principles of Antitrust and Labor Law

Arguably, the world of professional sports is an abyss of economic struggles controlled by the mismanagement of egos when professional sports executives, players, and owners close the doors to the negotiating room. Courts recognize that professional athletes, unions, and sporting leagues use varying economic weapons, such as strikes and lockouts, to persuade, provoke, or encourage negotiations.[11] Mediators, arbitrators, and attorneys endeavor to strike a middle ground where all interested parties can hear a '*monetary musical tune*' that is easy on the ears.

Federal law seeks to promote two primary goals through labor policy: 1) good faith bargaining between employees and management, and 2) the opportunity for employees and management to gain concessions from each other at the bargaining table.[12] [F]ederal labor policy activists champion the freedom to

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[10] The National Labor Relations Act of 1935 (NLRA), 29 U.S.C. §§ 151-169 (1935).

[11] Mark Goodwin, Strikes, Lockouts and Other "Economic Weapons": Federal, Xper t HR, https://www.xperthr.com/employment-law-manual/strikes-lockouts-and-other-economic-weapons-federal/3009/, (last visited July 2, 2022); see also M. LeRoy, The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining, 86 Tul. L. Rev. 859, 899 (2012); see also Feldman, supra note 8.

[12] See Feldman, supra note 8.

contract.[13] However, historical legal debates around labor and freedom to contract principles take their roots from the Lochner Era.[14]

The Lochner Era derives its namesake from the case *Lochner v. New York*.[15] The Lochner Era is famously known as a "free for all" for big corporations leading to the Great Depression.[16] From 1890 to 1937, the Supreme Court's broad interpretation of due process is historically known for striking down economic regulations of working conditions, wages, and hours designed to protect the working class.[17]

In the *Lochner* case, the Court rules that a state may not regulate the working hours mutually agreed upon between employers and employees. The Court's deliberation cites that the New York State regulation violates a person's Fourteenth Amendment rights to contract freely under the Due Process Clause.[18] Writing for the majority, Justice Rufus Peckham pens:

> It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law.[19] It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his

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[13] See generally Feldman, supra note 8.

[14] See generally Aayush Singh, A New Lochner Era, Berkeley Political Review (Nov . 14, 2021), https://bpr.berkeley.edu/2021/11/14/a-new-lochner-era ("In the sixteen years since Chief Justice John Roberts has headed the Supreme Court, the judiciary has enshrined a number of anti-labor doctrines into law that echo the decision made in Cedar Point. Understanding this current state of jurisprudence requires looking back more than a century to one of the most notorious periods in Supreme Court history. The parallels between the current Court and the infamous Lochner Era are chilling.").

[15] See Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), overruled by Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952), and overruled by Ferguson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963), and abrogated by W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937).

[16] See generally Andrew Prokop, The Supreme Court's infamous 'Lochner era' ended in the 1930s. Rand Paul wants it back, Vox (Jan. 17, 2015, 10:10 AM), https://www.vox. com/2015/1/17/7628543/rand-paul-lochner.

[17] See generally Prokop, supra note 16.

[18] *Lochner*, 198 U.S. at 45.

[19] See *Lochner*, 198 U.S. at 64.

> employees (all being men, Sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees.[20] Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.[21]

The Lochner Era distinguishes itself with themes throughout many legal cases that the "*liberty element"* of the due process clause protects the freedom to contract, rights protected by the Contract Clause in U.S. Constitution.[22] Moreover, other legal themes interweaving throughout the Lochner Era ultimately center around the constitutional interpretation that the right to purchase or sell labor is a liberty protected by the Fourteenth Amendment unless certain circumstances exclude that right."[23] During this era, a court's ruling perspective is seemingly rooted in the belief that a state may only infringe on economic liberties to achieve a valid state policing purpose anchored in protecting public health, safety, or morals.[24] Thus, the judiciary's role is only to examine the legislature's justification.[25] However, anti-Lochner Era critics believe that one of the most critical and disturbing characteristics of the Lochner Era is the Supreme Court's cunning transformation of laws protecting marginalized groups into tools attacking workers and protecting corporations.[26]

Nevertheless, as the identity of the Supreme Court begins evolving with Presidential power, the ruling idealism from behind the bench also changes. The Lochner Era comes to a pivotal turning

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[20] Id.

[21] Id., overruled by Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952), and overruled by Ferguson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963), and abrogated by W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937).

[22] See U.S. Const. art. I, § 10, cl. 1; see generally Prokop, supra note 16; see generall y also Obligation of Contract, Heritage, https://www.heritage.org/constitution/#!/article s/1/essays/72/obligation-of-contract (last visited Jan. 03, 2022).

[23] See U.S. Const. amend. XIV; see also Adair v. United States, 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908), overruled by Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1941).

[24] See generally *Lochner*, 198 U.S. at 45

[25] Id.

[26] See Singh, supra note 14.

point when President Franklin D. Roosevelt alters the gravity of the Court.[27] The reelection of President Roosevelt is seemingly a signal from the American people desiring the implementation of a national economic recovery plan for American households.[28] On February 5, 1937, President Franklin Roosevelt announces a plan to expand the Supreme Court up to fifteen Justices in hopes of neutralizing the decisions of the Supreme Court affecting the industries of working-class American people.[29]

The legal decisions of two Supreme Court cases appear to restore Americans' faith in the sanity of government. The decisions in *National Labor Relation Board v. Jones & Laughlin Steel Corp.*[30] and *U.S. v. Darby*[31] impliedly send a message to corporate America that the years of exploiting labor are gradually ending.[32] In *Jones & Laughlin Steel Corp,* the Court's ruling states that Congress has the constitutional authority to safeguard the rights of employees to self-organization, and the National Labor Relations Act[33] authorizes the freedom in the choice of representatives for collective

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[27] See History.com Editors, FDR announces "court packing" plan, History (Feb. 9, 2 010, Updated Feb. 3, 2021), https://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan.

[28] See William E. Leuchtenburg, FRANKLIN D. ROOSEVELT: IMPACT AND LEG ACY, Miller Center, https://millercenter.org/president/fdroosevelt/impact-and-legacy (last visited Sept. 1, 2022); see The White House, Franklin D. Roosevelt THE 32ND PRESIDENT OF THE UNITED STATES, https://www.whitehouse.gov/about-the-white-house/presidents/franklin-d-roosevelt (last visited Sept. 1, 2022); see generally also Kenneth T. Walsh, FDR: The President Who Made America Into a Superpower, US Ne ws (Apr. 10, 2021, 12:01 AM), https://www.usnews.com/news/blogs/kenwalshs-washington/2015/04/10/fdr-franklin-delano-roosevelt-made-america-into-a-superpower.

[29] See History.com Editors, supra note 27.

[30] See N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

[31] See United States v. Darby, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

[32] See Michael Schuman, History of child labor in the United Statespart 2: the refor m movement, Bureau of Labor Statistics (Jan. 2017), https://www.bls.gov/opub/mlr/201 7/article/history-of-child-labor-in-the-united-states-part-2-the-reform-movement.htm ("Despite the relatively limited scope of the first federal child labor law (FLSA), historian Paul R. Benson, Jr. in 1970 noted that the Supreme Court's Darby decision (the decision that upheld the FLSA) was "one of the half-dozen most important cases in the whole 180-year history of American constitutional law." The decision answered the long-contested question of the role of the federal government regarding child labor and the role of the federal government in interstate commerce in general. For the child labor movement, the Darby decision was a monumental victory. Although the scope of the law was limited, it gave the Department of Labor a role in the regulation of child labor that has expanded and that the Department of Labor continues to exercise to this day.

[33] See 29 U.S.C. §§ 151-169 (1935).

bargaining.[34] A few years later, the Supreme Court strengthened the voice of the Court and the power of Congress in the case of *Darby*.[35] The Court decrees that the reach of Congressional powers can forbid the shipment of goods within interstate commerce that derives from production relating to violations of wage/hour provisions of the Fair Labor Standards Act.[36] In addition, Congress can prohibit the employment of workers with involvement in producing goods for interstate shipment relating to the Act's violation.[37]

With the Court's advocation of these distinctive legal principles, the present-day aspects of federal labor law theoretically provide a fair playground for unions and employers to have equal bargaining power.[38] Therefore, federal labor law creates a process allowing both parties to create the terms of their agreements.[39] Nevertheless, labor law can shift the balances of bargaining power by allowing employees to strike and employers to lock out their employees.[40]

While the Court's intervention is essential in regulating labor laws, the government plays a vital role serving as a "referee" between parties in the economic marketplace.[41] The government's role seeks to balance economic infrastructures in the competitive marketplace that are tethered by other critical legal aspects such as antitrust law, which promotes and regulates competition.[42]

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[34] See *Jones & Laughlin Steel Corp.*, 301 U.S. at 1.

[35] See *Darby*, 312 U.S. at 100.

[36] Id.

[37] Id.

[38] See Feldman, supra note 8.

[39] Id.; see also generally Alexandra Baumann, Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights on, 32 J. Nat'l Ass'n Admin. L. Judiciary 251, 259 (2012) ("[T]he NLRB defers decisions on charges of unfair labor practices until after the parties have gone through arbitration…").

[40] See Feldman, supra note 8.

[41] See G.L. Anderson, The Role of Government is a Referee, Not a Player, in Econo mics and Culture, Integral Society (Mar. 11, 2022), https://integralsoc.com/governance/t he-role-of-government-is-a-referee-not-a-player-in-economics-and-culture; see also M. Leroy, Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons Under the NLRA, 74 Wash. Univ. L. Qtr. 981, 1058 (1996); see also Feldman, supra note 8.

[42] See Howard Bartee, Jr, The Role of Antitrust Laws in the Professional Sports Industry From a Financial Perspective, The Sport Journal, https://thesportjournal.org/ article/the-role-of-antitrust-laws-in-the-professional-sports-industry-from-a-financial-perspective (last visited Apr. 28, 2021).

Therefore, Congress ultimately enacted antitrust laws to prevent anti-competitive behavior in business and drive down consumer prices.[43] The Sherman Antitrust Act[44] was Congress's response to help regulate this complex arena.

The Sherman Antitrust Act prohibits monopolies and restraints of trade.[45] In the initial era of combining businesses and capital, the Act's fundamental purpose is to centrally assist in controlling activities that suppress competition while taming public concern over the growing trend of monopolies[46] that may restrict production or contribute to price increases.[47] In *Spectrum Sports, Inc. v. McQuilla*n,[48] the Supreme Court states:

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.[49] The law directs itself not against conduct, which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.[50]

Violations of the Sherman Act include, but are not limited to, "per se" and "rule of reason" violations.[51] Violations are "per se" by proving that the conduct occurred and fell within a per se category.[52] "Per se" conduct includes horizontal price-fixing, horizontal market division, and concerted refusals to deal.[53] The Rule of Reason, however, is a "traditional framework of analysis" to determine whether Section One is in violation.[54] Unlike per se violations, intent and motive are relevant when conducting a Rule

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[43] See id.

[44] See Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

[45] See Antitrust Labor Law Issues In Sports, US Legal, https://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/, (last visited Apr. 28, 2021).

[46] See Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

[47] See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

[48] Id.

[49] See *Spectrum Sports,* 506 U.S. at 447-58.

[50] Id. (explaining the fundamental purpose of the Sherman Act and its essence in the marketplace).

[51] See R. Mark McCareins, Federal Antitrust Overview, Access MCLE (2013), http://www.accessmcle.com/Courses/MCLE_437.pdf, (last visited Apr. 27, 2021).

[52] Id.

[53] Id.

[54] McCareins, supra note 51.

of Reason analysis.[55] The Court will generally deliberate over facts distinctive to the business, the history of the restraint, and the reasons behind its imposition to determine its effect on competition in the relevant product market.[56]

A. MLB & Antitrust Exemption

Baseball enthusiasts are attuned to the legal issues relating to Major League Baseball (MLB) and have a firm grasp on MLB's immunity from antitrust law.[57] Yet, many fans erroneously believe that Congress is the granting authority over MLB's antitrust exemption[58] and are unaware that the immunity stems from a nearly one-hundred-year-old decision by the U.S. Supreme Court.[59] The Court's novel decision in the case of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* [60] derives from the American and National leagues' need for control over baseball.[61]

The epicenter of the case's assertions derives from the Plaintiffs accusing the Defendants of conspiring to monopolize baseball by buying up constituent clubs and inducing players to leave their current baseball clubs.[62] When the Federal League failed to operate wholly as an organization during the 1914 season efficiently, the Plaintiffs filed a '*one-of-a-kind*' federal antitrust lawsuit in January of 1915.[63] Ultimately, seven of the eight Federal League teams agreed to cease their operations in December of 1915 in exchange for various concessions from MLB.[64]

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[55] Id.

[56] McCareins, supra note 51.

[57] Nathaniel Grow, Baseball's Antitrust Exemption: A Primer, FanGraphs (Jun. 4, 2015), https://blogs.fangraphs.com/baseballs-antitrust-exemption-a-primer/, (lastvisited Apr. 27, 2021).

[58] See Grow, supra note 57.

[59] Id. (explaining that fans have misconceptions regarding the legal doctrine of antitrust exemption and how it was granted to Major League Baseball).

[60] See Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs, 42 S. Ct. 465 (1922).

[61] See Grow, *supra* note 57; see also *Fed. Baseball Club of Baltimore*, 42 S. Ct. at 465.

[62] See *Fed. Baseball Club of Baltimor*e, 42 S. Ct. at 465.

[63] See Grow, supra note 57 (explaining the unique nature of linking the causation of the lawsuit to Antitrust and being filed by a sports organization during the 1900s).

[64] Id.

Deciding to continue the fight despite the decisions of other teams, the Federal League files another antitrust lawsuit against the two major leagues.[65] Federal League alleges that the American and National leagues illegally monopolized the baseball industry by driving the Federal League out of business,[66] and the U.S. Supreme Court decides to hear the case on its merits.[67] Writing for the majority, in a unanimous decision, Justice Oliver Wendell Holmes, Jr. cites that professional baseball is not subject to the Sherman Antitrust Act.[68] The Court states:[69]

> [T]he Leagues must induce free persons to cross state lines… and … so is not enough to change the character of the business. According to the distinction insisted upon in (*Hooper v. California*, 155 U. S. 648, 655, 15 Sup. Ct. 207, 39 L. Ed. 297), the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words. As it is put by defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.[70]

The Court continues its deliberation by indicating that the players' contractual restrictions preventing the plaintiff from bargaining with the players alternatively in contractual negotiations is not an interference with commerce among the States.[71]

The Supreme Court yet again scrutinizes baseball's status under antitrust law in *Toolson v. New York Yankees*.[72] George Earl

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[65] Id.

[66] Id.

[67] See also *Fed. Baseball Club of Baltimore*, 42 S. Ct. at 465-66.

[68] See id; see generally Grow, supra note 57.

[69] See *Fed. Baseball Club of Baltimore*, 42 S. Ct. at 465-66 (Holmes, J., deducing the actions by the American and National leagues and how the actions differ from conduct that violations of antitrust laws).

[70] Id.

[71] Id.

[72] Toolson v. New York Yankees, 346 U.S. 356 (1953); see also Grow, supra note 57; see also Luke Hasskamp with Bona Law PC, Baseball and the Antitrust Laws Part I: T he Origins of the Reserve Clause, The Antitrust Attorney (Oct. 4, 2019), https://www.th

Toolson and a group of baseball players allege that several owners of professional baseball clubs are in violation of federal antitrust laws,[73] and the baseball reserve clause is at the center of discussions in the lawsuit.[74] Toolson could not get out of his contract with the Yankees due to the reserve clause.[75] Toolson and other MLB players believed that the reserve clause gave MLB teams control over players' services for the entire length of their careers under the Sherman Act.[76]

The "reserve clause" is a legal creation crafted during a meeting when the owners of the National League team agreed on a player's contractual provision that effectively bound the player to the team for their entire career.[77] The motives behind the clause involve a scheme to keep salaries down among teams and players.[78] The owners decided to allow each team to *"reserve"* up to five players for each following season.[79] Therefore, no other team can sign a "reserved" player without permission.[80]

In *Toolson,* the Court notes that for-profit baseball games and [labor structures within and among the organization] that are between the clubs of professional baseball players are not within

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eantitrustattorney.com/baseball-and-the-antitrust-laws-part-i-the-origins-of-the-reserve-clause.

[73] Id.

[74] See *Toolson*, 346 U.S. at 356.

[75] See Luke Hasskamp with Bona Law PC, Baseball and the Antitrust Laws Part I: The Origins of the Reserve Clause, The Antitrust Attorney (Oct. 4, 2019), https://www.theantitrustattorney.com/baseball-and-the-antitrust-laws-part-i-the-origins-of-the-reserve-clause.

[76] Grow, supra note 57 (stating that a minor league pitcher challenges Major League Baseball clause under the Sherman Act).

[77] See Hasskamp, supra note 75 (discussing the origin of the reserve clause in major league baseball).

[78] Id. ("At the time, most National League teams were losing money and faced bleak financial prospects. To curb expenses, the teams agreed on a strategy to keep salaries down: each team would be allowed to 'reserve' up to five players for the following season. This meant that no other team could sign a reserved player unless he received permission to do so. As expected, each team elected to reserve their five best players, i.e., their most expensive players. With no market competing for players' services, team owners were able to suppress salaries for elite talent and increase profits. Indeed, just two seasons after the adoptions of the reserve clause, most teams had become profitable, the first time that had happened.").

[79] Hasskamp, supra note 75.

[80] Id.

the scope of the federal antitrust laws.[81] The *Toolson* court assesses that antitrust laws within baseball need to be developed through legislation.[82] The *Toolson* court fears that any decision reversing baseball's antitrust immunity will unfairly subject the sport to retroactive liability.[83] Monetary damages in federal antitrust suits are triple the amount, and the Court feared MLB might go bankrupt.[84] Seemingly, the Court's unsubstantiated acumen around their ruling demonstrates an implied pause of judicial temperament that the prior application of baseball's antitrust exemption needs revisiting.

B. MLB, Antitrust, and The Labor Movement
The Damming of the Flood

Will There Ever Be Harmony?

Curt Flood is an essential historical figure of the baseball labor movement,[85] and the reason why many baseball players can invoke "free agency."[86] Flood is historically known as one of several MLB players alleging that MLB's reserve clause violated antitrust laws during the 1960s and 1970s.[87] Fed up with the league's treatment, Flood writes a letter to former baseball commissioner Bowie Kuhn, expressing:

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[81] *Toolson*, Inc., 346 U.S. at 356-57; see also Hasskamp, supra note 75 (alteration in the original).

[82] Id.

[83] Grow, supra note 57.

[84] Id.

[85] Hasskamp, supra note 75.

[86] Id. ("Curt Flood was immensely important in baseball's labor movement, serving as the plaintiff in the last baseball lawsuit to reach the U.S. Supreme Court, and helping to usher in the current "free agency" era of baseball."

[87] See generally Roger Abrams, Arbitrator Seitz Sets the Players Free, Sabr (Fall 2 009), https://sabr.org/journal/article/arbitrator-seitz-sets-the-players-free, n. 3 (last visited May 15, 2022) ("The Players Association had supported the ill-fated effort of St. Louis Cardinals outfielder Curt Flood to have the federal courts overrule a half-century of precedent and declare that baseball was covered by the antitrust laws. (In its 1922 decision in Federal Baseball v. National League, 259 U.S. 200, a unanimous U.S. Supreme Court had ruled that baseball was a purely 'state affair' not affecting interstate commerce.) Flood had refused a 1969 trade to the Philadelphia Phillies and brought suit, claiming the reserve system violated the antitrust laws. Although he ultimately struck out in the Supreme Court, Flood v. Kuhn, 407 U.S. 258 (1972), many remember Flood as a valiant champion of the players' revolution. The Players Association next turned its attention to the grievance procedure, where victory would be theirs").

> [I] am *incomparable to a piece of property* and [the withholding or selling of my labor right] is irrespective of my wishes." [A]ny system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several States."[88]

After expressing his disdain for the league's seemingly unjustified actions, Flood files a lawsuit against Kuhn and retains former Supreme Court Justice Arthur Goldberg.[89] Unwavering from his moral compass, Flood knows the suit might end his playing career.[90] Prophetically, it did.

1. *Flood v. Kuhn* | The Final Chord
Major League Baseball's Supreme Court Finale

Historically, *Flood v. Kuhn*[91] is the last baseball lawsuit to reach the U.S. Supreme Court doorsteps.[92] The antitrust suit stems from the trading of Curt Flood to another major league club without his previous knowledge or consent.[93] Kuhn, the former baseball commissioner, denies Flood's request for free agency, and Flood challenges professional baseball's reserve clause."[94]

While acknowledging flaws in prior Supreme Court cases, Justice Blackmun delivers the opinion of the Court by citing, "the longstanding exemption of professional baseball's reserve system from federal antitrust laws is an established aberration in which Congress accepts and deserves the privilege of stare decisis, and any illogic inconsistency needs remedying by the Congress."[95] In a dissent, Justice William Douglas expresses his regret over the

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[88] Hasskamp, supra note 75 ("Flood refused to report to Philadelphia and sent a strongly-worded letter to baseball's commissioner at the time, Bowie Kuhn, noting that he was not "a piece of property to be bought and sold irrespective of my wishes." Flood added his belief that "any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several States") (alteration in the original) (first emphasis added).

[89] Hasskamp, supra note 75.

[90] Id.

[91] Flood v. Kuhn, 407 U.S. 258 (1972).

[92] Hasskamp, supra note 75.

[93] *Flood*, 407 U.S. 258 (1972).

[94] Id.

[95] *Flood*, 407 U.S., at 268-85 (alteration in the original).

Court's prior decision in *Federal League*.[96] Justice Douglas states, "The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. [97]

2. Why Mindful Mediation After *Flood* Changed The Tune in MLB & Justice Holmes and The Supreme Court's Analysis of MLB's Exemption Needs Revisiting

The most critical baseball labor arbitration decision involves Arbitrator Peter Seitz.[98] Seitz's decision surrounding the interpretation and application of MLB's baseball reserve system is pivotal in baseball history.[99] In what is now known as a "*historical arbitration*," Seitz rules that the "reserve clause" is a combination of provisions in the uniform players' contract, and the governing rules of baseball only allow a club to renew a player's contract once and not perpetually.[100]

The controversy surrounding Seitz's decision is at the cornerstone of the Dodgers' attempts to contractually extend a player's contract after exercising the contractual right of an explicit term within an option clause.[101] Most teams use the option clause as their pipeline for the reserve list.[102] To support their actions,

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[96] See *Flood*, 407 U.S., at 286-88; see also *Federal Baseball Club*, 259 U.S. at 200.

[97] See *Flood*, 407 U.S., at 286-88; see also Gardella v. Chandler, 172 F.2d 402 (CA2); see generally Haywood v. National Basketball Assn., 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (Douglas, J., in chambers).

[98] See generally Abrams, supra note 87 ("The most important labor arbitration decision of all time involved baseball, two pitchers and one of the finest labor arbitrators of all time, a true arbitration "superstar." His 1975 decision in baseball's Messersmith case still reverberates throughout the multibillion-dollar sports industry. Arbitrator Seitz set the players free. Peter Seitz was a role model for many of us who came to arbitration in the 1970s").

[99] Id. (explaining that In 1975 Seitz was an arbitrator between Major League Baseball and the Major League Baseball Players Association to resolve a dispute).

[100] Abrams, supra note 87.

[101] Id.

[102] Id. (explaining that the Dodgers organization exercised its power to renew Messersmith's contract, and at the close of the 1975 season, however, Messersmith claimed that he was a free agent because the Dodgers could no longer unilaterally extend his contract. In addition, demonstrating that when McNally finished his career with 12 appearances for Montreal in 1975, and, although he retired, the Expos retained him on

executives for MLB argue that Article XV of the 1975 league basic agreement states, "[e]xcept as adjusted or modified hereby, this Agreement does not deal with the reserve system;" therefore, it is not an arbitrable matter.[103] However, Seitz points out that Article XV of the basic agreement explicitly and indirectly deals with the reserve system as it refers to: 1.) the uniform player contract containing the option clause, 2.) the major-league rules that set forth the system of reserve lists, and 3.) the no-tampering edicts of the reserve system.[104] Hence, making the matter arbitrable.

Arbitrator Seitz settles the dispute by demonstrating that the option clause covers only a single term renewal.[105] Seitz explains that renewing the entire contract does not include the option clause.[106] Seitz further expounds that if parties want to renew the option clause, the terms of the provision must be clear and unmistakable within the body of the contract.[107]

It appears that Seitz's interpretation of the reserve clause, understanding of freedom to contract principles, and forward-thinking on foreseeable public policy concerns concerning perpetual contracting align with how some courts are ruling on identical matters more than thirty years later.[108] Courts view perpetual contracts as contrary to public policy when a private contract or a provision is "*manifestly injurious.*"[109] Courts believe that individuals need to be free to order their affairs, and courts will look closely to determine if the manifestation of the same decision occurs

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its reserve list even though McNally claimed that upon completion of his 1975 option year, he was a free agent).

[103] Abrams, supra note 87.

[104] Id.

[105] Id.

[106] Id.

[107] Id.

[108] See generally Rico Indus., Inc. v. TLC Grp., Inc., 2014 IL App (1st), 6 N.E.3d 415.

[109] See *Rico Indus., Inc.* 2014 IL App (1st), ¶ 17, 6 N.E.3d at 419 ("Our Illinois Supreme Court "has a long tradition of upholding the right of parties to freely contract." Mohanty v. St. John Heart Clinic, S.C., 225 Ill.2d 52, 64, 310 Ill.Dec. 274, 866 N.E.2d 85 (2006) ("Consequently, [its] decisions have held that a private contract, or provision therein, will not be declared as void as contrary to public policy unless it is 'clearly contrary to what the constitution, the statutes or decisions of the courts have declared to be the public policy' or it is clearly shown that the contract is 'manifestly injurious to the public welfare.'") (emphasis added); see also *Mohanty,* 225 Ill.2d at 64–65, 310 Ill.Dec. 274, 866 N.E.2d 85 (quoting Vine Street Clinic v. HealthLink, Inc., 222 Ill.2d 276, 300, 305 Ill.Dec. 617, 856 N.E.2d 422 (2006)).

balanced against instances of duress or undue influence.[110] With judicial benches being a primary source for determining what constitutes public policy, any contract interpretation or language signaling ambiguous terms of indefinite duration must be terminable at the will of either party.[111]

In a retrospective legal analysis, for almost a century, baseball players have endured *"commercial harms"* by baseball owners. Due to the enforcement of Justice Holmes's seemingly 'yarn-ball' interpretation of interstate commerce surrounding baseball, the use of the reserve system appears to be a perpetual *'labor-suppressing windmill'* mechanism.[112] Redressing the commercial harms suffered by players, and the deprivation of their economic liberties fundamentally justifies why Justice Holmes's analysis of the MLB antitrust exemption needs revisiting.

II. COLLECTIVE BARGAINING "TO TRIUMPHANT OR DIE IN BATTLE"

Debatably, collective bargaining is intense when professional athletes, leagues, or team owners are hell-bent on their stances regarding money and power. Owners of professional sports teams wield substantial power both individually and as a group in collective bargaining.[113] To curb their power, professional athletes in most major American sports leagues have formed unions that devise collective bargaining agreements to protect athletes' rights.[114] Unions, otherwise known as player associations in sports, assist in navigating contract negotiations.[115]

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[110] See *Rico Indus., Inc.* 2014 IL App (1st), ¶ 19, 6 N.E.3d at 420; see also Jespersen v. Minnesota Mining & Manufacturing Co., 183 Ill.2d 290, 295, 233 Ill.Dec. 306, 700 N.E.2d 1014 (1998).

[111] See generally *Jespersen*, 183 Ill.2d at 295, 233 Ill.Dec. 306, 700 N.E.2d 1014; see generally also Mohanty v. St. John Heart Clinic, S.C., 225 Ill.2d 52, 64-65, 310 Ill.Dec. 274, 866 N.E.2d 85 (2006).

[112] See Abrams, supra note 87 (emphasis added).

[113] See Collective Bargaining Agreements in Sports Leagues, Justia (July 2022), https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues (last visited July 22, 2022).

[114] See Collective Bargaining Agreements in Sports Leagues, supra note 113.

[115] See Antitrust Labor Law Issues In Sports, US Legal, https://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/, (last visited Apr. 28, 2021); see also *What Is Collective Bargaining in Professional Sports?* STU Online (July 17, 2020), https://online.stu.edu/articles/business/collective-bargaining-in-professional-sports.aspx.

Collective bargaining is the negotiation process between an employer and a union to create an agreement governing employment conditions.[116] Players typically fight for fundamental economic rights such as pensions, health benefits, minimum salaries, and greater freedom to move between teams during collective bargaining.[117] However, more sophisticated collective bargaining includes a broader range of issues such as revenue sharing between teams and players, salary caps and structures, transfer rules (trades), injury grievances, and health benefits.[118] As players gain more rights and leverage, power plays between the players and owners during negotiations shift to conversations around the percentage of league-generated revenues versus salary caps and other limiting factors affecting players' salaries.[119]

While the uniqueness and complexity of sports labor negotiations emanate from clashes in labor law, the heart of many collective bargaining agreements comes from the struggles between players and owners.[120] The terms of the collective bargaining agreements appear to follow a similar arc.[121] For instance, a standard player contract addresses potential game cancellations or suspensions due to acts beyond the parties' control, typically in the form of "force majeure" language.[122] However, it appears that specific force majeure and cancellation provisions seemingly vary considerably across collective bargaining agreements (CBA)s. Even then, the provisions may not paint the entire picture of rights and obligations relating to player salaries.[123]

In MLB, the 2021 CBA is silent concerning the parties' rights in the event games are postponed, suspended, or canceled due to a pandemic.[124] In fact, words and phrases like "force majeure," "act of God," "pandemic," "epidemic," or "virus" are not included in the

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[116] See Collective Bargaining, Cornell.edu, https://www.law.cornell.edu/wex/collective_bargaining, (Last visited Apr. 27, 2021).

[117] Id.; see also Collective Bargaining Agreements in Sports Leagues, supra note 113.

[118] See also Collective Bargaining Agreements in Sports Leagues, supra note 113.

[119] Id.

[120] Feldman, supra note 8.

[121] Id.

[122] See Collective Bargaining, Professional Sports, and COVID-19: MLB Player Salaries in 2020, Foley.com (May 11, 2020), https://www.foley.com/en/insights/publications/2020/05/collective-bargaining-sports-covid19-mlb-salaries.

[123] Id.

[124] Collective Bargaining, Professional Sports, and COVID-19, supra note 122.

MLB 2021 CBA.[125] However, paragraph eleven of the MLB's Uniform Player's Contract (UPC) provides:

> This contract is subject to federal or state legislation, regulations, executive or other official orders or other governmental action, now or hereafter in effect respecting military, naval, air or other governmental service, which may directly or indirectly affect the Player, Club or League and subject also to the right of the Commissioner to suspend the operation of this contract during any national emergency during which Major League Baseball is not played.[126]

Thus, Commissioner Manfred effectively had the right to immediately suspend all player contracts, including any payment obligations of the clubs, indefinitely, during the state of emergency declaration during the COVID-19 pandemic.[127]

III. A HOUSE DIVIDED
COLLECTIVE BARGAINING & PROFESSIONAL SPORTS

THE IMPACT OF THE NATIONAL LABOR RELATIONS BOARD ON SPORTS

Congress originally enacted the National Labor Relations Act (NLRA) of 1935[128] under its power to regulate interstate commerce by way of Article I, Section 8 of the U.S. Constitution.[129] Under the creation of Senator Robert F. Wagner, the NLRA (or the Wagner Act)[130] driving powers govern collective bargaining process.[131] The fundamental building blocks of the NLRA center around guaranteeing private-sector employees the right to organize

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[125] Id.

[126] Id.

[127] Id.

[128] See 29 U.S.C. §§ 151-169 (1935); see also National Labor Relations Act (NLRA), Employment Law Handbook, https://www.employmentlawhandbook.com/federal-employment-and-labor-laws/nlra (last visited Sept. 1, 2022).

[129] See National Labor Relation Act (NLRA), Employment Law Handbook, https://www.employmentlawhandbook.com/federal-employment-and-labor-laws/nlra (last visited Sept. 1, 2022); see also U.S. Const. art. I, § 8.

[130] See 1935 passage of the Wagner Act, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act (last visited Sept. 1, 2022).

[131] Id.

into trade unions, engage in collective bargaining, and take collective action in strikes.[132] Any decisions and regulations of the Act flow from the National Labor Relations Board (NLRB).[133]

Along with guaranteeing private-sector employees certain rights, the NLRA regulates tactics (e.g., strikes, lockouts, picketing) each side may employ to further their bargaining objectives.[134] It does not require either side to agree to a proposal or make concessions but does establish procedural guidelines on good faith bargaining.[135] Proposals that violate the NLRA or other laws may not be subject to collective bargaining.

The NLRB gains jurisdictional authority over professional sports in the 1970s.[136] Currently, the NLRB deals with two issues in professional sports: (1) unfair labor practices; and (2) the scope of bargaining.[137] In 2019, a start-up labor organization, the International Brotherhood of Professional Running Backs (IBPRB), files a petition with the Chicago office of the National Labor Relations Board (NLRB) to form a separate union for the National Football League's Running Backs.[138] Ultimately, severing ties with the National Football League Players Association (NFLPA) is IBPRB's vision for the start-up organization.[139]

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[132] See National Labor Relation Act (NLRA), supra note 129.

[133] Id.

[134] Id.

[135] See Collective Bargaining, supra note 116.

[136] See Nat. Football League Mgmt. Council, 216 NLRB 423 (1975) ("On September 3, 1974, the court issued its decision,2 affirming the Board's dismissal of that part of the complaint which alleged that the Respondent had unlawfully refused to bargain over the future installation of artificial turf on playing fields, but rejecting the Board's dismissal of that part of the complaint which alleged that the Respondent had unlawfully instituted a rule on March 25, 1971, whereby any player leaving the bench during a fight on the playing field would automatically be fined $200.); Alexandra Baumann, Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On, 32 Pepp. J. Nat. Assn. Admin. L. Jd., 250, 307 (2012), https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1029&context=naalj.

[137] Alexandra Baumann, Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On, 32 Pepp. J. Nat. Assn. Admin. L. Jd., 250, 307 (2012), https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1029&context=naalj.

[138] See Patrick L. Egan, Gregg E. Clifton and Howard M. Bloom, Running Backs NLRB Petition Seeks To "Stiff Arm" NFL Players Association With New Bargaining Unit, College and Pro Sports Law (Aug. 28, 2019), https://www.collegeandprosportslaw.com/collective-bargaining/running-backs-nlrb-petition-seeks-to-stiff-arm-nfl-players-association-with-new-bargaining-unit/.

[139] See Id.

In order to create a new or separate union, an organization must file a unit clarification.[140] A unit clarification (UC) petition generally resolves disputes regarding the unit placement of disputed positions, typically newly created positions, in a process referred to as "accretion."[141] However, a UC petition can also affect the subdivision of an existing bargaining unit, as the IBPRB seeks to do in this petition.[142] Severing efforts can occur when changes in particular circumstances negate the "community of interest."[143] For instance, changes in more suitable terms and conditions of employment are triggering circumstances that may affect the community interest.[144] The petition filed by the IBPRB alludes to "the unique career structures" of running backs as its basis for the loss of the "community of interest" between the running backs and other NFL players of the NFLPA.[145]

In order to have a successful UC petition, the petitioner must show: 1). recent, substantial changes in their operations; or 2). the presence of other compelling circumstances warranting disregarding the long-existing bargaining history of the parties.[146] While the role of a running back consistently evolves yearly due to more aggressive offensive schemes, the essential building blocks of a running back position is unchanged.[147] The unique career structure the IBPRB refers to in their petition is that the average career of an NFL running back is 2.5 years compared to 3.3 years for all other positions.[148] Although an NFL running back career is shorter, the IBPRB challenges do not gravitate toward satisfying the compelling circumstances for a successful UC petition due to the lack of substantial reasoning around contributing factors to shorter careers for running backs.[149]

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[140] See Unit Clarification Petitions, Snider Law, https://www.sniderlaw.com/unit-clarification-lawyer (last visited Sept. 1, 2022); see also Egan, et al., supra note 138.

[141] See Egan, et al., supra note 138.

[142] Id.

[143] Id.

[144] Id.

[145] Id.

[146] See Egan, et al., supra note 138.

[147] Id.

[148] Id.

[149] Id.

IV. PROFESSIONAL SPORTS LOCKOUTS & COLLECTIVE BARGAINING AGREEMENTS

A Historical Chord of Strife

The history of collective bargaining negotiations in professional sports have long periods of labor strife.[150] In many ways, collective bargaining in professional sports equates to management and labor using economic weapons, including strikes and lockouts, to gain leverage at the bargaining table.[151] Whether lockouts are lucrative chess moves or labor deals disguised as economic weapons, they are combative elements depending on the leveraging power of those negotiating.[152] However, the ramifications of failed collective bargaining are high for players, team owners, and fans.[153]

A. Economic Weapons

In order to get a clear and current picture of labor negotiations in sports and non-sport industries, it is crucial to understand the evolution of professional sports lockout from a defensive maneuver to an offensive tactic.[154] Lockout maneuvers give professional sporting organizations leverage at the bargaining table to get more desirable terms from players.[155] While lockouts receive no explicit statutory protection under labor law, the NLRA expressly protects

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150 Id.
151 See Egan, et al., supra note 138.
152 See Goodwin, supra note 11.
153 See generally Feldman, supra note 8.
154 See id.
155 Id.

strikes.[156] Such protection reflects the NLRB's early view that strikes and lockouts are not equal counterparts.[157]

Historically, striking by sports players, at times, disproportionately created lockouts by sporting organizations.[158] The NLRB views lockouts as aggressive but striking as a mechanism for reducing the economic disparity between unions and management.[159] Yet, legal scholars consistently debate about the presence of different economic weapons appearing in past negotiations of sporting organizations. For example, under the decisions of the NLRB, employers and sports organizations may hire replacement workers during a strike.[160] In 1987, NFL owners executed a similar negotiating tactic to pressure NFL players to end their strike.[161] The Players suffered a severe defeat when the NFL

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[156] See NLRA and the Right to Strike, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/nlra-and-the-right-to-strike, ("Section 7 of the Act states in part, Employees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Strikes are included among the concerted activities protected for employees by this section. Section 13 also concerns the right to strike. It reads as follows: Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. It is clear from a reading of these two provisions that: the law not only guarantees the right of employees to strike, but also places limitations and qualifications on the exercise of that right) (last visited Apr. 27, 2021); see also Feldman, supra note 8.

[157] Feldman, supra note 8.

[158] See Daniel Bukszpan, 10 Game Changing Pro Sports Lockouts and Strikes, CNB C (Mar. 8, 2011, 2:01 PM EST, Updated, Sept. 13, 2013 4:33 PM EST), https://www.cnb c.com/2011/03/08/10-Game-Changing-Pro-Sports-Lockouts-and-Strikes.html.

[159] See Feldman, supra note 8; see also Michael H. LeRoy, The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining, 86 Tul. L. Rev. 859 (2012*);* see also Paul D. Staudohar, Baseball Labor Relations: The Lockout of 1990, Monthly Lab. Rev., Oct. 1990, at 32 (stating that negotiations between the players' union and MLB "in 1968 and 1970 set the stage for later breakthroughs that would result in undreamed of economic gains for the players").

[160] See Howard M. Wexler, A Costly Lesson for Employers on Replacement Workers, Employer Labor Relations (June 6, 2016), https://www.employerlaborrelations.com/2016/06/06/1391/#:~:text=Ever%20since%20the%20Board%E2%80%99s%20decision%20in%20Hot%20Shoppes%2C,employer%20was%20motivated%20by%20an%20%E2%80%9Cindependent%20unlawful%20purpose.%E2%80%9D, ("Ever since the Board's decision in Hot Shoppes, Inc., 146 NLRB 802 (1964), employers have been permitted to hire permanent replacement workers for economic strikers almost at will, unless the union can put forth evidence that the employer was motivated by an "independent unlawful purpose.").

[161] See Michael H. LeRoy, The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining, 86 Tul. L. Rev. 859 (2012); see also Paul D. Staudohar, Baseball Labor Relations: The Lockout of 1990, Monthly Lab. Rev., Oct. 1990, at 30.

resumed games by persuading many strikers to return and hiring striker replacements.[162] NFL football players abandoned the frequent use of strikes after 1987, and players never recovered their preference for collective bargaining after this miscalculated strike.[163]

1. Major League Baseball (MLB) and Minor League Baseball Lockout & Strikes

The MLB organization consistently encounters turbulent labor-management issues.[164] During MLB collective bargaining negotiations, the critical issues typically at stake are pension payments, minimum salaries, salary caps, and revenue sharing.[165] The collective bargaining process can be more challenging when unforeseen circumstances like COVID-19 occur, thereby complicating the business of professional baseball.[166]

Essentially, due to complications of COVID-19 affecting MLB's 2021 regular season, labor strifes between the players and owners begin to arise, triggering specific terms of the CBA between MLB and the Major League Baseball Player Association (MLBPA).[167] Despite the apparent absence of significant concessions to MLB players, the negotiating desires of MLB owners center around expanding the post-season.[168] The MLBPA rejected the owners' proposal because it primarily benefitted the owners instead of both parties.[169] According to the terms of the CBA, all post-season television revenues go to the owners, and players share gate revenues.[170] Therefore, with COVID-19 health restrictions, the owners' proposal equates to players receiving a significantly smaller slice of the pie while receiving nothing in return for putting

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[162] Michael H. LeRoy, The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining, 86 Tul. L. Rev. 859, 885 (2012).

[163] Id.

[164] See Feldman, supra note 8.

[165] See Id.

[166] Dayn Perry, What MLB, MLBPA negotiations mean for 2021 season and beyond, and why players rejected league's offer, CBS Sport (Feb. 2, 2021, 4:11 PM EST), https://www.cbssports.com/mlb/news/what-mlb-mlbpa-negotiations-mean-for-2021-season-and-beyond-and-why-players-rejected-leagues-offer.

[167] See Perry, supra note 166.

[168] Id.

[169] Id.

[170] Id.

their health at risk during an extended post-season amid the pandemic.[171]

Along with extended post-season clashes, baseball players from the major and minor leagues have growing disputes around the failure to maintain minimum salaries, deferred payment of salaries, and keeping up with the pace of revenue generation in the sport.[172] The U.S. District Court of Northern California recently made deliberations surrounding allegations by Minor League Baseball players that MLB, the MLB commissioner, and MLB franchises are in violation of minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act (FLSA) and other state laws in the case of *Senne v. Kansas City Royals Baseball Corp*.[173]

Due to the lawsuit's class certification, the *Senne* court's initial task is determining whether MLB violates the FLSA under Florida's state constitution.[174] In March 2018, Congress passed the Save America's Pastime Act (SAP Act), which amended the FLSA to exempt baseball players from the statute's minimum wage and overtime requirements.[175] In particular, the amendment exempted from sections 206 and 207 of the FLSA states:

> [A]ny employee employed to play baseball who is compensated pursuant to a contract that provides for a weekly salary for services performed during the league's championship season (but not spring training or the off season) at a rate that is not less than a weekly salary equal to the minimum wage under section 206(a) of this title for a workweek of 40 hours, irrespective of the number of hours the employee devotes to baseball-related activities.[176]

The amendment went into effect on March 23, 2018.[177] Following the enactment of the SAP Act, Defendants filed

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171 Id.

172 Id.

173 Senne v. Kansas City Royals Baseball Corp., No. 14-CV-00608-JCS, 2022 WL 783941 (N.D. Cal. Mar. 15, 2022).

174 See *Senne*, 2022 WL 783941, at *14-36.

175 See *Senne*, 2022 WL 783941, at *17.

176 See 29 U.S.C. § 213(a)(19); see also *Senne*, 2022 WL 783941, at *17.

177 See Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, at *1127 (2018); see *Senne*, 2022 WL 783941, at *17.

supplemental answers asserting an affirmative defense in which they contend that the SAP Act bars in whole or in part Plaintiffs' FLSA claims, and their claims under all state laws follow the FLSA and/or incorporate the FLSA exemptions, including New York and Florida law.[178]

The next task of the *Senne* court is to determine whether or not MLB is a joint employer of minor league players. To determine if a joint employment relationship exists under the FLSA, courts apply an "economic reality" test relating to the circumstances of the whole activity. The factors a court will consider are whether the alleged employer: (1) has the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. However, under the NLRA or FLSA, the *Senne* court must analyze the relationship between the players and the league to determine whether MLB is a joint employer of the players playing with the league's affiliate member teams.

After careful deliberation, the *Senne* court determines that the Florida Minimum Wage Act (FMWA), which implemented the Florida constitutional amendment requiring payment of minimum wage, and the guidance within the federal FLSA regarding the definition of "employee" is not incorporated in the Save America's Pastime (SAP) Act, which post-dates the FMWA.[179] In addition, as adopted by voters, the Florida constitutional amendment itself did not incorporate future statutory changes to FLSA into the Florida minimum wage outlined in the constitution and implementing laws.[180] The Court further extends its analysis by holding that the language of FMWA did not indicate a legislative intent to amend the constitution to incorporate future FLSA exemptions, and any such amendment to the constitution by the legislature would likely violate the non-delegation principle.[181]

As a matter of first impression, the *Senne* court finds that if a state constitution lacks language incorporating a subsequent

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[178] Id.

[179] See *Senne,* 2022 WL 783941, at *26.

[180] Id.

[181] See Fla. Const. art. 2, § 3; see also Fla. Const. art. 10, § 24; see Fair Labor Standards Act of 1938 § 13, 29 U.S.C.A. § 213(a)(19); see also Fla. Stat. Ann. §§ 448.110(3), 448.110(10); see *Senne*, 2022 WL 783941, at *26.

federal statute exempting baseball players from the definition of "employee," minor league players must be considered an employee under FLSA and that the MLB organization is also a joint employer of minor league players.[182] In addition to the Court's first finding, it uncovers that MLB's demonstrative failure to maintain records over time constitutes a recordkeeping statute violation for each improper record of the employee.[183] The Court also establishes that wages paid as signing bonuses cannot be an offsetting expense from the minimum wage liability under FLSA and that signing bonuses are to be paid within the articulated bonus pay period and not beyond that specific date.[184]

The *Senne* court also undisputedly establishes that the evidence demonstrates that MLB significantly controls the hiring and firing of affiliate players and teams.[185] The Court points to one of the most prominent features of MLB's role as a joint employer, which is conducting the First-Year Player Draft.[186] The Court also corroborates additional evidence of MLB requiring amateur players to upload forms and provide medical records through MLB's online portal and undergo drug testing, among other things.[187]

As to firing, the Court finds distinct facts establishing that MLB has significant control over all minor league players.[188] In particular, the Major League Constitution gives the Commissioner the authority to take punitive action against a player for conduct deemed by the Commissioner "not to be in the best interests of Baseball," including declaring a player permanently ineligible to play.[189] As the court in *Ruiz*[190] found, it is not the frequency with which this occurs but the fact that MLB holds this significant power supporting the finding that MLB is a joint employer.[191]

Although MLB attempts to create a myriad of factual disputes concerning MLB's control over the rate and method of minor league

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[182] See *Senne*, 2022 WL 783941, at *106.
[183] Id.
[184] Id.
[185] See *Senne*, 2022 WL 783941, at *42.
[186] Id.
[187] Id.
[188] See *Senne*, 2022 WL 783941, at *43.
[189] Id.; see also Major League Baseball Constitution, Art. II § 3.
[190] See Ruiz v. Fernandez, 949 F. Supp. 2d 1055 (E.D. Wash. 2013), order clarified, No. CV-11-3088-RMP, 2013 WL 12167930 (E.D. Wash. June 24, 2013).
[191] See *Senne*, 2022 WL 783941, at *43.

players' payment; however, their arguments are unpersuasive to the *Senne* court.[192] By applying the proper legal standard, the Court concludes that MLB exercises power regarding setting the amount of the uniform rate for first-year minor leaguers.[193] In particular, the governing determination of the uniform rate are decisions by the Major League Clubs for each Minor League classification or League.[194] The Court makes an inference that any act of MLB in association concerning compliance with bylaws or rules is a binding act of the association.[195]

The Court grants summary judgment to the minor league players regarding state-specific violations by MLB.[196] Findings by the Court determine that states such as Arizona impose labor laws requiring recordkeeping obligations for each employee; therefore, the Court rejects MLB's suggestion that an employer's recordkeeping violation constitutes a single violation.[197] Under Arizona's state labor regulations, a "violation" is a "transgression of any statute or rule, or any part of a statute or rule, including both acts and omissions,"[198] and the implementing regulation makes clear that this requirement applies to "each employee."[199] Therefore, the Court concludes that an employer commits a separate violation of Arizona's recordkeeping requirement for each employee whose payroll records are not maintained as required.[200]

Finally, the Court gives a two-part analysis on signing bonuses, timely payments, and minimum wage liability.[201] The *Senne* court points out that under the FLSA, "remuneration for employment paid to ... an employee" is considered part of the employee's regular rate of pay unless it falls under one of eight categories of "excludable payments," which include discretionary

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192 See *Senne*, 2022 WL 783941, at *48.
193 Id.
194 Id.
195 Id.
196 Id.
197 See *Senne*, 2022 WL 783941, at *88.
198 Id.; see Ariz. Admin. Code R20-5-1202 (28).
199 See *Senne*, 2022 WL 783941, at *88; see also Ariz. Admin. Code R20-5-1210(B).
200 See *Senne*, 2022 WL 783941, at *88.
201 See *Senne*, 2022 WL 783941, at *98.

bonuses.[202] The regulations explain that a bonus is "discretionary" under the following circumstances:[203]

> In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount.[204]

Yet, if the bonus is a promise of the employer to induce employment or performance, it is not a wage, and the amount cannot be a deduction from the regular wage rate.[205] Therefore, under FLSA, deducting the amount of a signing bonus from the minimum wage rate violates the Act.[206] Furthermore, bonuses contingent upon the employee's continuing employment until a specific payment date must include the regular pay rate at remission.[207] While it appears that minor league players are toiling with labor exploitation issues, MLB players are battling contractual issues with the league and owners.

A. The Historic Lockout | The Grumbling Sound of Future Lawsuits

The initial months of 2022 will be marked as a historic moment in baseball history.[208] For the first time in twenty-seven years, the cancellation of MLB's games is directly related to a labor dispute leading to the cancellation of the first regular season in history.[209]

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[202] See 29 U.S.C. § 207(e); see also 29 C.F.R. § 778.208; see *Senne*, 2022 WL 783941, at *98.

[203] See *Senne*, 2022 WL 783941, at *98.

[204] 29 C.F.R. § 778.211(b); see *Senne*, 2022 WL 783941, at *99.

[205] 29 C.F.R. § 778.211(c); see *Senne*, 2022 WL 783941, at *99.

[206] See *Senne*, 2022 WL 783941, at *99.

[207] Id.

[208] See Max Molski, How many MLB games were canceled due to the 2022 lockout?, NBC Sports (Mar. 10, 2022), https://www.nbcsports.com/bayarea/giants/how-many-mlb-games-were-canceled-due-2022-lockout.

[209] See Maxski, supra note 208; see also Matt Johnson, Why the MLB lockout happened, the new CBA, and their history, SportsNaut (Mar. 11, 2022), https://sportsnaut.com/mlb-lockout.

By using the powerful economic weapon of a lockout, MLB owners and the league created a labor war.[210]

It is important to remember that a lockout differs from a strike.[211] Strikes involve players imposing a work stoppage.[212] However, in a lockout, the ownership group can refuse to consent to any league-related operations without reaching a new CBA.[213] Without a new CBA, MLB players are prohibited from team facilities altogether.[214]

Until the signing of a new CBA, the salaries of MLB players cease unless they have a signing bonus schedule or deferred salary due.[215] With both sides drawing definite lines in the sand, *revenue allocation* is the central issue of the 2022 baseball labor dispute.[216] The MLBPA's lack of faith in the MLB organization to negotiate in good faith gives the stench of a lawsuit alleging MLB's practice of unfair labor practices.[217]

V. THE ARMS OF SOCIAL JUSTICE & PROFESSIONAL SPORTS

The Race to Social Equality

Social justice and equality fundamentally hinge on providing a remedy to the capitalistic exploitation of human labor and societal obstructions to fairness.[218] Presently, social justice is expanding from economics to spheres that include race, gender, and other manifestations of inequality.[219] Today, athletes are using their voices and celebrity platforms, through their respective sports, to move the needle around social justice and inequality.[220] Social

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[210] See generally Kerry Flynn, MLB lockout: What is it? Why is it happening? When is it over?, CNN (Mar. 5, 2022, 12:30 PM EST), https://www.cnn.com/2022/03/05/sport/mlb-lockout-explainer-baseball-spt-intl/index.html.

[211] See Flynn, supra note 210.

[212] Id.

[213] Id.

[214] Id.

[215] Id.

[216] Id.

[217] See Flynn, supra note 210.

[218] See generally What is Social Justice, Pachamama, https://pachamama.org/social-justice/what-is-social-justice (last visited Sept. 1, 2022).

[219] Id.

[220] See Kiki Jain, Social Justice Activism in Sports, BreakThrough U.S. (Aug. 21, 20 19), https://medium.com/breakthrough-u-s/social-justice-activism-in-sports-68da2c8d475.

justice and sports have always intersected, producing a reciprocal relationship that raises awareness around inequality and discrimination while stirring political backlash.[221]

Although sports have progressively shined a light on injustices of yesteryear, twenty-first-century athletes are still feeling the fire of discrimination by seemingly the most progressive companies in the world.[222] For instance, Olympian Allyson Felix alleges Nike cut her contract pay by seventy percent and explicitly rejected any maternity protections in contract negotiations.[223] Allegedly, public backlash drives Nike to change its policies and remove contract reductions for pregnant athletes.[224] Whether Nike's actions are performative or genuine acts of mindful social responsibility, inequality in the sports world will always find its way to media outlets for the world to see.

In 2020 and 2021, the reckoning of social justice worldwide revived conversations about varying degrees of inequalities, the duty of government and businesses, and aspects of economic empowerment of marginalized communities.[225] However, in March of 2021, Oregon Ducks player Sedona Prince showed the disparity between the men's and women's weight rooms in a viral TikTok video.[226] Garnering over twelve million views, Prince's video features the men's NCAA teams' access to a spacious room full of exercise training equipment, while the NCAA women's teams' access to exercise includes only a single set of weights.[227] The race to balance the scales of social equality is never-ending.

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[221] See Jain, supra note 220.

[222] See generally Talia Lakritz, 13 athletes who have fought for equal pay, Insider (Aug. 26, 2021, 4:05 PM), https://www.insider.com/athletes-olympians-equal-pay-womens-sports#olympic-track-and-field-star-allyson-felix-spoke-out-after-she-said-nike-offered-her-a-70-pay-cut-after-giving-birth-7.

[223] See Lakritz, supra note 222.

[224] Id.

[225] See Hesham Zafar and Ahmed Medien, How the power of sport can bring us together and drive social justice, World Economic Forum (Jan, 8, 2021), https://www.weforum.org/agenda/2021/01/uniting-the-world-through-sport-what-can-we-learn-from-sport-in-enabling-social-cohesion/.

[226] See Lakritz, supra note 222.

[227] See Talia Lakritz, (Scroll Down To:) In March, Oregon Ducks player Sedona Prince showed the disparity between the men's and women's weight rooms in a viral TikTok video, Insider (Aug. 26, 2021, 4:05 PM), https://www.insider.com/athletes-olympians-equal-pay-womens-sports#in-march-oregon-ducks-player-sedona-prince-showed-the-disparity-between-the-mens-and-womens-weight-rooms-in-aviral-tiktok-video-12.

Nevertheless, the race to fight social justice can ignite a political war.

A. Baseball & Social Justice: The Flames of a Political Civil War

In April 2021, key Republican lawmakers started laying the foundation to introduce legislation to remove MLB's antitrust exemption.[228] The motivation behind the legislation comes after MLB announced plans to move the All-Star Game out of Georgia because of the state's new voting law, Senate Bill (SB) 202.[229] Often labeled as "Georgia's Anti-Voter Law," most critics of the law are taking the position that the law attacks absentee voting, allows the state to take over county elections, and retaliates against the elected Secretary of State by replacing him with a State Board of Elections Chair chosen by the legislature.[230] Due to companies and major power players condemning Georgia's new voting law, MLB moved the 2021 All-Star Game and MLB Draft out of Georgia.[231] Commissioner Rob Manfred said in a statement, "Major League Baseball fundamentally supports voting rights for all Americans and opposes restrictions at the ballot box. Fair access to voting continues to have our game's unwavering support."[232] Nonetheless, it appears that Commissioner Manfred's statement vocalizing

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[228] David Aaro, Republican lawmakers to introduce legislation to take away MLB's antitrust exemption, FOXBusiness (Apr. 20, 2021, 5:59 AM EST), https://www.foxbusiness.com/sports/republican-lawmakers-intoducing-legislation-mlb-anti-trust-exemption, (last visited Apr. 27, 2021).

[229] See 2021 GA S.B. 202*;* see also id.*;* see also Zack Beauchamp, Georgia's restrictive new voting law, explained, Vox (Mar. 26, 2021, 2:40 EST), https://www.vox.com/22352112/georgia-voting-sb-202-explained ("The bill, known as SB 202, gives state-level officials the authority to usurp the powers of county election boards — allowing the Republican-dominated state government to potentially disqualify voters in Democratic-leaning areas. It criminalizes the provision of food and water to voters waiting in line, in a state where lines are notoriously long in heavily nonwhite precincts. It requires ID for absentee ballots and limits the placement of ballot drop boxes.").

[230] See Georgia's Anti-Voter Law (SB 202), ACLU GA, https://acluga.org/georgias-anti-voter-law (last visited Sept. 1, 2022).

[231] See Joel Anderson et al., Why Major League Baseball Is BoycottingGeorgia, Slate (Apr. 7, 2021, 4:04 PM), http://slate.com/culture/2021/04/mlb-all-star-game-moved-atlanta-georgia-voting-law-sb202.html; see also Terry Nguyen After Georgia, companies are banding together to condemn restrictive voting laws, Vox (Apr. 12, 2021, 12:27 PM EST), https://www.vox.com/the-goods/2021/4/5/22368566/corporate-response-georgia-sb202.

[232] Id.

MLB's perspective around voting rights is not the only thing provoking politicians to pull the curtain on baseball's antitrust exemption.

In June of 2022, the chairman and ranking minority member of the Senate Judiciary Committee, Sen. Richard Durbin-Chairman and Charles Grassley, sent a letter to an advocacy group for minor leaguer baseball asking questions about baseball's antitrust exemption.[233] The letter probes about the impact of the antitrust exemption on negotiating minor league players' contract length, wages, housing, or other working conditions.[234] MLB responds in a seventeen-page letter to Congress with a warning that minor league players may lose job opportunities, and communities may lose minor league teams if stripping of baseball's antitrust exemption occurs.[235] However, critics of MLB's antitrust exemption debate the impact of the loss when the starting salary for a triple-A player — the very top of the minor leagues — is about $14,000.[236] The federal poverty line is one is $13,590.[237]

Legal experts believe that the most significant impact of the exemption is that MLB can prevent a franchise from moving to a different city without league permission.[238] The significance of the exemption's impact drives the U.S. Justice Department (DOJ) to follow the tune of the Senate Judiciary Committee by filing a statement of interest in June of 2022.[239] The DOJ's statement urges lower courts to limit the baseball exemption to conduct central to the business of offering professional baseball games to the public.[240]

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[233] See Associated Press, Senate Judiciary Committee probing MLB's antitrust exemption, New York Post (June 28, 2022, 11:16 PM), https://nypost.com/2022/06/28/senate-judiciary-committee-probing-mlbs-antitrust-exemption.

[234] See Associated Press, supra note 233.

[235] See Bill Shaikin, MLB to Congress: Without our antitrust exemption, players and fans lose, Los Angeles Times (July 29, 2022, 8:45 AM PT), https://www.latimes.com/sports/story/2022-07-29/mlb-to-congress-without-our-antitrust-exemption-players-and-fans-lose.

[236] Id.

[237] See HHS Poverty Guidelines for 2022, ASPE (Jan. 12, 2022), https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines; see also id.

[238] See Associated Press, supra note 233.

[239] Id.

[240] Id.

VI. CONCLUSION AND RECOMMENDATION

Will the future of sports change due to political pressure or the fight for social justice? The answer to that question is undetermined. The power of the athlete and the uncertainties of balancing government intervention in sports is a challenging feat.

The intersection between labor and antitrust laws coupled with professional sports and outcries for social justice reforms makes the water murky when looking into the future.[241] Ultimately, all adversarial parties have to decide on whether the financial pie or access to specific resources will be distributed more equitably among the players, owners, or sporting organizations.[242] The genuine merit of the dispute between all parties is how to design a distinctive business model to meet all the parties' unique needs.[243]

In order to help balance the special interest of Congress and professional sports leaders, the implementation of a '*disinterested'* oversight council needs to occur in order to provide a more binocular viewpoint on conflicting legal and public policy issues. The proposed council should be an arm of an administrative agency with rulemaking authority. The selection of proposed council members will derive from prerequisites set by former professional athletes and the Attorney General of each team's state location. The need for this council is due to the appearance of varying collective bargaining mechanisms, the uniqueness of particular sports, and the strong-arm techniques used by owners during negotiations. Although the council's inner workings will need more cultivating, it will likely be able to provide a viable labor solution that limits subjective judicial review and mediation in sports litigation.

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[241] Id.
[242] See Bartee, supra note 42.
[243] Id.