

Spring 1995

The Ploys of Summer: Antitrust, Industrial Distrust, and The Case Against a Salary Cap for Major League Baseball

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<http://ir.law.fsu.edu/lr/vol22/iss4/12>

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THE PLOYS OF SUMMER: ANTITRUST, INDUSTRIAL DISTRUST, AND THE CASE AGAINST A SALARY CAP FOR MAJOR LEAGUE BASEBALL*

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Jeanne Jorgensen (Class of 1996) and Rahulan Kathirgamanathan and Michael Perry (Class of 1997) provided valuable research assistance. Larry Sullivan, Kevin Johnson, and Warren Grimes generously offered comments on prior drafts. Our thanks is due also to our colleagues of the Southwestern faculty who attended and critiqued our presentations as part of a works-in-progress in January 1995. Any mistakes in the final version are our fault.

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I. INTRODUCTION

I see the boys of summer in their ruin

Lay the gold tithings barren

Setting no store by harvest, freeze the soils.

Dylan Thomas¹

IN the summer of 1994, America endured the first labor dispute ever to cancel the finish of a Major League Baseball season, including the playoffs and World Series.² It happened because the Major League Baseball Players' Association, the union representing professional ballplayers, went on strike to stop owners from carrying out their threat to impose unilaterally a salary "cap"³ on the amount each

1. DYLAN THOMAS, *I See the Boys of Summer*, in COLLECTED POEMS (1939), quoted in ROGER KAHN, *THE BOYS OF SUMMER* ix (1972).

2. For an account of the cancellation of the remainder of the season and the World Series, see, e.g., Murray Chass, *Baseball: The Season—Owners Terminate Season, Without the World Series*, N.Y. TIMES, Sept. 15, 1994, at A1; Ross Newhan, *Baseball Season, Series Canceled*, L.A. TIMES, Sept. 15, 1994, at A1. For accounts of the strike's beginning, see Murray Chass, *Baseball Is Given a Stop Sign as Strike Hour Arrives*, N.Y. TIMES, Aug. 12, 1994, at A1; Ross Newhan, *Owners Gripe as Baseball Strike Begins*, L.A. TIMES, Aug. 12, 1994, at A1.

3. A salary cap limits how much teams can spend on players' wages. A cap restricts a ballclub's payroll, not how much a franchise might want to spend on such superstars as Ken Griffey Jr. or Frank Thomas.

Of course, the more high-priced players a team signs, the less room it has under its salary cap. A general manager would need to fill out the roster with inexpensive talent if the payroll is eaten up by a half-dozen or so stars.

The owners' proposal would split revenues 50-50 with the players. Baseball is a \$1.8 billion industry, so take that figure, divide by the number of teams (28), and divide again by two (for the 50% split) for a salary cap of \$32 million [per team].

The owners want a ceiling of 110% of that average and a floor of 84%. So the proposal also sets a limit on how little a club can spend. Some franchises would have

club may spend on its payroll.⁴

Things got worse. As summer turned to fall and then to spring, the dispute persisted with no end in sight⁵—causing concern the 1995 season would be canceled before it even started.⁶ Finally, after 231

to increase payrolls.

Players oppose any form of a cap.

Cap Would Set Pay Ceiling, Floor, BASEBALL WEEKLY, Aug. 24-30, 1994, at 9.

On December 23, 1994, owners announced the unilateral implementation of their salary cap demand. But in January 1995, faced with a potential unfair labor practice complaint by the National Labor Relations Board (NLRB) for breach of the duty to bargain in good faith, owners announced the cap would be dropped in favor of a "luxury tax" plan. This luxury tax would impose a monetary penalty, the proceeds of which would be shared by other major league franchises, on any owner who exceeded the mandatory payroll applicable to all clubs in a given year. See, e.g., Associated Press, *Clinton to Baseball: Keep Talking*, L.A. TIMES, Feb. 6, 1995 at C1 ("Owners made their new proposal . . . asking for a 75 percent tax on the amount of payrolls between \$35 million and \$42 million, and a 100% tax on the amount above that.")

Players insisted the luxury tax was really another salary cap with a new label. See, e.g., Ross Newhan, *Baseball's Owners, Players Renew Talks*, L.A. TIMES, Feb. 27, 1995, at C14 ("The issue still remains cost control and the owners' desire for a payroll mechanism that will slow salary growth. Amid the optimism, there is the reality that the union will continue to oppose any rate tax that works as a salary cap.")

4. Under federal labor law, see National Labor Relations Act (NLRA) § 8(d), 29 U.S.C. § 185(d) (1988), once a collective bargaining agreement expires and negotiations between labor and management for a new one have reached impasse, each side is free to deploy its "economic weapons"—including strikes and picketing by labor and lock-outs and unilateral changes in wages and working conditions by management. See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

The Major League Baseball Players' Association ("MLBPA") called the strike for mid-summer, threatening owners' revenue stream during lucrative pennant races, the playoffs, and the World Series, in hopes of persuading them to drop their plan of unilaterally implementing the salary cap before the start of the 1995 season. See, e.g., Ross Newhan, *Players Call for Aug. 12 Walkout Date*, L.A. TIMES, July 29, 1994, at C1, C8 ("[T]he owners have made it clear that they are prepared to unilaterally implement a salary cap without the players' consent after the season ends, which leaves us with no choice [but to strike].") (quoting remarks of MLBPA Executive Director Donald Fehr). But see *id.* at C1 ("We believe that the Aug. 12 [strike] date maximizes the chance of successfully negotiating an agreement without a work stoppage.") (quoting remarks of MLBPA Executive Director Donald Fehr).

For a summary of the NLRA's affect on baseball, see generally Elliott Almond, *Owners' Main Weapon Hasn't Been Unsheathed*, L.A. TIMES, Aug. 20, 1994, at C1, C9.

5. Despite personal intervention by President Clinton, the parties remained far apart as late as the week of the scheduled opening of spring 1995 training camps. See Ross Newhan & Doyle McManus, *Clinton Pitches Baseball Strike's Ball to Congress*, L.A. TIMES, Feb. 8, 1995, at A1. In fact, each of three possible strike settlements was rejected during White House-brokered talks: adopting a modified "luxury tax" plan recommended by presidential mediator William J. Utery (rejected by players); submitting the matter to binding interest arbitration while returning to work for the 1995 season, suggested by the White House (rejected by owners, but embraced by players); and conducting further presidential fact-finding while returning to work (suggested by the players but rejected by owners). *Id.*

Mediator Utery said he had never seen such deep hostility in a career of mediating difficult labor disputes. *Id.* at A19.

6. In a statement issued by the White House, President Clinton said "America has been living without baseball for too long," noting that the walkout threatened the start of the 1995

days—the longest strike in professional sports history⁷—ballplayers returned to play an abbreviated 144-game schedule under an injunction preserving pre-strike employment conditions,⁸ but without a final settlement of the owners' demand for payroll cost controls.⁹ It was a state of affairs guaranteed to displease all.

Owners, who had schemed unsuccessfully for most of the past decade to limit players' salaries by means both legitimate¹⁰ and illegitimate,¹¹ claimed as many as nineteen of the twenty-eight clubs were losing money.¹² Skyrocketing player salaries, they argued, finally had to be brought under control.¹³

season. "It could well damage the economies of the spring training states. It is imperiling the livelihoods of tens of thousands of workers whose jobs depend on baseball. And it is trying the patience and depressing the spirits of millions of baseball fans—including me." *Clinton, Mayors Urge Baseball Negotiators to Resume Talks*, 1995 Daily Lab. Rep. (BNA) No. 18, at D16 (Jan. 27, 1995). The President stopped short, however, of invoking his emergency powers to call for a cooling off period during which the season might have been resumed for up to 80 days. See Christopher D. Cameron, *Bill, Just Pitch Around Congress*, USA TODAY, Feb. 15, 1995, at 11A (discussing labor-management relations).

7. Ross Newhan, *It's Now Official: Baseball to Return*, L.A. TIMES, Apr. 3, 1995, at A1.

8. The temporary injunction was obtained by the National Labor Relations Board (NLRB) pending the outcome of unfair labor practice charges that owners had bargained last summer in bad faith. See *Silverman v. Major League Baseball Player Relations Committee, Inc.*, Case No. 95 Civ. 2054 (SS), slip op. (S.D.N.Y. Apr. 5, 1995) (Sotomayor, J.), reported in 1995 Daily Lab. Rep. (BNA) No. 65, at D28 (Apr. 5, 1995).

9. Ross Newhan, *It's Now Official: Baseball to Return*, L.A. TIMES, Apr. 3, 1995, at A1, A14. The strike cost owners about \$700 million in revenues and players \$200 million in salaries. *Id.* at A14. At publication of this Article, the parties had yet to resume negotiations to complete a new collective bargaining agreement.

10. Owners unsuccessfully proposed a salary cap during collective bargaining negotiations in 1985 and 1990. See, e.g., Ross Newhan, *Players Call for Aug. 12 Walkout Date*, L.A. TIMES, July 29, 1994, at C1, C8.

11. See, e.g., *MLB Players Ass'n & 26 Major League Clubs (1987)* (Nicolau, Arb.) (collusion grievance No. 2), reported in PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 280-84 (1993) [hereinafter WEILER & ROBERTS].

For the background of these collusion cases, see JOHN HELYAR, *LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL* 310-63 (1994); Steven L. Willis, *A Critical Perspective on Baseball: Collusion Decisions*, 1 SETON HALL J. SPORT L. 109 (1991).

Disputes over ballplayers' compensation have a long and tortuous history over which even the principal combatants disagree. Compare MARVIN MILLER, *A WHOLE DIFFERENT BALLGAME: THE SPORT AND BUSINESS OF BASEBALL* (1991) (memoir of former MLBPA executive director giving union-side account) with BOWIE KUHN, *HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER* (1987) (memoir of former MLB commissioner giving management-side account).

12. See, e.g., Ross Newhan, *Owners Set Stage for Baseball Strike*, L.A. TIMES, June 9, 1994, at C6.

13. See, e.g., Murray Chass, *Baseball; High Noon Today as Walkout Will Be Set*, N.Y. TIMES, July 28, 1994, at B13 ("The cost is too high. Indeed, [the union's counter-proposal] moves in the opposite direction this game has to go in. The problems of this game will not be solved by further increasing the amount of gross revenues that go to player compensation.") (remarks of owners' chief negotiator Richard Ravitch); Ross Newhan, *Eleventh-Hour Baseball Negotiations Strike Out*, L.A. TIMES, Aug. 11, 1994, at A1, A11 ("I have never seen so much

Players responded by comparing the owners' traditional, often-repeated claim of financial woe to the claims of Chicken Little.¹⁴ Besides, players insisted, they would never compromise the free market system that freed them from virtual chattel slavery¹⁵ under the dreaded "reserve clause" system¹⁶ and made them wealthy.

And fans who simply wanted to enjoy the game complained that baseball's third mid-season strike and eighth work stoppage in the past twenty-three years was yet again interrupting a precious summer ritual.¹⁷ A group of fans even announced plans to call its own "strike" to remind owners and players about the people who watch, and ultimately support, Major League Baseball.¹⁸

[economic] distress and despair among the clubs. For too many years we put off addressing the problems until tomorrow, figuring they'd disappear, just go away. We now know tomorrow is here and something has to be done. The future of the game is at stake.") (remarks of interim MLB Commissioner Bud Selig).

14. See Tom Verducci, *In the Strike Zone*, SPORTS ILLUSTRATED, Aug. 1, 1994, at 26, 28 ("[O]nce again the owners are busy running around chirping that the sky is falling—but they really *mean* it this time—a warning the players won't believe unless a chunk whacks them on the head.") (emphasis in original).

15. *Flood v. Kuhn*, 407 U.S. 258, 289 (1972) (Marshall, J., dissenting) (footnote omitted).

To non-athletes it might appear that [ex-St. Louis Cardinals' center fielder Curtis Flood] was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know that it was not servitude that bound petitioner to the club owners; it was the reserve system. The essence of that system is that a player is bound to the club with which he first signs a contract for the rest of his playing days. He cannot escape from the club except by retiring, and he cannot prevent the club from assigning his contract to any other club.

Id.

16. The "reserve clause," which was first introduced into Major League Baseball in 1887, see *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198, 202-04 (C.C.S.D.N.Y. 1890), is incorporated into article 10(a) of the Uniform Player's Contract. In pertinent part, it provides:

[T]he [Baseball] Club may, on or before December 20 . . . in the year of the last playing season covered by this contract, tender to the Player a contract for the term of the next year by mailing the same to the Player If prior to the March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player . . . to renew this contract for the period of one year on the same terms

UNIFORM PLAYER'S CONTRACT art. 10(a).

Until 1975 it was thought article 10(a) gave the owner holding a player's contract the exclusive right to his services in perpetuity. The famous arbitration case of pitchers Andy Messersmith and Dave McNally, however, changed all that. Arbitrator Peter Seitz ruled article 10(a) means, in the absence of an agreement to renew, a player's services belong to the club holding his contract for just one year following expiration of the old contract. Afterward, the player becomes a free agent. See *Professional Baseball Clubs*, 66 Lab. Arb. (BNA) 101, 116 (1975) (Seitz, Arb.).

17. One poll showed 29% of the public blamed the players for the strike, 34% blamed the owners, and 15% blamed both equally. Walter Shapiro, *Bummer of '94*, TIME, Aug. 22, 1994, at 68, 71 (Time/CNN survey).

18. See Dave Anderson, *Strike Date? Look Who's Setting One*, N.Y. TIMES, July 28, 1994, at B6. Fans First, an organization formed by the merger of originally separate groups in Cleve-

In virtually any other industry, what the owners were demanding—to “fix” the cost of labor for themselves and their competitors¹⁹—would have been held illegal per se under the Sherman²⁰ and Clayton²¹ Antitrust Acts.²² An executive, for example, of an airline²³ or computer software company²⁴ who sought a similar advantage would expose the firm, and possibly himself, to prosecution by the U.S. Department of Justice for civil or criminal penalties,²⁵ as well as to private suit by the independent competition for out-of-pocket losses and treble damages.²⁶

But baseball is not just any other industry. To many Americans, the game is practically a sacred religious institution²⁷—and it has been protected like one. For more than seventy years, club owners have enjoyed immunity from the antitrust laws. A double-play combination

land and New York, planned to boycott major league games scheduled for August 13, 1994. *Id.* The actual strike date, however, was moved up to Aug. 12—effectively canceling the fans’ “strike.” See *supra* note 4. After the strike began, Consumer Federation of America and a group calling itself Sports Fans United launched a petition drive to persuade Congress to repeal baseball’s historic antitrust exemption. See *Fans Urged to Support Repeal of Baseball’s Antitrust Exemption*, 1994 Daily Lab. Rep. (BNA) No. 158, at D8 (Aug. 18, 1994); *All Talk, No Action*, BASEBALL WEEKLY, Aug. 24-30, 1994, at 24.

19. Owners’ representative Richard Ravitch repeatedly used the term “fix” to describe what the proposed salary cap would do to labor costs. See, e.g., Murray Chass, *Baseball; High Noon Today as Walkout Will Be Set*, N.Y. TIMES, July 28, 1994, at B13; Richard Justice, *Baseball Players, Owners Remain at a Standstill; Fruitless Talks Point Toward Strike on Friday*, WASH. POST, Aug. 9, 1994, at E1.

20. 15 U.S.C. §§ 1-7 (1988).

21. 15 U.S.C. §§ 12-27 (1988).

22. See *infra* notes 68-78 and accompanying text.

23. See, e.g., *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1116 (5th Cir. 1984) (upholding U.S. Justice Department’s antitrust challenge against American Airlines based on conversation between its president and president of Braniff Airlines).

24. See, e.g., JAMES WALLACE & JIM ERICKSON, *HARD DRIVE: BILL GATES AND THE MAKING OF THE MICROSOFT EMPIRE* 3-4, 372-81, 397-401 (1994) (discussing Federal Trade Commission antitrust investigation of software giant Microsoft).

25. 15 U.S.C. § 26 (1988).

26. 15 U.S.C. § 15 (1988).

27. I believe in the church of baseball. I’ve tried all the major religions and most of the minor ones. I’ve worshipped Buddha, Allah, Brahma, Vishnu, Shiva, 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.

Annie Savoy, *BULL DURHAM* (Orion Pictures Corp. Studios motion picture 1988) (opening speech delivered by actress Susan Sarandon). See also Thomas Boswell, *The Church of Baseball*, in GEOFFREY C. WARD & KEN BURNS, *BASEBALL: AN ILLUSTRATED HISTORY* 189 (1994) [hereinafter WARD & BURNS].

of Supreme Court lawmaking,²⁸ congressional inaction,²⁹ and until recently, public indifference,³⁰ has placed the National Pastime in a privileged position. And although the strike of 1994 has encouraged several members of Congress to introduce legislation that would overturn baseball's antitrust exemption,³¹ none of those efforts is likely to become law anytime soon.³²

When labor disputes erupt in most industries, ripple effects may be felt in other parts of the economy, but the impact of the ensuing bad feelings and financial distress is confined mainly to the labor and management combatants. Not even in the rare event of a professional football strike will the games be stopped for long or the rituals of a fall season be ignored.³³

By contrast, when a labor dispute erupts in professional baseball, the summer comes to a halt. Both *Time*³⁴ and *Newsweek*³⁵ ring the alarm on their covers. Sports networks, scrambling for replacement programming, suddenly air games between teams at every skill level from the minor leagues to Little League.³⁶ Serious political columnists and other journalists, usually preoccupied with events in Washington,

28. A trilogy of Supreme Court decisions spanning 50 years granted baseball its antitrust exemption. See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam); *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs*, 259 U.S. 200 (1922).

29. Despite having held extensive hearings and considered scores of bills over the years, Congress has never enacted legislation modifying the antitrust exemption created for baseball by the Supreme Court. For a review of much of this activity, see *Flood v. Kuhn*, 407 U.S. 258, 281-82, n.17 (1972).

30. See *infra* note 305 and accompanying text.

31. See *infra* notes 32, 113 (citing pending legislation).

32. *Meet the Press* (NBC television broadcast, Aug. 14, 1994) (remarks of Sen. Mitchell, D-Me.). In the broadcast, George Mitchell, then the Senate's majority leader, correctly predicted his chamber would not have time to take up baseball's antitrust exemption before the summer recess due to extended debate over health care reform and the President's crime bill. *Id.* Sen. Mitchell's remarks were particularly relevant in light of his announced retirement at the end of the year and his reported recruitment by owners to serve as the next commissioner of baseball. *Fans Urged to Support Repeal of Baseball's Antitrust Exemption*, 1994 Daily Lab. Rep. (BNA) No. 158, at D8 (Aug. 18, 1994).

33. For example, a strike called by the National Football League Players Association ("NFLPA") during the 1987 season caused cancellation of just one week of games. Owners continued the season for the next three weeks by hiring strike replacements and playing strike defectors before the NFLPA called off the work stoppage and the regulars returned to play. See *Strikes in Pro Sports*, L.A. TIMES, Aug. 24, 1994, at C6. Of course, the strike did not interrupt the extensive fall 1987 schedules of either American college football or the Canadian Football League. For an account of labor strife in the NFL, see generally ROBERT C. BERRY, ET AL., *LABOR RELATIONS IN PROFESSIONAL SPORTS* 123-48 (1986).

34. TIME, Aug. 22, 1994 (headline: "Stee-rike!").

35. NEWSWEEK, Aug. 22, 1994 (headline: "Foul Ball!").

36. See, e.g., TV GUIDE, Aug. 20-Aug. 26, 1994, (listing programming for ESPN-1 and ESPN-2 networks).

D.C.'s Federal Triangle, turn their attention to a geometric figure of another shape: the baseball diamond.³⁷ Movies are made.³⁸ Poems are written.³⁹ Even Justice, our legal system's most hallowed symbol of neutrality, takes off her blindfold to catch a glimpse of a star ball-player and ask for his autograph.⁴⁰

Canceling the remainder of a season also means unpaid vacations for the legions of private and public business owners and their employees who operate industries dependent upon professional baseball: brewers, concessionaires, equipment makers, hoteliers, parking-lot attendants, sports-bar proprietors, stadium operators, tour operators, and umpires all feel the pain.⁴¹

With so much more at stake than a simple game, it is not too much to ask whether the cause of all this social and economic dislocation, the owners' demand for a salary cap, is worth the candle. An industry already blessed with prized privileges in the eyes of the law ought to articulate at least one sound reason it is entitled to yet another privilege subsidized by the men who do the work and the consumers who support them.⁴² This Article addresses whether the owners have made their case that Major League Baseball needs a salary cap.

37. *E.g.*, George F. Will, *Tony Gwynn, Union Man*, NEWSWEEK, Aug. 22, 1994, at 70 (chiding owners who long for the "good old days" of labor relations, which "were never nearly as good as today"). Columnist Will has even devoted a book to the sport. GEORGE F. WILL, *MEN AT WORK* (1992).

38. *E.g.*, BASEBALL (PBS television broadcast Sept. 18-22, 25-28, 1994). Actually, filmmaker Ken Burns' 18.5-hour history of the game was in the works long before the 1994-95 labor dispute but was broadcast by coincidence a month into the strike and by design just as pennant races and playoff berths would have been determined. *See* WARD & BURNS, *supra* note 27, at xvii (preface to book and movie).

39. The pitcher's semi-pro—with admirable nerve/
With Walter Mitty dreams without
a breaking curve/
The catcher cannot catch. He also cannot throw/
Why call this
major league? The owners say it's so.

The opera season starts. The principal they hire/
A bass assigned no solos in his
church's choir/
Sings flat as the soprano in a grim duet/
If owners say it's so, will that
still be the Met?

Calvin Trillin, *The Bigs*, NATION, Apr. 17, 1995 at 514 (satirizing "replacement" ballplayers hired by owners to break strike).

40. *See, e.g.*, *A Baseball Fan Judge Presents Barry Bonds With a Striking Decision*, PEOPLE, Sept. 5, 1994, at 54 (reporting how family court Judge George Taylor reduced multimillionaire slugger Barry Bonds' alimony and child support payments then asked for Bonds' autograph).

41. *See, e.g.*, Thomas Bonk, *Dodger Stadium's 'Real' Workers Will Feel Pinch*, L.A. TIMES, Aug. 7, 1994, at C3; Mike DiGiovanna, *Anaheim Cannot Find Way to Offset Walkout Losses*, L.A. TIMES, Aug. 7, 1994, at C3; Ara Najarian, *The Hotels, Bars, and Restaurants Will Suffer Too*, L.A. TIMES, Aug. 7, 1994, at C3.

42. Under federal antitrust law, determining whether such justification exists is called a "rule of reason" analysis. *E.g.*, GEORGE W. SCHUBERT, ET AL., SPORTS LAW § 3.2, at 46-47 (1986) [hereinafter SCHUBERT, ET AL., SPORTS LAW]; HERBERT HOVENKAMP, ECONOMICS AND

Part II reviews the application of the antitrust laws to professional sports in general and Major League Baseball in particular.⁴³ The Article explores baseball's exemption from those laws and examines how the breadth of this exemption has affected, not always for the better, the business of the game.

Part III analyzes the owners' stated reason for demanding a salary cap: to ensure "competitive balance" among major league teams.⁴⁴ The owners argue "big market" clubs such as the Los Angeles Dodgers and New York Yankees must be prevented from buying championships at the expense of "small market" clubs such as the Montreal Expos and Seattle Mariners.

A Major League Baseball division title, league pennant, or World Series ring, however, is not for sale at any price. If it were, two assumptions would have to be true: individual player talent would predict successful individual performance, and successful individual performance would predict successful team performance.⁴⁵

Neither assumption is true. The game of baseball is too unpredictable to permit an owner to purchase success merely by purchasing talent. There are three reasons for the fundamental unpredictability of baseball.

First, the mechanics of hitting a pitched ball make success inherently unpredictable. Success in baseball depends less upon a hitter's accomplishing what he sets out to do (hitting the ball well) than upon something over which he has little control (hitting the ball to a certain location in fair territory where it will not be caught). This is why even the game's best offensive players fail about 70% of the time at bat.⁴⁶

Second, the rules of the game prohibit a club from maximizing the participation of its "best" players⁴⁷—a factor bound to minimize the relationship between individual talent and team success. Merely having a Babe Ruth, Henry Aaron, or even Ken Griffey Jr. in the dugout is no guarantee he will ever get a turn at bat, much less succeed, with the game hanging in the balance.⁴⁸

FEDERAL ANTITRUST ANALYSIS 142-45 (1985). For cases applying the rule of reason analysis to anticompetitive conduct in sports, see, e.g., *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (NCAA's television restrictions violated Sherman Act § 1); *Regents of Univ. of Calif. v. ABC, Inc.*, 747 F.2d 511 (9th Cir. 1984) (similar provision in College Football Association-ABC television contract violated Sherman Act § 1); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (NFL's "Rozelle Rule" violated Sherman Act § 1), *cert. dismissed*, 434 U.S. 801 (1977).

43. See *infra* notes 58-166 and accompanying text.

44. See *infra* notes 167-216 and accompanying text.

45. See *infra* notes 217-55 and accompanying text.

46. See *infra* notes 256-72 and accompanying text.

47. See *infra* notes 273-77 and accompanying text.

48. *Id.*

Third, baseball's new playoff structure substantially exacerbates the game's unpredictability and its random results. With twice as many teams now eligible for post-season play, for the first time it is likely a team which loses as many games as or fewer games than it wins during the regular season can nevertheless qualify for the playoffs, and possibly, the World Series.⁴⁹

Part IV concludes with the thought that although the salary cap makes little sense, the owners will demand one anyway.⁵⁰ Given a lawful chance, few employers in any industry could resist putting a ceiling on payrolls.

The salary cap proposal should be seen for what it is: merely the latest offensive by owners in the war with players to decide who shall determine the terms and conditions of employment in the industry. For a century, owners enjoyed the power to dictate these terms unilaterally.⁵¹ That control ended in 1969, when the Major League Baseball Players Association (MLBPA) emerged as a countervailing power capable of enforcing the players' demand to establish these terms bilaterally through collective bargaining.⁵² For the last twenty-five years, owners have fought, so far unsuccessfully, to recapture absolute control.

At the heart of the problem is a tension inherent in every industry, including baseball: labor feels entitled to share the profits, while capital sees labor as another cost standing in the way of those profits.⁵³ Therefore, resolving baseball's salary cap crisis means addressing not only the owners' justification for it, the competitive balance theory, but also the fundamental tension beneath it. Merely repealing baseball's antitrust exemption, as some have suggested,⁵⁴ would place another weapon in the players' hands but would do nothing to ameliorate the basic conflict.

Baseball is a special industry, and special cases deserve special solutions. Other, more systemic changes, such as public ownership of baseball franchises, creation of a players' league, and player ownership of the clubs themselves, should be considered carefully. At an average salary of \$1.2 million⁵⁵ and a minimum salary of \$109,000,⁵⁶

49. See *infra* notes 278-83 and accompanying text.

50. See *infra* notes 298-314 and accompanying text.

51. See *infra* notes 149-55 and accompanying text.

52. See *infra* notes 154-56 and accompanying text.

53. For a thoughtful discussion of labor-management conflict in the context of the summer 1994 baseball strike, see Neal Gabler, *The Owners: Baseball's Newest Heroes*, L.A. TIMES, Aug. 7, 1994, at M1.

54. See *infra* notes 112-13, 305 and accompanying text.

55. See, e.g., Walter Shapiro, *Bummer of '94*, TIME, Aug. 22, 1994, at 70.

56. *Id.*

today's major league player is wealthy enough to buy a stake in his club and to start working for himself. He may find, as workers at other employee-owned enterprises have learned,⁵⁷ people who own the company tend to avoid instituting strikes against themselves. Giving ballplayers' a stake in the business could stabilize baseball's turbulent labor relations to the benefit of those who depend on the major league game—especially the fans.

II. FROM ANTITRUST TO INDUSTRIAL DISTRUST: THE LAW AND BASEBALL

This Court's decision in Federal Base Ball . . . made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business . . . would keep that derelict in midstream.

William O. Douglas⁵⁸

A. Anticompetitive Behavior in Professional Sports

The era, if ever it existed, when sport was merely a diversion for amateur participants and Sunday spectators is long past. Today professional and amateur athletics alike "resemble any other highly successful business enterprise capable of generating many millions of dollars in revenues. Sport is packaged and marketed nationwide. It has become an industry."⁵⁹

Part of sport's growth into an industry has meant learning to obey the federal antitrust laws. Since 1957, when the Supreme Court rejected an antitrust exemption for the National Football League,⁶⁰ courts have applied the antitrust laws to nearly every major sport, including professional basketball,⁶¹ boxing,⁶² golf,⁶³ hockey,⁶⁴ and ten-

57. See *infra* notes 307-11 and accompanying text.

58. *Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) (citation and footnote omitted).

59. SCHUBERT, ET AL., *SPORTS LAW*, *supra* note 42, § 3.2, at 50. For a thoughtful analysis of the subject, see generally JAMES QUIRK & RODNEY D. FORT, *PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS* (1992).

60. *Radovich v. NFL*, 352 U.S. 445 (1957).

61. *E.g.*, *Haywood v. NBA*, 401 U.S. 1204 (Douglas, Circuit Justice) (1971); *Washington Professional Basketball Corp. v. NBA*, 147 F. Supp. 154 (S.D.N.Y. 1956).

62. *E.g.*, *United States v. International Boxing Club of N.Y., Inc.*, 348 U.S. 236 (1955).

63. *E.g.*, *Deesen v. Professional Golfers Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *Blalock v. PGA*, 359 F. Supp. 1260 (N.D. Ga. 1973).

64. *E.g.*, *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

nis.⁶⁵ Even nonprofessional sports generating significant revenues in interstate commerce, including college athletics⁶⁶ and amateur softball,⁶⁷ have not escaped the grasp of antitrust regulation.

The cornerstone of federal law regulating anticompetitive behavior is the Sherman Antitrust Act of 1890.⁶⁸ The Sherman Act is directed toward trade practices involving two or more competitors in interstate commerce.⁶⁹ Its main provisions are section 1,⁷⁰ prohibiting any contract, combination, or conspiracy in restraint of trade or commerce; and section 2,⁷¹ prohibiting monopolization or attempts to monopolize trade or commerce.⁷²

The Sherman Act's working partner is the Clayton Antitrust Act of 1914.⁷³ The Clayton Act is directed toward anticompetitive behavior by individual competitors as well as groups of competitors.⁷⁴ Applying

65. *E.g.*, *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 665 F.2d 222 (8th Cir. 1981).

66. *E.g.*, *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577 (D.C. Cir. 1984); *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977).

67. *E.g.*, *Amateur Softball Ass'n v. United States*, 467 F.2d 312 (10th Cir. 1972).

68. 15 U.S.C. §§ 1-7 (Supp. 1993).

69. *See generally* HOVKENKAMP, *supra* note 42, at 50-54 (discussing legislative history of federal antitrust laws).

70. 15 U.S.C. § 1 (Supp. 1993). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

71. 15 U.S.C. § 2 (Supp. 1993). "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 . . ." *Id.*

72. There are two classifications of anticompetitive behavior triggering Sherman Act liability.

First, any trade practice that fails the "rule of reason" test is illegal. Under the rule of reason test, a court must balance the alleged procompetitive effects of a challenged trade practice against its anticompetitive results. If the former is outweighed by the latter, the practice is an unreasonable restraint of trade. The existence of a less restrictive alternative to the challenged practice is of vital concern to a court undertaking a rule of reason analysis. *See* SCHUBERT, ET AL., *SPORTS LAW*, *supra* note 42, § 3.2, at 46-47.

Second, certain trade practices are considered so injurious that they are illegal per se—notwithstanding any procompetitive effects they may have. A per se violation of the Sherman Act automatically triggers liability without the need for a rule of reason analysis. Behavior classified as a per se violation of section 1 includes any agreement to fix prices, any contract "tying" the buyer to a promise not to deal with the seller's competitors, a group boycott, or a horizontal division of markets. *See id.* § 3.2, at 47.

The trend under more recent Supreme Court jurisprudence, however, is to discard per se analysis in favor of the rule of reason approach for all claims of anticompetitive conduct. *See, e.g.*, *NCAA v. Board of Regents*, 468 U.S. 86 (1984). Even under this trend, Professor Sullivan believes most of the anticompetitive practices discussed here, *see infra* notes 119-32, would be found to violate the Sherman or Clayton Acts. *See* Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CALIF. L. REV. 835, 838, 847-48 (1987).

73. 15 U.S.C. §§ 12-27 (Supp. 1993).

74. *See generally* HOVKENKAMP, *supra* note 42, at 50-54.

principally to sales of goods and services in interstate commerce, the Clayton Act is somewhat narrower in scope than the Sherman Act. The Clayton Act's main provisions are section 1,⁷⁵ prohibiting price discrimination in the sale of the same product to similarly-situated buyers; section 3,⁷⁶ prohibiting any "tying" contract; section 7,⁷⁷ prohibiting acquisition of competing firms in the same industry; and section 8,⁷⁸ prohibiting interlocking directorates on the boards of competing firms.

Although criminal sanctions may be imposed for violating either the Sherman or Clayton Act,⁷⁹ the more common remedies are civil in nature: an injunction or other equitable relief,⁸⁰ compensatory damages, treble damages, and attorneys' fees and costs.⁸¹ Liability for treble damages is the single biggest threat to a firm engaging in anticompetitive behavior.⁸²

75. 15 U.S.C. § 13 (1988).

76. *Id.* § 14.

77. *Id.* § 18 (Supp. 1993).

78. *Id.* § 19.

79. *Id.* §§ 1-2, 13-14.

80. *Id.* § 26.

81. *Id.* § 15.

82. *See, e.g.,* SCHUBERT, ET AL., SPORTS LAW, *supra* note 42, § 3.2, at 49.

Despite the application of the antitrust laws, in practice most professional sports teams are shielded from actual liability for otherwise anticompetitive behavior due to the relationships forged, however reluctantly, by club owners and players' unions through collective bargaining. Federal labor law establishes two separate shields: the "statutory" labor antitrust exemption and the "non-statutory" labor antitrust exemption.

The "statutory" exemption shields unilateral, concerted union activities, including secondary picketing and the group boycott, taken in furtherance of union interests. This shield is mandated by Congress. Clayton Act §§ 6, 20, 15 U.S.C. § 17; Norris-LaGuardia Act §§ 4, 5, 13, 29 U.S.C. §§ 104, 105, 113. *See, e.g.,* Powell v. NFL, 678 F. Supp. 777, 782 (D. Minn. 1988) ("The statutory labor exemption removes from the coverage of the antitrust laws certain legitimate, albeit anti-competitive, union activities because they are favored by federal labor policy."). The statutory exemption does not extend to agreements or actions between labor and non-labor groups. *See, e.g.,* Bridgeman v. NBA, 675 F. Supp. 960, 964 (D.N.J. 1987).

The "nonstatutory" exemption shields certain anticompetitive practices undertaken jointly by labor and management so long as such practices are the product of collective bargaining. This shield is not spelled out by Congress but has been implied by the courts to protect collective bargaining agreements concerning the terms and conditions under which employees work. *See* UMW v. Pennington, 381 U.S. 657, 662 (1965) (immunity under nonstatutory exemption may be removed if employees attempt to influence working conditions other than their own). In the sports industries there is some debate whether the nonstatutory exemption survives both expiration of a collective bargaining agreement and a subsequent impasse in labor-management negotiations for a new contract. *Compare, e.g.,* Powell v. NFL, 930 F.2d 1293, 1301-02 (8th Cir. 1989) (corrected opinion) (yes as to both) *with, e.g.,* Brown v. Pro Football, Inc., 782 F. Supp. 125 (D.D.C. 1991) (yes as to expiration but no as to impasse), *rev'd*, 148 L.R.R.M. (BNA) 2769 (D.C. Cir. 1995) (yes as to both). Some courts have suggested the nonstatutory exemption evaporates only when the players no longer wish the union to act as their exclusive bargaining repre-

The only professional sport to escape application of the federal antitrust laws has been Major League Baseball. For reasons having more to do with sentimentality than legality,⁸³ the Supreme Court created baseball's exemption out of whole cloth in 1922. *Federal Base Ball Club of Baltimore v. National League of Base Ball Clubs*⁸⁴ was an action brought by the Baltimore franchise of the old Federal League, the last serious rival to the two major leagues in this century, against the sixteen teams in the National and American Leagues, the three officials then running Major League Baseball, and three former owners of Federal League clubs. The suit alleged that the defendants had conspired to violate section 1 of the Sherman Act by preventing Baltimore from launching a viable franchise. In fact, the Federal League had folded in 1915 after just two seasons.⁸⁵

At trial, the jury returned an \$80,000 verdict, which was trebled under the provisions of the Sherman Act.⁸⁶ But Baltimore's victory was short-lived. On appeal, the judgment was reversed on the ground that baseball was outside the scope of the Act.⁸⁷ The Supreme Court affirmed.⁸⁸ Writing for a unanimous Court, Justice Holmes offered what was to become his oft-misquoted⁸⁹ and much-criticized⁹⁰ explanation that baseball was not subject to regulation by the Sherman Act because it was not "trade or commerce in the commonly accepted use of those words."⁹¹

sentative. See, e.g., *Powell v. NFL*, 764 F. Supp. 1351, 1359 (D. Minn. 1991).

For discussions of these exemptions as they affect professional sports, see RAY YASSER, ET AL., *SPORTS LAW* 262-64 (2d ed. 1994); Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 Colum. L. Rev. 1045, 1051-53, 1059-71 (1994).

83. MILLER, *supra* note 11, at 127.

84. 259 U.S. 200 (1922).

85. See WARD & BURNS, *supra* note 27, at 121-23.

86. *National League of Professional Base Ball Clubs v. Federal Base Ball Club*, 269 F. 681, 682 (2d Cir. 1920).

87. *Id.* at 688.

88. *Federal Base Ball Club of Baltimore v. National League of Base Ball Clubs*, 259 U.S. 200 (1922).

89. "It should be noted that, contrary to what many believe, Holmes did call baseball a business; time and again those who have not troubled to read the text of the decision have claimed incorrectly that the court said baseball was a sport and not a business." HAROLD SEYMOUR, *BASEBALL: THE GOLDEN AGE* 420 (1971). For the text of what Holmes actually wrote, see *infra* note 91.

90. See *infra* note 114 (collecting judicial and scholarly commentary).

91. The business [of baseball] is giving exhibitions of base ball, which are purely state affairs. . . . [T]he fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. . . . [T]he transport is a mere incident, not the essential thing. That to which it is [an] incident, the exhibition, although made for money[,] would not be called trade or commerce [as] in the commonly ac-

Twice the Court revisited baseball's antitrust exemption over the next half-century, but on both occasions reaffirmed it.

In 1953, in *Toolson v. New York Yankees*,⁹² the Court rejected a consolidated challenge to the "reserve" clause in the Uniform Player's Contract brought by players in three separate cases on the ground that Congress had had thirty years to overturn *Federal Base Ball* but did nothing.⁹³ *Toolson*, however, was hardly a ringing endorsement of precedent. Instructively, the Court spoke through an unsigned per curiam opinion reaffirming *Federal Base Ball* without embracing Justice Holmes' rationale.⁹⁴ For the first time, two Justices dissented from a decision upholding a special antitrust exemption for baseball.⁹⁵

In 1972, in *Flood v. Kuhn*,⁹⁶ the Court apologetically turned back a similar challenge for essentially the same reason.⁹⁷ In that case, Curt Flood, a longtime star center fielder for the St. Louis Cardinals who had played in three World Series, sued the commissioner of baseball to enjoin the Cardinals from trading Flood to the Philadelphia Phillies against his wishes. Writing now for a majority of only five Justices,⁹⁸ Justice Blackmun called *Federal Base Ball* "an exception

cepted use of those words. As it is put by [the] defendant[s], personal effort, not related to production, is not a subject of commerce.

Federal Base Ball Club of Baltimore v. National League of Base Ball Clubs, 259 U.S. 200, 208-09 (1922) (Holmes, J.).

92. 346 U.S. 356 (1953) (per curiam).

93. *Id.* at 357.

Congress has had the ruling [in *Federal Base Ball*] under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left [out] for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.

Id.

94. See *id.* ("[T]he judgments below are affirmed on the authority of *Federal Base Ball Club* . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.").

95. *Id.* (Burton & Reed, JJ., dissenting).

96. 407 U.S. 258 (1972).

97. Actually, the *Flood* Court purported to identify four separate reasons for the ruling by the *Toolson* Court:

(a) Congressional awareness for three decades of the Court's ruling in *Federal Baseball*, coupled with congressional inaction. (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws. (c) A reluctance to overrule *Federal Baseball* with consequent retroactive effect. (d) A professed desire that any needed remedy be provided by legislation rather than by court decree.

Id. at 273-74.

98. *Id.* at 259 (Blackmun, J., joined in pertinent part by Burger, C.J., Stewart, White & Rehnquist, JJ.). Justices Douglas, Brennan, and Marshall dissented. Justice Powell did not par-

and an anomaly . . . an aberration confined to baseball."⁹⁹ He also pointedly rejected Justice Holmes' rationale.¹⁰⁰ But Blackmun announced that the Court was adhering to its prior decisions in both *Federal Base Ball* and *Toolson*—while simultaneously adhering to its prior decisions denying antitrust exemptions to other professional sports.¹⁰¹ "If there is any inconsistency or illogic in all this," he wrote, "it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court."¹⁰²

Four other Justices filed or joined separate opinions.¹⁰³ Chief Justice Burger, although expressing "grave reservations,"¹⁰⁴ concurred nevertheless on the ground that too much time had passed for the courts to be "the forum in which this tangled web ought to be unsnarled."¹⁰⁵ Justice Douglas, joined by Justice Brennan, dissented.¹⁰⁶ He called *Federal Base Ball* a "derelict in the stream of the law . . . [that the Court] . . . its creator, should remove."¹⁰⁷ In a footnote, Douglas recalled that he himself had joined the *Toolson* major-

ticipate.

In his book about the Court, journalist Bob Woodward revealed that, during conference after oral argument in *Flood*, the initial vote was 5 to 3 to affirm, with Justice Marshall voting for and Chief Justice Burger voting against adherence to *Federal Base Ball*. Then Justice Marshall switched sides. With the vote now 4 to 4, which by the rules of the Court still would have affirmed the Court of Appeals, Justice White showed signs of joining Marshall to provide the fifth vote needed to end baseball's antitrust exemption. Meanwhile, Justice Powell's law clerks tried to persuade him to do likewise rather than abstain. (Powell owned stock in Anheiser-Busch, the brewery which controlled Flood's ex-employer, the St. Louis Cardinals.) In the end, the only other member of the Court to switch his vote was Chief Justice Burger, who now voted for *Federal Base Ball*—restoring the initial 5 to 3 margin in favor of stare decisis. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 186, 189-92 (1979); accord MILLER, *supra* note 11, at 199 (speculating what might have happened had Justices Black and Harlan not resigned the prior year).

99. *Flood v. Kuhn*, 407 U.S. at 282 (Blackmun, J.).

100. *Id.* ("Professional baseball is a business and it is engaged in interstate commerce.").

101. *See id.* at 282-83.

102. *Id.* at 284. Justice Blackmun's final, baffling justification was that "there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency." *Id.*

In his memoir, ex-MLBPA Executive Director Marvin Miller remarked: "I don't think I've ever read such criticism of a majority decision of the court by the very justices who formed the majority." MILLER, *supra* note 11, at 194 (emphasis omitted).

103. A fifth, Justice White, concurred in the judgment and in all of Justice Blackmun's opinion except Part I, a screed whose principal purpose was to pay homage to the game by listing the names of some 88 famous and not-so-famous ballplayers of bygone eras. HELYAR, *supra* note 11, at 127 ("If the Supremes weren't embarrassed by their twisted logic, they should have been by Justice Harry Blackmun's writing in the majority opinion.").

104. *Flood v. Kuhn*, 407 U.S. at 285-86 (Burger, C.J., concurring).

105. *Id.* at 286 (Burger, C.J., concurring).

106. *Id.* (Douglas, J., joined by Brennan, J., dissenting).

107. *Id.* (Douglas, J., dissenting).

ity but had now "lived to regret it."¹⁰⁸ Finally, Justice Marshall, joined also by Justice Brennan, dissented too.¹⁰⁹ Marshall argued Flood "was virtually enslaved by the owners of [M]ajor [L]eague [B]aseball clubs who bartered among themselves for his services."¹¹⁰ He observed over the years that the Court had "not lightly overrule[d] our prior constructions of federal statutes, but when our errors deny substantial federal rights . . . we must [freely] admit our error and correct it."¹¹¹

B. *Effect of Baseball Law on Baseball Business*

Since 1972, attacks on baseball's antitrust exemption have been mounted several times, but none has ever captured the support of either the courts or Congress.¹¹² Nor is any likely to do so in the near future, despite the recent efforts of several members of Congress.¹¹³

Accordingly, there is little point in rehashing once again the arguments for and against baseball's antitrust exemption, and this Article

108. *Id.* at 286 n.1.

109. *Id.* at 288 (Marshall, J., joined by Brennan, J., dissenting).

110. *Id.* at 289 (Marshall, J., dissenting).

111. *Id.* at 292-93.

112. Judge Moore's assessment, offered at the intermediate appellate stage of *Flood*, as to the odds *Federal Base Ball* and *Toolson* might be overruled has so far proved correct. See *Flood v. Kuhn*, 443 F.2d 264, 272 (2d Cir. 1971) (Moore, J., concurring) ("[T]here is no likelihood that such an event will occur.").

113. The 103rd Congress did not pass any of the numerous bills before it. See, e.g., S. 2380, 103d Cong., 2d Sess. (1994) (by Sens. Metzemabaum, D-Ohio & Hatch, R-Utah); H.R. 4965, 103d Cong., 2d Sess. (1994) (by Rep. Owens, D-N.Y.); H.R. 245, 103d Cong., 2d Sess. (1994) (by Rep. Bunning, R-Ky.).

The 104th Congress, early in the first session, considered more than 10 pieces of baseball-related legislation, at least eight of which addressed repeal or modification of baseball's antitrust exemption. See, e.g., S. 15, 104th Cong., 1st Sess. (1995) (by Sen. Moynihan, D-N.Y.); H.R. 749, 104th Cong., 1st Sess. (1995) (by Rep. Torres, D-Cal.); H.R. 385, 104th Cong., 1st Sess. (1995) (by Rep. Traffigant, D-Ohio); H.R. 365, 104th Cong., 1st Sess. (1995) (by Rep. Schumer, D-N.Y.); H.R. 120, 104th Cong., 1st Sess. (1995) (by Rep. Bunning, R-Ky.); H.R. 106, 104th Cong., 1st Sess. (1995) (by Rep. Bilirakis, R-Fla.); H.R. 105, 104th Cong., 1st Sess. (1995) (by Rep. Bilirakis, R-Fla.); H.R. 45, 104th Cong., 1st Sess. (1995) (by Rep. Conyers, D-Mich.). For summaries of these bills, see *Rep. LaFalce Offers Bill to Establish National Baseball Commission, End Strike*, 1995 Daily Lab. Rep. (BNA) No. 21, at D8 (Feb. 1, 1995).

In light of statements by congressional leaders, however, it remains unlikely any baseball legislation will reach the President's desk during this session of Congress. See Christopher D. Cameron, *Bill, Just Pitch Around Congress*, USA TODAY, Feb. 15, 1995, at A11 ("If President Clinton really wants major-league baseball played as scheduled on opening day this spring, then he ought to know better than to ask his archrivals in the 104th Congress, Senate Majority Leader Bob Dole and House Speaker Newt Gingrich, for legislative help."); Ross Newhan & Doyle McManus, *Clinton Pitches Baseball Strike's Ball to Congress*, L.A. TIMES, Feb. 8, 1995, at A19 ("We maintain our view that Congress is ill-suited to resolving private labor disputes.") (remarks of Senate Majority Leader Dole and House Speaker Gingrich).

·makes no attempt to do so.¹¹⁴ But weighing the merits of the owners' demand for a salary cap, we think it important to recognize the broad impact that more than seventy years of immunity from "the Magna Carta of free enterprise"¹¹⁵ has had on the baseball industry. In our view, three observations are particularly important.

1. *Broad Scope of Baseball's Antitrust Exemption*

The scope of baseball's antitrust immunity is quite broad. If they consider the matter at all, fans tend to think of the exemption as a shield protecting owners against claims by players who might otherwise challenge undesirable terms and conditions of employment, such as the reserve system or the barter method for transferring the rights to players' services.¹¹⁶ But the exemption created by *Federal Base Ball*,

114. That job has been thoroughly undertaken by others. For analysis of the antitrust laws as applied to professional sports, see generally Phillip J. Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C. L. REV. 341 (1983); Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-sports Markets*, 1989 UTAH L. REV. 617; Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971); Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339; Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19 (1986); Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337 (1986); John C. Weistart, *Judicial Review of Labor Agreements: Lessons from the Sports Industry*, 44 LAW & CONTEMP. PROBS. 109 (Autumn 1981); Note, *The Super Bowl and the Sherman Act: Professional Sports Teams and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967); Note, *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 94, 170-73 (1957).

For analysis of the antitrust laws as applied to major league baseball in particular, see John Eckler, *Baseball—Sport or Commerce?*, 17 U. CHI. L. REV. 56 (1949); John W. Neville, *Baseball and the Antitrust Laws*, 16 FORDHAM L. REV. 208 (1947); C. Paul Rogers, III, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611 (1977); Note, *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 105, 136-38 (1954); Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

115. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). There the Court said:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. . . . Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

Id. at 610, *quoted with approval* in *Flood v. Kuhn*, 407 U.S. 258, 291-92 (1972) (Marshall, J., dissenting).

116. The reserve system has been thwarted on antitrust grounds in other professional sports. See, e.g., *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (holding NFL reserve clause illegal per se); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975) (holding NBA reserve clause illegal per se). See also, e.g., *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974) (holding old NFL "Rozelle Rule," requiring football player's acquiring club to pay free agent "compensation" to his

Toolson, and *Flood* does much more than immunize the aggressive labor practices of club owners. Baseball's antitrust immunity preempts state as well as federal antitrust regulation,¹¹⁷ and it places up to a dozen of the industry's current and prospective business practices beyond the reach of these laws.¹¹⁸

At least seven trade practices common in baseball would ordinarily be vulnerable to antitrust attack as per se violations—that is, illegal without regard for their alleged procompetitive effects.¹¹⁹ The proposed salary cap,¹²⁰ like any conspiracy to fix wages, and the long-established reserve clause,¹²¹ which is still part of the Uniform Player's Contract, could be challenged as price-fixing schemes. Control over

former club, illegal under rule of reason test). *But cf.* *Nassau Sports v. Peters*, 352 F. Supp. 870 (S.D.N.Y. 1972) (finding reserve system necessary in professional sports).

Some scholars have questioned whether anticompetitive conduct in professional team sports, which economists analyze as classic monopsony behavior, is properly the concern of the antitrust laws at all. *See generally* WELER & ROBERTS, *supra* note 11, at 164-88 (discussing arguments for and against such application).

117. *Flood*, 407 U.S. at 285-86 (1972). *See also* *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674 (1983) (holding *Flood* preempts antitrust attack under California law against professional football); WELER & ROBERTS, *supra* note 11, at 122 ("Flood did more than merely maintain baseball's [antitrust] immunity from federal antitrust law—it also established, almost offhandedly, a new exemption for baseball from state antitrust law."). *But see* *Butterworth v. National League of Professional Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994) (Holding that because *Flood* undermines the basis of baseball's antitrust exemption, *Federal Base Ball* is limited to its facts—immunity for the reserve system—and permits state antitrust regulation of other aspects of the business of baseball).

118. There is now some dissent from the previously unquestioned view that the scope of baseball's antitrust exemption is broad enough to immunize an owner from everything he does while operating his business. *Compare, e.g.*, *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978) (concluding the Supreme Court intended to exempt "the business of baseball, not any particular facet of that business") with, *e.g.*, *Piazza v. Major League Baseball*, 831 F. Supp. 420, 421 (E.D. Pa. 1993) (interpreting *Flood* as limiting the *Federal Base Ball* exemption "to baseball's 'reserve system'") and *Butterworth*, 644 So. 2d at 1025 (concurring with *Piazza*). For a discussion of the debate, see Latour R. 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. U. L. REV. 1271 (1994).

The list presented here is neither exclusive nor exhaustive. Counsel for plaintiffs challenging a given trade practice under federal antitrust law may argue such practice is illegal per se, and if not, unreasonable anyway. For a summary of the antitrust implications of typical trade practices in professional sports other than baseball, see SCHUBERT, ET AL., *supra* note 42, § 3.2, at 53-63.

119. *See supra* note 72 (explaining per se violations).

120. *Cf. Brown v. Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. 1981) (holding salary cap on compensation paid to NFL teams' "development squads" to be wage-fixing and wage-fixing to be price-fixing).

121. *Cf. Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (holding NFL reserve clause illegal per se); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975) (holding NBA reserve clause illegal per se); *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974) (holding NFL Rozelle Rule, requiring football player's acquiring club to pay free agent "compensation" to his former club, failed rule of reason test). *But see* *Nassau Sports v. Peters*, 352 F. Supp. 870 (S.D.N.Y. 1972) (finding reserve system necessary in professional sports).

player eligibility,¹²² now exercised by the commissioner acting "in the best interests of baseball," and the rookie draft,¹²³ which gives one owner the sole right to deal with the drafted player, might be considered group boycotts. Limits on franchise movement¹²⁴ and barriers to entry by would-be owners in cities without major league franchises¹²⁵ look like horizontal market allocations. Moreover, certain stadium financing schemes, especially when packaged with season ticket sales,¹²⁶ appear to be tying contracts.

Five other trade practices would be vulnerable to attack for failure to pass the "rule of reason" test—that is, illegal because their alleged procompetitive effects are outweighed by their anticompetitive results.¹²⁷ Exclusive leases permitting clubs to use playing facilities,¹²⁸ exclusive deals for the rights to telecast ballgames,¹²⁹ potential mergers

122. *Cf.* *Boris v. United States Football League*, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984) (invalidating USFL 4-year rule requiring football player to have exhausted college eligibility before entering professional draft); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977) (striking down WHA rule requiring hockey player to have turned 20 before playing with any team); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (striking down NBA 4-year rule). *But cf.* *Neeld v. NHL*, 594 F.2d 1297 (9th Cir. 1978) (rejecting attack on NHL bylaw making hockey players with only one eye ineligible to play for member clubs); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.) (refusing to find group boycott in rule denying golfers with prolonged lack of adequate performance entry into PGA-sponsored tournaments), *cert. denied*, 385 U.S. 846 (1966); *Heldman v. United States Lawn Tennis Ass'n*, 354 F. Supp. 1241 (S.D.N.Y. 1973) (denying injunction against rule banning from USLTA events any tennis player who had competed in non-USLTA tournaments).

123. *Cf.* *Drysdale v. Florida Team Tennis, Inc.*, 410 F. Supp. 843 (W.D. Pa. 1976) (holding Pro Tennis Association's draft stifled competition for players' services); *Kapp v. NFL*, 389 F. Supp. 73 (C.D. Cal. 1974) (holding NFL draft patently unreasonable for permitting perpetual boycott of prospective draftees), *aff'd*, 586 F.2d 644 (1978); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.D.C. 1976) (holding NFL draft failed even to pass rule of reason test); *Robertson v. NBA*, 390 F. Supp. 867 (S.D.N.Y. 1975) (holding NBA draft analogous to price-fixing).

124. *Cf.* *Los Angeles Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) (permitting Raiders to move from Oakland to Los Angeles despite NFL rule prohibiting unauthorized relocation of member club).

125. *Id.*

126. *But cf.* *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974) (allowing club requirement that purchasers of regular season tickets buy low-cost stadium bonds too); *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286 (2d Cir.) (finding no violation in alleged tying between purchase of season and exhibition game tickets), *cert. denied*, 419 U.S. 1022 (1974).

127. *See supra* note 72 (explaining rule of reason analysis).

128. *Cf.* *International Boxing Club v. United States*, 358 U.S. 242 (1959) (holding defendant's control over key U.S. boxing arenas, making it almost impossible for competitors to stage championship boxing events without defendants' consent, was conspiracy in restraint of trade and attempt to monopolize); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971) (holding NFL club's exclusive use of only municipal stadium in Washington, D.C., suitable for professional football was restraint of trade at expense of potential clubs in the American and Continental football leagues), *cert. denied*, 404 U.S. 1047 (1972).

129. *Cf.* *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 95 (1984) (holding unrea-

with competing leagues,¹³⁰ and limits on who may own franchises,¹³¹ could all be considered attempts to monopolize the industry. Even discipline imposed by the commissioner's office¹³² on ballplayers or owners is subject to challenge as a conspiracy to deprive one of his right to earn a livelihood.

The list is hardly exhaustive. Certainly creative plaintiffs' lawyers would find other ownership practices vulnerable to antitrust attack were it not for the breadth of the exemption.

In light of these vulnerabilities, the breadth of baseball's antitrust immunity deserves comment. Imagine for the moment each of the sport's principal actors, twenty-eight club owners, the two leagues, and the commissioner's office, is named in just one civil antitrust lawsuit brought by a plaintiff having standing to bring an action alleging merely one count of each of the twelve acts described above. We may conservatively estimate baseball would face liability for up to 372 separate counts of anticompetitive conduct. The dollar value of the total liability, once treble damages, attorneys' fees, and costs have been added, would be truly staggering.

2. *Dulled Competitive Edge*

The breadth of baseball's antitrust exemption has been given much credit for the game's survival as a big business, especially during the economic vagaries of the mid-twentieth century.¹³³ But survival was ensured at a price: it also has dulled the industry's competitive edge.

sonable NCAA plan limiting total number of intercollegiate football games member school may televise); *Regents of Univ. of Calif. v. ABC Inc.*, 747 F.2d 511 (9th Cir. 1984) (holding unreasonable similar College Football Association plan limiting broadcast of games against member schools of the Pacific 10 Conference). *But see* Sports Broadcasting Act, 15 U.S.C. § 1291 (Supp. 1993) (exempting from antitrust exposure joint agreements to telecast games of "organized professional team sports," identified as football, baseball, basketball, and hockey).

130. *Cf.*, e.g., *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975) (finding NBA-ABA merger to violate Sherman and Clayton Antitrust Acts).

131. *E.g.*, *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) (permitting challenge to MLB franchise ownership rules); *Butterworth v. National League of Professional Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994) (same).

132. *E.g.*, *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989) (challenging MLB Commissioner A. Bartlett Giamatti's investigation of Cincinnati slugger Pete Rose for gambling).

133. *See* SEYMOUR, *supra* note 89, at 420 ("What really saved baseball, legally at least, for the next half century was the protective canopy spread over it by the United States Supreme Court's decision in the Baltimore Federal League anti-trust suit against Organized Baseball in 1922."). Baseball historian Seymour has written an important trilogy of books telling the story of our National Pastime. *See* HAROLD SEYMOUR, *BASEBALL: THE PEOPLE'S GAME* (1990); HAROLD SEYMOUR, *BASEBALL: THE GOLDEN AGE* (1971); HAROLD SEYMOUR, *BASEBALL: THE EARLY YEARS* (1960).

Whether it is true that Major League Baseball is in financial distress today, a point hotly contested by owners and players,¹³⁴ the fact the question could even be asked reflects how poorly prepared for economic competition baseball executives really are.

If baseball owners are correct in asserting the game faces financial ruin, then they must admit to having squandered one of the most lucrative corporate welfare programs in American history.¹³⁵ Baseball would join the ranks of other domestic industries, such as aerospace,¹³⁶ automaking,¹³⁷ computer manufacture,¹³⁸ and private lending,¹³⁹ which stumbled despite long histories of government subsidy and token marketplace competition. Fans and players alike would be within their rights to question, as free market economists might do, whether the stewardship of baseball is in the proper hands.

If baseball officials are wrong then they must admit to having baser motives. Sensing such motives, some players have called the demand for a salary cap really a demand for guaranteed profits.¹⁴⁰ Naturally, the typical business owner in any industry is not averse to earning a guaranteed annual profit, if only there were a way to turn the trick legally. The notion of underwriting net income as a legitimate collective bargaining goal, much less an entitlement, is alien to the American free market economy much the same way property ownership was alien to the command economy in the former Soviet Union. As one lawyer for the MLBPA put it, owners talk like "Adam Smith when they're selling and Joseph Stalin when they're buying."¹⁴¹

134. The debate is an old one. See HELYAR, *supra* note 11, at 326 (reporting that during 1985 collective bargaining negotiations the same data offered by owners to support their claim 21 of 26 teams had lost \$41 million in 1984 was offered by players' economist and Stanford Professor Roger Noll to show baseball had *earned* \$25 million the same year). For a sampling of comments by owners claiming financial distress over the years, see *id.* at 263.

135. See HELYAR, *supra* note 11, at viii ("Gentlemen, we have the only legal monopoly in the country and we're fucking it up.") (quoting Atlanta Braves owner Ted Turner).

136. See generally WAYNE BIDDLE, *BARONS OF THE SKY: FROM EARLY FLIGHT TO STRATEGIC WARFARE, THE STORY OF THE AMERICAN AEROSPACE INDUSTRY* 288-328 (1991) (describing decline of aerospace industry pioneers after World War II).

137. See generally PAUL J. INGRASSIA & JOSEPH B. WHITE, *COMEBACK: THE FALL AND RISE OF THE AMERICAN AUTOMOBILE INDUSTRY 19-34* (1994) (chronicling decline of Big Three automakers in face of Japanese competition).

138. See generally PAUL CARROLL, *BIG BLUES: THE UNMAKING OF IBM 65* (1993) (discussing IBM corporate mentality that company did not need to change because it was already doing everything right).

139. See generally STEPHEN PIZZO, ET AL., *INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS AND LOANS* (1989) (chronicling decline of thrifts across the nation).

140. Speech by Donald Fehr to Fifth Annual Entertainment Industry Labor and Employment Law Conference, Universal City, Calif., Oct. 5, 1994.

141. Mark Starr, *We Was Robbed!*, *NEWSWEEK*, Aug. 22, 1994, at 46, 51 (remarks of MLBPA Associate General Counsel Gene Orza).

Indeed, the lingo of baseball executives suggests they are interested in a closed market rather than a free one. In an era when American managers are obsessed as never before with learning how to beat the competition,¹⁴² baseball executives are obsessed with figuring out how to avoid competition.¹⁴³ This obsession is especially ironic in sport, where declaring winners and losers through competition is precisely the reason the game is played.¹⁴⁴

In such an environment, the industry's antitrust immunity ensures the dulling of whatever competitive instincts owners might bring to the business of baseball. Owners have little incentive to run their businesses well if their financial success is ensured no matter what they do. One of the most persistent critics of the business acumen of baseball executives has been one of their own: former Commissioner Peter Ueberroth. He told owners to their faces during his tenure they were "dumb" and "stupid."¹⁴⁵ He was incredulous when principal owners would consider skipping industry meetings or sending underlings as substitutes.¹⁴⁶ During 1985 collective bargaining negotiations, Ueberroth publicly denounced the owners' first demand for a salary cap as "frivolous."¹⁴⁷ Owners, he said, should "stop asking for the players to solve their financial problems."¹⁴⁸

142. See generally GARY HAMEL & C.K. PRAHALAD, *COMPETING FOR THE FUTURE* (1994); BENNETT HARRISON, *LEAN AND MEAN: THE CHANGING LANDSCAPE OF CORPORATE POWER IN THE AGE OF FLEXIBILITY* (1994); MICHAEL E. PORTER, *COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE* (1985); MICHAEL E. PORTER, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* (1980); ROBERT SLATER, *GET BETTER OR GET BEATEN: 31 LEADERSHIP SECRETS FROM GE'S JACK WELCH* (1994).

143. See generally, e.g., MILLER, *supra* note 11, at 353-54 (discussing how lack of competition for fan's dollar under NFL's revenue-sharing scheme dulled competition among owners in professional football).

144. References to "teamwork" and other sports metaphors are quite popular among consultants advising American business how to be competitive. For a recent sampling, see, e.g., DONALD R. KATZ, *JUST DO IT: THE NIKE SPIRIT IN THE CORPORATE WORLD* (1994); JON R. KATZENBACH & DOUGLAS K. SMITH, *THE WISDOM OF TEAMS: CREATING THE HIGH PERFORMANCE ORGANIZATION* (1993); THOMAS A. KAYSER, *TEAM POWER: HOW TO UNLEASH THE COLLABORATIVE GENIUS OF WORK TEAMS* (1994); DON MARTIN, *TEAMTHINK: USING THE SPORTS CONNECTION TO DEVELOP, MOTIVATE, AND MANAGE A WINNING BUSINESS TEAM* (1993); PAUL C. MILLER & TOM GORMAN, *BIG LEAGUE BUSINESS THINKING: THE HEAVY HITTER'S GUIDE TO TOP MANAGERIAL PERFORMANCE* (1994).

145. HELYAR, *supra* note 11, at 321. Ueberroth liked to express his disdain for owners' economic skills in parables:

"Let's say I sat each one of you down in front of a red button and a black button," he said at one early meeting. "Push the red button and you'd win the World Series but lose \$10 million. Push the black button and you would make \$4 million and finish somewhere in the middle."

He paused to look around. "The problem is, most of you would push the red one."

Id. at 322.

146. *Id.* at 320.

147. *Id.* at 326.

148. *Id.*

3. *Worsened Labor Relations*

Labor relations in baseball are among the nation's most turbulent. Since 1969, a labor dispute has threatened every three to four years to interrupt spring training, the regular season, or both.¹⁴⁹ Players struck in 1972, 1980, 1981, 1985, and 1994-95; owners locked them out in 1973, 1976, and 1990.¹⁵⁰ Baseball's antitrust immunity is the single most important factor in not only setting the stage for these quadrennial battles, but also prolonging their duration.¹⁵¹

The antitrust exemption epitomizes one of organized baseball's basic truths: since baseball turned pro in 1871,¹⁵² owners have controlled virtually every facet of the business. There is a control so complete one commentator has referred to owners as "lords" and their industry as a "realm."¹⁵³ In the whole history of organized baseball, there has been but one serious breach in the castle walls: the rise of the MLBPA in the late 1960s.¹⁵⁴ By 1969, when the MLBPA took the first effective concerted action in modern baseball history—players reported for spring training but collectively refused to sign individual contracts until they won increased pension benefits¹⁵⁵—the Lords of the Realm had

149. Typically each threat coincides with the expiration of the old collective bargaining agreement and the negotiation of the new one.

150. *E.g.*, *Chapter 8?*, L.A. TIMES, July 29, 1994, at C8. A chronicle of baseball labor disputes since 1969 reads as follows:

<u>Year</u>	<u>Type</u>	<u>Days</u>	<u>Games Lost</u>	<u>Issue</u>
1972	Strike	14	86	Pensions
1973	Lockout	12	0	Arbitration
1976	Lockout	17	0	Free agency
1980	Strike	8	0	Free agency
1981	Strike	50	712	Free agency
1985	Strike	2	0	Salary cap/arbitration
1990	Lockout	32	0	Salary cap/arbitration
1994	Strike	34*	434*	Salary cap

*Owners canceled the remainder of 1994 regular season on Sept. 14, 1994. See *Baseball Strike: Developments from Day 34*, L.A. TIMES, Sept. 15, 1994, at C1. Counting the off-season and the delay in starting the 1995 season, the 1994-95 strike lasted 231 days and cost 686 regular season games (434 1994 games plus 252 1995 games). See Ross Newhan, *It's Official: Baseball to Return*, L.A. TIMES, Apr. 3, 1995, at A1.

151. See Thomas S. Mulligan, *Baseball Antitrust Loophole May Strike Out*, L.A. TIMES, Sept. 22, 1994, at D1 ("Without the antitrust exemption, baseball experts say, the owners would not have pushed their demand for a salary cap to the point where players felt compelled to launch the season-ending strike."). See also Ross Newhan, *Fehr and Players Agree on Issues*, L.A. TIMES, Sept. 28, 1994, at C2 (reporting players would return to work without a new collective bargaining agreement so long as Congress approved pending legislation to strip baseball of antitrust immunity).

152. See WARD & BURNS, *supra* note 27, at 23.

153. HELYAR, *supra* note 11.

154. See generally MILLER, *supra* note 11.

155. *Id.* at 98-104.

lost their absolute power to dictate the terms and conditions of employment:

Owners have waged a futile campaign to turn back the clock and regain complete control ever since. The cocoon of baseball's antitrust exemption has encouraged them. In professional basketball and football, where antitrust immunity is dependent upon maintaining the collective bargaining relationship rather than ignoring it, with the Supreme Court's blessing,¹⁵⁶ work stoppages have been comparatively unknown.¹⁵⁷

Indeed, while owners in other industries have recently championed cooperative approaches to industrial relations,¹⁵⁸ baseball's owners have demanded unconditional surrender.¹⁵⁹ But they have yet to capture a white flag. Instead, the undisputed winner in each of baseball's prior labor disputes (identifying a victor is not so easy when labor and management clash in other industries) has been the MLBPA.¹⁶⁰

Repeated defeat has not persuaded owners to choose cooperation over confrontation. In fact, over the years each of the owners' principal collective bargaining proposals has revisited precisely the types of hot button issues they knew the players would not alter voluntarily.¹⁶¹ In 1969 and 1972, owners proposed holding the line on or reducing pension benefits. Instead they agreed to raise them.¹⁶² In 1976, 1980, and 1981, owners proposed severely restricting free agency. Instead they settled for the changes that have made players so rich today.¹⁶³ In 1973, 1985, and 1990, owners proposed capping salaries. Instead they settled for no cap.¹⁶⁴ These proposals were all-or-nothing gambits. If the players went along, then they were giving away their hardest-won victories. If the players fought and lost, then they would have to take

156. See *supra* notes 28-32 and accompanying text.

157. See *supra* notes 33 and 82 and accompanying text.

158. Much has been written in both the popular and scholarly presses on this subject. For a sampling, see COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS (Dec. 1994). This document, known as the Dunlop Commission Report, sets as the top goal for the 21st century marketplace the "Expanded coverage of employee participation and labor-management partnerships to more workers and more workplaces and to a broader array of decisions." *Id.* at 4.

159. See *infra* notes 161-64 and accompanying text.

160. See, e.g., Starr, *supra* note 141, at 49. "In disputes with owners from 1969 to 1990, the MLBPA is 8-0." Christopher D. Cameron, *Lessons for Labor Unions*, USA TODAY, Oct. 20, 1994, at A13. Some commentators from the start suggested that the owners' plan of action was doomed to failure. See Mike Downey, *Owners Haven't Got a Chance*, L.A. TIMES, Aug. 12, 1994, at C1.

161. See HELYAR, *supra* note 11, at 5, 87, 91, 95, 110-13, 117, 156-57, 221-22, 259, 286.

162. See, e.g., *id.* at 86-87, 110-13.

163. See, e.g., *id.* at 156-57, 221-22, 286.

164. See, e.g., *id.* at 325-27, 395, 417-18.

whatever scraps owners were willing to throw from the table. Either way, the MLBPA would become weaker, and be ripe for the picking at the next round of negotiations.

After nearly a quarter-century of experience dealing with a strong union, most employers would face facts and approach negotiations with the sort of respect a mature collective bargaining relationship deserves.¹⁶⁵ Club owners have not. The reason, in part, is that their unsuccessful labor relations practices are out of synch with their successful trade practices in practically every other aspect of the baseball business. Owners, for example, are used to getting away with the types of anticompetitive behavior listed above.¹⁶⁶ Labor relations, they figure, should be no different. Owners may believe if they keep pressing the MLBPA to the limit, then eventually the power they have reluctantly shared can be wrested away. In the meantime, owners pay no price under the antitrust laws for trying.

III. THE CASE AGAINST THE SALARY CAP

You go through The Sporting News for the last one hundred years, and you will find two things are always true. You never have enough pitching, and nobody ever made money.

Donald Fehr¹⁶⁷

A. Shooting the "Competitive Balance" Theory

Owners say baseball needs a salary cap to ensure large and small market clubs have an equal chance to compete for the fruits of victory: division titles, league pennants, and World Series rings. In negotiations with the MLBPA last summer, owners called this goal "competitive balance,"¹⁶⁸ so we will refer to the stated justification for the salary cap as the "competitive balance" theory.

The competitive balance theory hypothesizes that unless all the teams in each league agree to salary parity, great salary disparities

165. Ken Moffett, former baseball mediator and one-time MLBPA executive director, explains the dynamic driving baseball's labor relations: "There's no trust between these people, . . . and with good reason. When there's no trust, all you have are Band-Aid [solutions]. Anyway, how can you have trust in an adversarial situation?" Paul White, *Moffett: New Wrinkles, Same Mistrust*, *BASEBALL WEEKLY*, Aug. 24-30, 1994, at 9.

166. See *supra* notes 119-32 and accompanying text.

167. Executive Director, Major League Baseball Players' Association, *quoted in* HELYAR, *supra* note 11, at ix.

168. See, e.g., Ross Newhan, *Patiently and with Foresight, Indians Stuck to Plan*, *L.A. TIMES*, June 19, 1994, at C12.

among teams will emerge. Wealthier clubs in the larger markets, such as Chicago, Los Angeles, and New York, will outspend poorer clubs in the smaller markets, such as Montreal, San Diego, and Seattle, and sign the most talented players. By cornering the talent market, the larger clubs will essentially buy division titles, league pennants, and World Series rings, thereby monopolizing success in the sport. By contrast, smaller clubs will struggle merely to finish respectably.

The theory also projects that, as an oligarchy of wealthy teams emerges, we would see the same clubs playing for the championship year in and year out. As the smaller clubs become athletically inferior, fan support will dwindle, leaving small market clubs economically marginalized, if not bankrupt. Thus the sport's competitive balance will be destroyed.¹⁶⁹

The main problem with the competitive balance theory is the lack of empirical evidence supporting it. If owners had to defend an antitrust challenge to the salary cap based only upon the competitive balance theory, then surely the salary cap would fail even a rule of reason analysis.¹⁷⁰ Indeed, all the evidence points in precisely the opposite direction: baseball enjoys remarkable competitive balance *without* a salary cap.¹⁷¹

We examined the period 1983 to 1992, the last complete decade of Major League Baseball competition before expansion in 1993. This is the same decade during which the average baseball player's salary jumped from about \$200,000 to more than \$1 million.¹⁷² Of the twenty-six franchises competing during this ten-year period, twenty different teams won the forty available division titles.¹⁷³

169. See, e.g., Houston Mitchell, *Baseball '94: Going, Going . . . Gone; Ending Leaves Many Questions, Unpleasant Answers*, L.A. TIMES, Sept. 15, 1994, at C9.

170. See *supra* note 72 (explaining rule of reason analysis).

171. By 1991, Major League Baseball had lived and flourished through fifteen years of free agency. It no longer has to rely on economists' theoretical arguments to know the impact of free agency on competitive balance. By any measure, competitive balance has not only not become more unequal since 1976, it has become noticeably more equal.

ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* 95 (1992).

Professor Zimbalist compared competitive balance before and after the advent of free agency in 1975. During the first 15 seasons of free agency, 12 different teams won the World Series and 16 different teams played for the championship. Only 3 teams—the Seattle Mariners, the Cleveland Indians, and the Texas Rangers—failed to win division titles. During the period before free agency, however, a handful of teams dominated the game. From 1903 to 1970, teams from the 4 biggest cities won 49 of 68 pennants. From 1903 to 1964, a New York team won 39 of 61 World Series. The Yankees dominated the era. From 1926 to 1964, they posted 39 consecutive winning seasons and finished first 26 times. *Id.*

172. See *Soaring Sums*, TIME, Aug. 22, 1994, at 70 (charting rise in average salaries).

173. See *infra* Table 1.

Fifteen different teams won the twenty available league pennants.¹⁷⁴ And nine different teams won the ten available World Series championships.¹⁷⁵ Every team seemed to have an equal chance at achieving success, failure, or mediocrity.

1. Success or Failure in the National League¹⁷⁶

From 1983 to 1992, all twelve teams in the National League finished dead last at least once. Eleven teams finished in first place at least once. Tables 1 and 2 provide the details:

174. TEAMS WINNING AVAILABLE PENNANTS

<u>National League Club</u>	<u>Year</u>	<u>American League Club</u>	<u>Year</u>
Philadelphia	1983	Baltimore	1983
San Diego	1984	Detroit	1984
St. Louis	1985, 1987	Kansas City	1985
New York Mets	1986	Boston	1986
Los Angeles	1988	Minnesota	1987, 1991
San Francisco	1989	Oakland	1988, 1989, 1990
Cincinnati	1990	Toronto	1992
Atlanta	1991, 1992		

For the data on which these figures are based, see THE BASEBALL ENCYCLOPEDIA passim (9th ed. 1994) (hereinafter BASEBALL ENCYCLOPEDIA).

175.

<u>Club</u>	<u>Year</u>
Baltimore	1983
Detroit	1984
Kansas City	1985
New York Mets	1986
Minnesota	1987, 1991
Los Angeles	1988
Oakland	1989
Cincinnati	1990
Toronto	1992

Id.

176. For the seasons 1983 through 1992, National League clubs performed as follows:

<u>Club</u>	<u>Winning Percentage</u>
New York Mets	.546
St. Louis	.517
Los Angeles	.509
Cincinnati	.506
Montreal	.506
Pittsburgh	.500
San Diego	.499
Houston	.499
Chicago Cubs	.491
San Francisco	.486
Philadelphia	.475
Atlanta	.464.

Id.

TABLE 1¹⁷⁷**Last Place Finishes in the National League, 1983-1992**

<u>Club</u>	<u>Last Place Finishes</u>
Atlanta	1986, 1988, 1989, 1990
Pittsburgh	1984, 1985, 1986
Philadelphia	1988, 1989, 1992
San Francisco	1984, 1985
Chicago Cubs	1987
Cincinnati	1983
Houston	1991
Los Angeles	1992
Montreal	1991
New York Mets	1983
San Diego	1987
St. Louis	1990

TABLE 2¹⁷⁸**First Place Finishes in the National League, 1983-1992**

<u>Club</u>	<u>First Place Finishes</u>
Los Angeles	1983, 1985, 1988
Pittsburgh	1990, 1991, 1992
Atlanta	1991, 1992
Chicago Cubs	1984, 1989
New York Mets	1986, 1988
San Francisco	1987, 1989
St. Louis	1985, 1987
Cincinnati	1990
Houston	1986
Philadelphia	1983
San Diego	1984

177. *Id.* at 464-521.178. *Id.*

The data show every team except the small market Montreal Expos¹⁷⁹ finished at both the bottom and the top of its division within the same decade. No team won as much as 55% of its games and no team lost more than 55% of its games.¹⁸⁰ Seven of the franchises were within 1% or less of winning 50% of their games.¹⁸¹ A team at the bottom of the division could reasonably expect to be at the top within a few years.¹⁸² The teams in the largest markets—New York, Los Angeles and Chicago—won just under 52% of their games.¹⁸³

2. Success or Failure in the American League¹⁸⁴

The story is much the same in the American League. During the same decade, eleven of the fourteen teams finished in last place at least once. Nine teams finished first at least once. Tables 3 and 4 provide the details:

179. If the 1981 and 1982 seasons are included, then we can say every team has finished first at least once. (The Montreal Expos won the National League East pennant in 1981.) *Id.* at 455.

This is also true if the shortened 1994 season is included. As of August 12, 1994, the date the strike began, Montreal was not only leading the National League East by six games, but also enjoying the best record in baseball (74-40, .649). *Final 1994 Major League Baseball Standings*, L.A. TIMES, Sept. 15, 1994, at C12.

180. BASEBALL ENCYCLOPEDIA, *supra* note 174, at 464-521.

181. *Id.*

182. For example, the Atlanta Braves finished last three years in a row (1988, 1989, and 1990) only to finish first the next three years in a row (1991, 1992, and 1993). Moreover, the Pittsburgh Pirates finished last three years in a row during the mid-1980s (1984, 1985, and 1986) only to finish first three years in a row during the early 1990s (1990, 1991, and 1992). Finally, the San Francisco Giants finished last two years in a row (1984 and 1985) but two years later finished first (1987). *Id.*

183. The combined winning percentage of the New York Mets, Los Angeles Dodgers and Chicago Cubs was .515. *Id.*

184. For the seasons 1983 through 1992, American League clubs performed as follows:

<u>Club</u>	<u>Winning Percentage</u>
Toronto	.561
Oakland	.538
Detroit	.525
Boston	.516
New York Yankees	.511
Kansas City	.506
Chicago White Sox	.503
Minnesota	.502
Milwaukee	.501
California	.498
Baltimore	.482
Texas	.475
Seattle	.443
Cleveland	.439

Id.

TABLE 3¹⁸⁵**Last Place Finishes in the American League, 1983-1992**

<u>Club</u>	<u>Last Place Finishes</u>
Cleveland	1983, 1985, 1987, 1991
Seattle	1983, 1986, 1988, 1992
Texas	1984, 1985, 1987
Baltimore	1986, 1988
California	1987, 1991
Boston	1992
Chicago White Sox	1989
Detroit	1989
Milwaukee	1984
Minnesota	1990
New York Yankees	1990

TABLE 4¹⁸⁶**First Place Finishes in the American League, 1983-1992**

<u>Club</u>	<u>First Place Finishes</u>
Oakland	1988, 1989, 1990, 1992
Toronto	1985, 1989, 1991, 1992
Boston	1986, 1988, 1990
Detroit	1984, 1987
Kansas City	1984, 1985
Minnesota	1987, 1991
Baltimore	1983
California	1986
Chicago White Sox	1984

Nearly half the league (six teams) finished at the bottom and the top of their divisions within the decade.¹⁸⁷ No team during the decade won more than 57% of its games and only one team¹⁸⁸ lost that many. Five

185. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 464-521.

186. *Id.*

187. If the 1981 and 1982 seasons are included, then the number expands to 11 teams. (The small market Milwaukee Brewers shared the American League East title with the New York Yankees during the strike-shortened 1981 season and won it outright in 1982.) *Id.* at 455-64.

188. The Cleveland Indians were one of the more unfortunate victims of the 1994 strike. At the time the strike was called they had the third-best record in the American League (66-47, .584) and were a serious threat to qualify for a "wild card" spot in the playoffs. *Final 1994 Major League Baseball Standings*, L.A. TIMES, Sept. 15, 1994, at C12. The Indians have not played in the post-season since 1954 and, as Cleveland fans can attest, remain an enigma.

teams fell within 1% of the 50% mark. The big market teams in New York, Southern California, and Chicago won just over 50% of their games.¹⁸⁹ Like their National League counterparts, most American League teams at the bottom could reasonably expect to rise to the top within a few years.¹⁹⁰

3. *Winning it All*

A full 162-game regular season of Major League Baseball lasts about five months. The club expected to win the World Series is usually the one with the superior record at the regular season's end. This happened only four times, however, in the ten Series played during the decade in question. In six Series, the "weaker" team actually won the championship. Table 5 provides the details:

TABLE 5¹⁹¹
World Series Winners and Losers, 1983-1992

<u>Year</u>	<u>Winner</u>	<u>Record</u>	<u>Loser</u>	<u>Record</u>
1983	Baltimore	98-64	Philadelphia	90-72
1984	Detroit	104-58	San Diego	92-70
1985	Kansas City	91-71	St. Louis	101-61
1986	New York Mets	108-54	Boston	95-66
1987	Minnesota	85-77	St. Louis	95-67
1988	Los Angeles	94-67	Oakland	104-58
1989	Oakland	99-63	San Francisco	92-70
1990	Cincinnati	91-71	Oakland	103-59
1991	Minnesota	95-67	Atlanta	94-68
1992	Toronto	96-66	Atlanta	98-64

This persistence, rather than absence, of competitive balance is best understood as the result of a phenomenon more prominent in baseball than in other professional team sports:¹⁹² unpredictability.

189. The combined winning percentage of the New York Yankees, California Angels, and Chicago White Sox was .502. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 464-521.

190. For example, the Minnesota Twins finished last in 1990 and first in 1991. The California Angels did the reverse, finishing in first in 1986 and last in 1987. The Toronto Blue Jays have won the last three Eastern Division titles, but were near the bottom of the division (55-60, .478) when the 1994 strike began. *Final 1994 Major League Baseball Standings*, *L.A. TIMES*, Sept. 15, 1994, at C12.

191. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 464-518, 2798-2825.

192. We define "other professional team sports" here as professional basketball as played in the National Basketball Association and professional football as played in the National Football League. Inasmuch as a large part of a professional sports franchise's revenues are derived from network television contracts, we only include football and basketball here and not hockey because, at least until recently, the National Hockey League had no network television contract, as it now does with the Fox network.

Consider the binary system, a system which produces only two outcomes. Coin-tossing is a classic binary system because its outcome is always heads or tails.¹⁹³ In a perfectly random,¹⁹⁴ binary system, the outcome goes one way (heads) 50% of the time and the other way (tails) 50% of the time. It is impossible to predict outcomes in such a system, because at any given time, each possible outcome—heads or tails—has an equal chance of occurring.

Like coin-tossing, a professional team sport—such as Major League Baseball, NBA basketball, or NFL football—is a binary system.¹⁹⁵ The outcome is virtually always win or lose.¹⁹⁶ But, unlike coin-tossing, a professional team sport is not supposed to produce random outcomes. The results are supposed to be stratified because various factors, especially talent, are unequal from team to team. That is, a “better” team—a team with more talent than other teams—should win more than 50% of its games. Indeed, a “great” team should win a lot more than 50% of its games. In such a system it becomes theoretically possible to predict outcomes by first assessing the relative talent of competing clubs.

We can test the generally held belief that the outcomes of baseball games are predictable, rather than random, by comparing the winning percentages of the most successful teams in each of the three major sports.

Since 1947,¹⁹⁷ the average winning percentage of a championship

193. Coin-tossing is a purely random system because a coin tossed in the air 100 times, on average, comes up heads 50 times and tails 50 times.

194. A simple random sample is one in which the elements of the population are listed, and then N of them are randomly selected to be elements of the sample. The random selection is carried out in such a way that (1) every element in the population has an equal probability of being included in the sample, and (2) every possible combination of N elements has an equal probability of constituting the sample. Random selection does not mean haphazard selection; rather it means a selection process that gives each element in the population an equal chance of appearing in the sample.

HERMAN J. LOETHER & DONALD G. MCTAVISH, *DESCRIPTIVE AND INFERENTIAL STATISTICS* 374 (1976) (emphasis omitted).

195. See BILL JAMES, *THE BILL JAMES HISTORICAL BASEBALL ABSTRACT* 290 (Villard rev. ed. 1988) (“Winning percentage is [baseball’s] one constant statistic; it stays at .500000 in every decade, in every park, in every season, in every game and on every pitch. Everything that happens is good for one team precisely in the degree to which it is bad for the other.”)

196. The only time the outcome is otherwise is during regular season professional football games. Occasionally final scores will result in ties. This does not affect the analysis since a tie is counted as half a win and half a loss in the standings.

197. The statistics herein begin with the year 1947 for two reasons. First, 1947 was the first year all three professional sports organizations discussed in this Article, Major League Baseball, the NBA, and the NFL, co-existed. (The 1946-47 season marked the NBA’s debut.)

Second, and more important, 1947 was the year the color line was broken in baseball. Arguably all baseball statistics before this time are invalid inasmuch as a large percentage of the best

club is 81.1% in football,¹⁹⁸ 70.4% in basketball,¹⁹⁹ and 61.0% in baseball.²⁰⁰ Baseball's results are the closest of the three to 50%, so therefore a baseball team's comparative success appears to be the most random. How often does a champion football team win as infrequently as the average champion baseball team? It has never happened.²⁰¹ How often does a champion basketball team win as little as the average baseball team? It has happened only 10% of the time over the last thirty-five years.²⁰² Conversely, how often does a championship baseball team win as frequently as an average champion football or basketball team? Never and rarely, respectively.²⁰³

Moreover, if regular season play is the true measure of a successful team, then the team with the better record should win the championship more often. In football, the team with the better record wins the

baseball players were excluded from participation. Only ethnocentrism can explain why historians continue to refer to organized baseball before 1947 as being Major League Baseball on the one hand and the Negro Leagues as something less on the other. After all, of the 438 games in which teams from all-White Major League Baseball and the all-Black Negro Leagues faced each other during baseball's segregated period, the Negro Leagues team won 309 games, or 71% of all contests. WARD & BURNS, *supra* note 27, at 198. Perhaps it would be better to view the two organizations as the White Leagues and the Black Leagues.

Of course, 1947 did not represent the year in which baseball was integrated. Having only one African-American, Brooklyn Dodger infielder Jackie Robinson, playing in the National League hardly qualified as integration. Major League Baseball was probably not fully integrated until the early 1960s.

Interestingly, the demise of the New York Yankees' dynasty (1921-1964) coincides with the full integration of baseball and is epitomized by the Yankees' defeat in the 1964 World Series at the hands of the St. Louis Cardinals. The Cardinals' success that year was due primarily to the contributions of young African-Americans: outfielders Lou Brock and Curt Flood, pitcher Bob Gibson, and first baseman Bill White. The Yankees remained a team of aging Whites: outfielders Mickey Mantle and Roger Maris and pitchers Whitey Ford and Bill Terry. For a thoughtful review of the 1964 season, see generally DAVID HALBERSTAM, OCTOBER 1964 (1994). Nobody knows how many championships the Yankees would have won had they faced the likes of Satchel Paige, Josh Gibson, "Cool Papa" Bell, Buck O'Neill, or other Negro Leagues stars in their prime.

198. See generally DAVID S. NEFT, ET AL., THE SPORTS ENCYCLOPEDIA: PRO FOOTBALL (1993) [hereinafter NEFT, ET AL., PRO FOOTBALL] (recording yearly team results).

199. See generally DAVID S. NEFT & RICHARD M. COHEN, THE SPORTS ENCYCLOPEDIA: PRO BASKETBALL (1992) [hereinafter NEFT & COHEN, PRO BASKETBALL] (recording yearly team results).

200. See generally BASEBALL ENCYCLOPEDIA (8th ed. 1993) (recording yearly team results).

201. No championship football team since 1947 has won as few as 61% of its games. See NEFT, ET AL., PRO FOOTBALL, *supra* note 198.

202. Only four championship basketball teams in the past 35 years failed to win 60% of their regular season games: the Washington Bullets (1977-78), Portland Trailblazers (1976-77), Golden State Warriors (1974-75), and Boston Celtics (1968-69). See NEFT & COHEN, PRO BASKETBALL, *supra* note 199.

203. No professional baseball team since 1885 has ever won 80% of its games, and since 1947 only one club, the 1954 Cleveland Indians, has won 70%. BASEBALL ENCYCLOPEDIA, *supra* note 174, at 87-521.

Super Bowl 71.1%²⁰⁴ of the time.²⁰⁵ In basketball, the team with the better record wins the NBA championship series 71.7% of the time.²⁰⁶ In these sports, success is predictable. In a given season, picking the ultimate winner in these sports is relatively easy.

What about baseball? Since 1947 the team with the better record has won the World Series only 44.1% of the time.²⁰⁷ In sum, the outcome of the World Series is relatively difficult to predict, because about half the time the team having the better record wins and about half the time it loses.

Many things could influence this number, but most of them are probably insignificant. Take two examples: home field advantage and relative league strength. Neither factor changes the result.

As to the former, since 1947 the team with the home field advantage in the World Series has won if only 46.8% of the time.²⁰⁸

As to the latter, it could be that a team's regular season record is irrelevant since there is no inter-league competition and one league could be stronger than the other. There is no good way to measure relative league strength. One superficial indicator is All-Star game results. One could surmise the league that wins the All-Star game is be the "stronger" league. And how often does the "stronger" league win the World Series? Since 1947 the All-Star winning league has won the World Series just 48.9% of the time.²⁰⁹

In sum, if a fan was given her choice of predicting the World Series winner based on regular season record, home field advantage, relative league strength, or tossing a coin, she would be best off tossing a coin. This is hardly surprising given the random nature of the baseball

204. This number includes NFL championships from 1947 to 1965 (before the Super Bowl was established to decide league championships).

205. Over the last 47 years, the team with the better record, among the finalists, has won the championship game 32 times and lost 13. In two games, the competitors had identical regular season records, so these years were excluded from the calculation. See NEFT, ET AL., *PRO FOOTBALL*, *supra* note 198.

206. Over the last 46 years, the team with the better record among the finalists has won the NBA finals 33 times and lost 13. See NEFT & COHEN, *PRO BASKETBALL*, *supra* note 199.

207. Over the last 47 World Series, the team with the better record among the finalists has won 19 and lost 24 series. The 1949, 1951, and 1958 seasons were omitted because the teams had identical regular season records. The 1981 season was omitted because a strike canceled a significant part of the season. See *BASEBALL ENCYCLOPEDIA*, *supra* note 174.

208. The site of the World Series rotates between the National League and American League every year. In the 47 Series since 1947, the team with home field advantage at the outset of the series has won 22 series and lost 25. *Id.*

209. The 1959 and 1962 seasons were excluded from this calculation because in both years two All-Star games were played with each league winning one contest. *THE BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 2832-33.

enterprise,²¹⁰ a phenomenon that is probably heightened under the random pressures of a short World Series schedule.

A last comment about competitive balance and "winning it all." During the past fifteen years, eighteen different baseball franchises have participated in the World Series, with no team making more than three appearances.²¹¹ On average, a different team is in the World Series every year. Baseball is a sport in which each club has almost an equal opportunity to win a championship ring.

By contrast, NBA basketball—which had a salary cap for more than a decade²¹²—is not such a sport.²¹³ During the past fifteen years, only nine franchises have made the NBA Finals, and fourteen of those appearances were made by either or both the Los Angeles Lakers and/or Boston Celtics combined.²¹⁴ Historically, a Lakers or Celtics team has played in the championship series nearly every year.²¹⁵

Therefore, the evidence is fatal to the theory that there will be no competitive balance absent a salary cap. There is no salary cap now and baseball enjoys competitive balance. Perhaps that is why New York Yankees' owner George Steinbrenner announced his support for his colleagues' salary cap demand, but not their justification for it. "You can shoot that theory right in the butt," he said.²¹⁶

B. Salary Cap Assumptions: Talent and Success

Two assumptions about the relationship in baseball between talent and success²¹⁷ are critical to the feasibility of the competitive balance

210. See *infra* notes 256-83 and accompanying text.

211. Toronto (1992 & 1993), Minnesota (1987 & 1991), Oakland (1988-1990), Boston (1986), Kansas City (1980 & 1985), Detroit (1984), Baltimore (1979 & 1983), Milwaukee (1982), New York Yankees (1981), Atlanta (1991-1993), Cincinnati (1990), San Francisco (1989), Los Angeles (1981 & 1988), St. Louis (1982, 1985, 1987), New York Mets (1986), San Diego (1984), Philadelphia (1980 & 1983), Pittsburgh (1989). *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 2782-2825.

212. For background on the salary cap in the NBA, see *Bridgeman v. NBA*, 675 F. Supp. 960 (D. N.J. 1987).

213. Football lies somewhere in between. Injuries to key offensive players, among other reasons, reduce somewhat the game's predictability.

214. Los Angeles Lakers (1980, 1982, 1983, 1984, 1985, 1987, 1988, 1989, 1991) and Boston Celtics (1981, 1984, 1985, 1986). See *NEFT & COHEN*, *PRO BASKETBALL*, *supra* note 199.

215. This holds true for the NBA since its inception. In 47 years of championship play, the Lakers or Celtics have made the finals an amazing 42 times (Lakers 23, Celtics 19). *Id.*

216. Starr, *supra* note 141, at 51 (quoting New York Yankees' owner George Steinbrenner). Interestingly, for all Steinbrenner's well-publicized machinations and free-spending ways, his club has won only two championships in almost 20 years. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 2779-825.

217. This Article analyzes and compares the relationship between talent and success among offensive players only. We do not address such relationship, if any, among defensive players, particularly pitchers and fielders. The reasons are simple: the object of the game is to win by scoring more runs than the opponent, creating runs is the essence of offense, and it is the hitter's job to create runs for his team. For an explanation, see *JAMES*, *supra* note 195, at 273-74, 276.

theory, and hence, the salary cap. Unless both assumptions are true, the theory falls of its own weight.

The first assumption is that an individual player's *talent* can accurately predict his *success* at any given time during play. In other words, a player who does his job well predictably produces benefits (usually in the form of runs) for his team.

The second assumption is that a player's *individual* success can accurately predict his *team's* success. In other words, a player who produces benefits predictably produces victories too.

As applied to Major League Baseball, neither assumption is true. We quite agree that without talent, ballplayers cannot succeed, and without successful ballplayers, baseball clubs cannot succeed. But it is another matter altogether to predict accurately *when* their success is going to happen. We demonstrate below.

1. *Talent Cannot Predict Individual Success*

Defining baseball success is not hard at all. It has plenty to do with talent. The most talented hitter in the league is, by definition, the most successful: he is the player who wins the batting title at the end of the season. But predicting who that player will be at the beginning of the season is next to impossible.

If the competitive balance theory worked, then an offensive player's athletic ability—to “see” the ball, swing the bat well, and get “good wood” on it—would have to predict success on the field, including, more often than not, getting on base, advancing runners, and scoring runs. The salary cap is premised upon the assumption that such success can be purchased because success among talented ballplayers is predictable.

Baseball, however, defies predictability. We can know who is most talented, but not when he will be successful. The result is a comparatively random system. To account for baseball's unpredictability, players, fans, and even sportswriters have made corresponding downward adjustments in their measurements of what constitutes individual player success. Instead of expecting top offensive players to play .700 or .600 ball, as we do in football and basketball, we tolerate .300 or even .200 ball. A .300 hitter is someone who is talented; a .200 hitter is someone who is not so talented. Inevitably, these adjustments run in precisely the opposite direction needed to predict successful performance (the more the success rate surpasses 50%, the more predictable is successful performance). In the case of the .300 or .200 hitter, batting average is really a better predictor of failure than success.

But no adjustment in the definition of success in baseball can change the nature of predictability. One measure of success is producing a good result more than 50% of the time. The more often the good result is produced the more predictable is the success. We can call someone who succeeds only three out of every ten at-bats a "success" all we like, but the numbers are a better predictor of when he will fail than when he will succeed.

Consider a hitter who bats .400 for a full season, something nobody but Hall of Fame slugger Ted Williams²¹⁸ has done in more than half a century. By most measurements, this performance would not be considered great, or even good. It means the hitter is failing "only" 60% of the time. But to a baseball fan, hitting .400 is astounding. Hitting .500? Unimaginable. Batting .600? Impossible.

Yet outside the baseball world even the unimaginable .500 success rate simply indicates a purely random system: 50% of the time the hitter succeeds, 50% of the time he fails. For a given at-bat, we could predict the .500 hitter's success just as easily by flipping a coin.

The unpredictability of baseball success is reflected in both lore and ledger. As for lore, baseball, wags like to remind us, is a sport in which an offensive player is considered a success if he fails only 70% of the time.²¹⁹ "If Joe Montana or Dan Marino completed three of every ten passes they attempted, they would be *ex*-professional quarterbacks," says Ted Williams. "If Larry Bird or Magic Johnson made three of every ten shots they took, their coaches would take the basketball away from them."²²⁰

As for ledger, the statistics reveal relative inconsistency even when baseball's highest-paid—and presumably most talented—hitters achieve success. Two statistics are especially illuminating: the predictability of individual success in the three major professional sports (a) from game to game and (b) from season to season.

(a) *Game Consistency.*²²¹

We explain below why an individual player's effort often does not

218. Outfielder, Boston Red Sox, 1939-1960. Admitted to Hall of Fame, 1966. Career batting average, .344. In 1941, Williams batted .406 and remains the last major leaguer to bat at least .400. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 1620.

219. *E.g.*, WARD & BURNS, *supra* note 27, at xix.

220. TED WILLIAMS & JOHN UNDERWOOD, *THE SCIENCE OF HITTING* 7 (Fireside rev. ed. 1986).

221. A word about the methodology. Game-by-game statistics across sports are somewhat unreliable for a number of reasons: (1) it is difficult to ascertain what precise measure to use that is comparable in each sport; (2) each regular season in professional sports season has a different length—for example, football's 16 games to baseball's 162; and (3) individual players from sport

ensure his success,²²² but for our purposes here it is sufficient to analyze how consistently the top players are (or are not) successful.

How often will a player, in any individual game, fail to perform at a level within 50% of his season average? We examined the statistics of the top ten salaried performers in each sport. Tables 6, 7, and 8 summarize the results:

TABLE 6²²³

Per Game Failure Rates of Top-Salaried Baseball Players, 1993

<u>Player</u>	<u>Salary</u>	<u>Failure Rate (%)</u>
Bobby Bonilla	\$ 6,300,000	33.8
Joe Carter	5,500,000	29.8
Rafael Palmeiro	5,406,603	29.3
Cal Ripken, Jr.	5,400,000	30.9
Roberto Alomar	5,333,334	19.3
Jose Canseco	5,100,000	30.9
Kirby Puckett	5,200,000	27.1
Barry Bonds	4,984,300	29.2
Rickey Henderson	4,800,000	26.7
Ruben Sierra	4,700,000	39.0

to sport have disparate opportunities to participate in the offensive side of the game.

The measures chosen here were expressed by common percentages used to indicate offensive success: for baseball, the percentage of hits per at-bats (batting average); for basketball, the percentage of field goals per attempts (field goal percentage); and for football, the percentage of completions per attempts (passing completion rate). A baseball player's offensive participation is more limited than in other sports. A hitter playing nine innings takes about four at-bats per game, whereas a basketball star playing 60 minutes takes about 20 shots per game. Fewer opportunities to participate in the offensive game naturally make the results in baseball more unpredictable. But that is the point: a baseball player, in any individual game, has fewer opportunities to display his "talent" due to his limited participation. See *infra* notes 273-77 and accompanying text (discussing baseball's limited participation rules).

222. For example, consider the lack of "directedness" in the hitter's task as compared to that of his counterparts on offense in basketball or football. See *infra* notes 259-72 and accompanying text.

223. The list of the top 10 players by salary is based on published figures for 1994. See *Baseball's Elite*, L.A. TIMES, July 17, 1994, at C14. The figures were derived as follows. We tracked the top 10 players through newspaper box scores for the 1993 season. Only non-pitchers were considered. Their success was defined by batting average. For example, a player whose season batting average is .300 (meaning overall he averages almost one hit per three at-bats) shall achieve 50% of his season average by getting at least one hit per six at-bats per game (an average of .167). For all practical purposes, a ballplayer's failure to achieve 50% of his overall season average in a given game means he is going hitless.

TABLE 7²²⁴**Per Game Failure Rates of Top-Salaried Basketball Players, 1993-94**

<u>Player</u>	<u>Failure Rate (%)</u>
Patrick Ewing	6.3
Hakeem Olajuwon	1.3
Charles Barkley	3.1
Isaiah Thomas	6.6
Moses Malone	5.3
Chris Mullin	8.1
Robert Parish	6.8
Karl Malone	0.0

TABLE 8²²⁵**Per Game Failure Rates of Top-Salaried Football Players, 1993**

<u>Player</u>	<u>Failure Rate (%)</u>
Joe Montana	0.0
Jim Kelly	0.0
Jeff George	0.0
Warren Moon	0.0
Jim Everett	10.0
Bernie Kosar	0.0
John Elway	0.0
Randall Cunningham	0.0
Dan Marino	0.0
Phil Simms	0.0

The results are telling. In baseball, a top player will not perform at the 50% level 30% of the time.²²⁶ In basketball the figure is less than

224. The list of the top 10 basketball players by salary is based on published figures from 1991. See *The 1991 Sport 100 Salary Survey*, SPORT, June 1991, at 41-60. The figures were derived as follows. We tracked the top 10 players through newspaper box scores for the 1993-94 season. Only starting players were tracked. Success was defined by shooting percentage. (Games in which a player took fewer than four shots were excluded.)

Although Michael Jordan and Earvin "Magic" Johnson were among the top 10 highest-paid starters in 1991, they are excluded from the tally here because both were retired during the 1993-94 season. Thus only eight players were actually reviewed through that season.

225. The list of the top 10 football players by salary is based on published figures from 1991. *Id.* at 41-60. The figures were derived as follows. We tracked performance through newspaper summaries for the 1993 season. Only quarterbacks were reviewed. Success was defined by passing completion percentage.

226. Based on the method explained above, see *supra* note 223, we calculate the average per game failure rate of the 10 most highly paid baseball players at 29.8%.

5%²²⁷ and in football it is close to 0%.²²⁸ From game to game, the success of baseball players is much less predictable than it is in the other sports.

(b) *Season Consistency.*

How often will a top player not come close to or exceed his cumulative average in any given season? Again we examined the statistics of the top ten salaried performers in each sport. Tables 9, 10, and 11 summarize the results:

TABLE 9²²⁹

**Per Season Failure Rates of Top-Salaried Baseball Players
(Through 1993)**

<u>Player</u>	<u>Failure Rate (%)</u>
Bobby Bonilla	28.6
Joe Carter	30.0
Rafael Palmeiro	28.6
Cal Ripken Jr.	50.0
Roberto Alomar	0.0
Jose Canseco	28.6*
Kirby Puckett	22.2
Bobby Bonds	14.3
Rickey Henderson	28.6
Ruben Sierra	14.3

*Excludes 1993 season due to injury.

227. Under the method explained above, *see supra* note 224, we calculated the average per game failure rate of these basketball players at 4.7%.

228. Under the method explained above, *see supra* note 225, we calculated the quarterbacks' per game average failure rate at 1.0%. In fact, nine of the 10 players posted average failure rates of 0.0%.

229. We tracked the same baseball players as above in measuring average season failure rates. *See* text accompanying *supra* note 223. We define "coming close" as within 5% or better, in a given season, of a player's lifetime batting average entering such season. For example, if a player has a lifetime batting average of .300 when he arrives to play on Opening Day, he needs to hit at least .285 during the new season to come within 5% of his lifetime average.

TABLE 10²³⁰**Per Season Failure Rates of Top-Salaried Basketball Players
(Through 1991-92)**

<u>Player</u>	<u>Failure Rate (%)</u>
Patrick Ewing	0.0
Hakeem Olajuwon	0.0
Charles Barkley	0.0
Isaiah Thomas	20.0
Moses Malone	33.3
Chris Mullin	0.0
Robert Parish	6.7
Michael Jordan	0.0*
Magic Johnson	27.3
Karl Malone	0.0

*Excludes 1985-86 season due to injury.

TABLE 11²³¹**Per Season Failure Rates of Top-Salaried Football Players
(Through 1991)**

<u>Player</u>	<u>Failure Rate (%)</u>
Joe Montana	7.7
Jim Kelly	11.1
Jeff George	25.0
Warren Moon	20.0
Jim Everett	12.5
Bernie Kosar	12.5
John Elway	0.0
Randall Cunningham	0.0
Dan Marino	10.0
Phil Simms	7.7

230. The top 10 basketball players are rated based upon salary data available in 1991. See *supra* note 224. We define "coming close" as within 5% or better of a player's lifetime shooting percentage. We tracked these players through the 1991-92 season only.

Interestingly, when age is taken into account, the failure rate is 0.0%. That is, the only players who failed to reach their lifetime averages in a given season were players who had played more than 10 years. The data suggest a basketball player in his prime consistently comes close to or betters his lifetime average each season. This is not true in baseball, where even a player in his prime does not consistently meet or beat his lifetime average. See *supra* Table 9.

231. We identified the top 10 quarterbacks based on figures available in 1991. See *supra* notes 225 and 228. We define "coming close" as within 5% percent or better of a quarterback's cumulative passing completion percentage. We tracked players only through the 1991 season.

In baseball, a top-salaried player's average failure rate is 25%.²³² In basketball, the number is less than 9%²³³ and in football less than 12%.²³⁴ From season to season, the baseball player's success is much less predictable than in other sports.

This Article has undermined the competitive balance theory's first assumption. Compared to other professional sports, individual talent in baseball cannot accurately predict individual success. How does this affect the salary cap proposal?

It means that buying the "best" players, as measured by baseball standards, is a risky investment. From game to game or season to season—for that matter, from at-bat to at-bat or inning to inning—it is difficult to know when even a star will come through when his team needs him. Eventually, the star will hit his hits and homer his homers; but so will the players of lesser talent. For either type of ballplayer, however, the problem is the same: we cannot predict with any certainty how often he will succeed.

2. *Individual Success Cannot Predict Team Success*

We define success as the competitive balance theory would—making the playoffs.²³⁵ If the competitive balance theory was valid, then a wealthy owner could buy a division title, league pennant, and World Series championship simply by signing the most talented players. The team with the largest payroll would win it all.²³⁶ Even if this assump-

232. The actual average failure rate per season is 24.5%.

233. The actual average failure rate per season was 8.7%.

234. The actual average failure rate per season was 11.8%.

235. Of course, real success to an owner means making money, not simply making the playoffs (although the two goals are certainly intertwined for most clubs). The latter creates an audience for the team, and having an audience generates revenues through broadcast viewership, ballpark attendance, and ancillary marketing.

For example, a comparison of 1994 baseball attendance records with divisional standings reveals a direct correlation between the two. That is, teams at the top of a division draw well and teams at the bottom draw poorly. For example, the four American League playoff contenders—division leaders Texas, Chicago, and New York, plus "wild card" leader Cleveland—were among the six highest teams in league attendance. See *Final 1994 Major League Baseball Standings*, L.A. TIMES, Sept. 15, 1994, at C12. Conversely, the three last-place teams—California, Milwaukee and Detroit—were among the five lowest in attendance. *Id.*

Similarly, the four National League playoff contenders—division leaders Los Angeles, Cincinnati, and Montreal, plus "wild card" leader Atlanta—were among the six highest teams in league attendance. *Id.* Two of the three last place teams were among the bottom half. *Id.* The exception, of course, was the Chicago Cubs. As Cub fans know, their team loyalty transcends winning and losing. (Colorado and Florida were excluded from the National League attendance statistics because as expansion franchises, their attendance may have been artificially inflated by the newness of the franchise in their cities.)

236. This assumes the owner bought the right talent. *But see* HELYAR, *supra* note 11, at 214-15 (citing examples of owners' paying high salaries to mediocre players).

tion holds true in other enterprises, such as professional basketball and football,²³⁷ it does not hold true in baseball.

This assumption also depends upon the first assumption that individual talent predicts individual success. As we have shown, this is not true. So the difficulty of predicting team success based upon individual success not only persists, but also is magnified. Whatever correlation exists between individual talent and individual success, the correlation between individual success and team success is so attenuated as to be virtually nonexistent.

Two famous anecdotes reflect the unpredictability of team success in baseball. First, in 1960, the heavily-favored New York Yankees²³⁸ outscored the underdog Pittsburgh Pirates²³⁹ by twenty-eight runs in a seven-game World Series—an average of four runs per game—yet lost the championship when Pirate second baseman Bill Mazeroski homered in the bottom of the ninth inning in game seven.²⁴⁰ Mazeroski had hit only eleven home runs during the regular season.²⁴¹

Second, in 1988, the Oakland Athletics, winners of 104 regular season games, were beaten by the Los Angeles Dodgers, winners of ninety-four regular season games, in a five-game World Series.²⁴² In game four, the Dodgers started a lineup averaging only .252—reputed to be the weakest-hitting club in Series history.²⁴³ But the turning point for the Dodgers came in game one, with two outs in the bottom of the ninth inning. Left fielder Kirk Gibson, injured so badly he did not even suit up for the start of the game, dressed later and pinch-hit a two-run homer to catapult Los Angeles from a 4-3 deficit to a 5-4 victory.²⁴⁴ It was Gibson's only at-bat of the Series.

237. This Article does not offer an opinion on the subject.

238. Regular season record, 97-57 (.630). *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 353.

239. Regular season record, 95-59 (.617). *Id.* at 352.

240. *See, e.g.*, *WARD & BURNS*, *supra* note 27, at 365.

241. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 1201.

242. *Id.* at 2813.

243. *THE OFFICIAL 1988 WORLD SERIES VIDEO* (CBS/Fox Sports 1988) (remarks of NBC commentator Bob Costas). Afterwards, the winning team's skipper reflected:

Well, first of all you should give the MVP [award] to Bob Costas because we were in the clubhouse before the game began and he mentioned that this is the weakest hitting team ever to play in the World Series. Now to me what a tremendous victory it is for the weakest team to ever be played [sic] in the World Series to beat out one of the best teams that was ever put in the World Series.

Id. (quoting remarks of Los Angeles Dodgers manager Tom Lasorda).

244. *WARD & BURNS*, *supra* note 27, at 455-58.

By now it should surprise no one that there is almost no useful correlation between a team's big payroll and its success. There are at least two ways to study this relationship: (a) by examining how successful well-paid teams are and (b) by examining how well-paid are successful teams.

(a) *How Successful Are Well-Paid Teams?*

There are twenty-six nonexpansion baseball teams.²⁴⁵ Before 1994, only four teams each year could expect to advance to the playoffs. In theory, at the beginning of the season, every team had an 85% chance of failing to make the playoffs.²⁴⁶ If there were a perfect correlation between paying high salaries and making the playoffs, then the four most well-paid teams would never fail to make the playoffs. If there were no correlation between team payroll and team performance, then the four-best paid teams would fail to make the playoffs 85% of the time, just like everyone else.

From 1989 to 1993, only six of Major League Baseball's twenty playoff teams ranked among the four best-paid clubs for the season in question.²⁴⁷ Thus the clubs with the four biggest payrolls failed to make the playoffs 75% of the time. These clubs did only marginally better than the average-paid team (which fails to qualify 85% of the time). At best, only a weak correlation exists between paying high salaries and making the playoffs.²⁴⁸

(b) *How Well-Paid Are Successful Teams?*

By definition, the median team with respect to salary is about thirteenth.²⁴⁹ If there is no correlation between success (making the playoffs) and being well-paid, then the average playoff team's payroll will

245. The National League's expansion teams, Colorado and Florida, have been excluded from the calculations here because first-year expansion clubs are notorious for performing poorly. None has ever made the playoffs.

246. The actual rate is 84.6%. The figure is derived by dividing the number of non-qualifying teams (22) by the number of total teams (26).

247. For club payroll information, see Michael Ozanian, *The \$11 Billion Pastime*, FIN. WORLD, May 10, 1994, at 50, 52-56 (1993 season); Michael Ozanian, et al., *Foul Ball*, FIN. WORLD, May 25, 1993, at 18, 28 (1992 season); Michael Ozanian & Stephen Taub, *Big League, Bad Business*, FIN. WORLD, July 7, 1992, at 34, 50-51 (1991 season); *Market vs. Payroll*, USA TODAY, Dec. 12, 1990, at C11 (1990 season); *Mets Have Highest Payroll; Phillies The Lowest*, USA TODAY, Oct. 18, 1989, at C12 (1989 season).

248. The same holds true for the strike-shortened 1994 season. Four of the top six salaried teams—nearly 67%—were not among the division leaders. See *Budget vs. Performance*, TIME, Aug. 22, 1994, at 70.

249. Actually, across a spectrum of 26 participants the midpoint falls between 13 and 14, or 13.5.

rank at or near thirteenth in the league. If there is a perfect correlation, then the average playoff team's payroll will rank between second and third.²⁵⁰

From 1989 to 1993, the average playoff team ranked only tenth in salary.²⁵¹ Again we find only a weak correlation between team payroll salary and team performance. Far from carrying the heftiest payrolls, playoff teams pay only above-average salaries.²⁵² Spending a lot of money guarantees nothing. A number of highly paid teams did quite well,²⁵³ but so did a number of poorly paid teams.²⁵⁴ Finally, on the day last summer's strike began, the small market Montreal Expos—ranked twenty-seventh among twenty-eight teams in terms of salary—had the best record in baseball.²⁵⁵

C. Why Baseball Is Unpredictable

Why is baseball so unpredictable relative to other team sports? Why do the assumptions about individual talent translating into individual success, and individual success translating into team success, fail? Perhaps it is because, as some have observed, baseball mimics life.²⁵⁶ Like

250. Until this year, only four teams could make the playoffs. Thus the midpoint is between second and third place, or 2.5.

251. The actual average is 9.7. For 1994 the average is even worse: 10.8.

252. Former California Angel Manager Whitey Herzog opined that to remain competitive a team would need to pay at least between \$27.5 million and \$30 million "and then you've got to get lucky." Bob Nightengale, *Strike Losses Not Merely Peanuts*, L.A. TIMES, Aug. 18, 1994, at C1. A \$30 million payroll would fall below the 1994 median team payroll of \$32 million. For a summary of 1994 median team payrolls, see *Budget vs. Performance*, TIME, Aug. 22, 1994, at 70.

253. For example, the American League pennant-winning and defending two-time World Champion Toronto Blue Jays had baseball's highest payroll in 1992 and 1993. Of course, when the strike-shortened 1994 season ended August 12, the Blue Jays were mired in third place in the American League East with a losing record (55-60, .478). *Final Major League Baseball Standings*, L.A. TIMES, Sept. 15, 1994, at C12.

254. Some low-payroll clubs which recently have won division pennants include the 1989 Chicago Cubs (18th), the 1990 Pittsburgh Pirates (17th), and the 1991 Atlanta Braves (22d).

255. *Budget vs. Performance*, TIME, Aug. 22, 1994, at 70. Unfortunately salary information before 1989 is difficult to obtain. But anecdotal evidence suggests if the data were carried back over a longer period of time the weak correlation might dissolve into absolutely no correlation or even a negative correlation. For example, Calvin Griffith and Charles O. Finley, former owners of the Minnesota Twins and Oakland A's, respectively, were notoriously tight-fisted. Yes, in the decade from 1965 to 1974, their teams combined to finish first six times and appear in four World Series—winning three of the latter.

256. See generally THOMAS BOSWELL, *HOW LIFE IMITATES THE WORLD SERIES* (1982). Writes Boswell:

That is baseball's greatest blessing and the source of its richness: you play it every day. Consequently, baseball has no "game face"—no mood of real or feigned mortal crisis that must be put on like a protective psychological mask before leaping into the fray. As [ex-Baltimore Orioles manager Earl] Weaver's pitching coach Ray Miller puts

the rest of our lives, a baseball game contains long stretches where nothing happens, punctuated by short periods of intense activity in which seemingly arbitrary and unfair results occur. There may be “no crying in baseball,”²⁵⁷ but there certainly is a lot of luck.²⁵⁸

We think the extent to which baseball contests result in seemingly unfair or unpredictable outcomes—randomness—is a product of three things: (1) the mechanics of hitting, (2) the sport’s limited offensive participation rules, and (3) the changing playoff format.

1. *The Mechanics: Hitting and “Directedness”*

Baseball’s most apocryphal story involves, naturally, George Herman “Babe” Ruth.²⁵⁹ During the 1932 World Series against the Chicago Cubs, legend has it, Ruth grew so irritated with the Chicago faithful jeering him in Wrigley Field that he made a prediction: during a trip to the plate in the fifth inning, the Yankee slugger pointed to the center field bleachers to indicate where he would hit the next ball for a home run. He then homered over the center field fence.²⁶⁰

Ruth’s “called shot” is storied, and so controversial, precisely because of its implausibility.²⁶¹ It is nearly impossible to hit a baseball on purpose to a specific location. It is hard enough just to hit the thing, which is why Ted Williams said the hardest thing to do in sports is to hit a round ball with a round bat.²⁶²

it, “It’s never fourth-and-one in baseball.”

That sense of moderation—of both physical and emotional temperance in all the familiar acts of the game—is almost a philosophical precept. Given a choice between raw effort and controlled skill, the latter will usually win in baseball.

Id. at 5.

257. Joe Duggan, *A LEAGUE OF THEIR OWN* (Columbia Pictures Industries, Inc., motion picture 1992) (line spoken by actor Tom Hanks).

258. See *supra* notes 217-44 and accompanying text.

259. Pitcher, Boston Red Sox, 1914-1918, Outfielder, Boston Red Sox, New York Yankees, Boston Braves, 1919-1935. Admitted to Hall of Fame, 1936. Career batting average, .342. Career home runs, 714. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 1421. Ruth has been so important to the sport and its culture that Hofstra University presented a three-day conference this year just to honor his 100th birthday. See Robert Jarvis, *Babe Ruth as Legal Hero*, 22 *FLA. ST. U. L. REV.* 885 (1995); see also Registration Program, *Baseball and the “Sultan of Swat,”* Apr. 27-29, 1995.

260. Whether the story is true or not is moot; the mere fact the story is repeated as if true is a tribute to the Babe. See, e.g., WARD & BURNS, *supra* note 27, at 209-11. Ruth did hit two home runs in the third game of the World Series against the Chicago Cubs on October 1, 1932. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 2713. The Yankees won the game, 7-5, and swept the Series, 4-0. *Id.*

261. For an interesting discussion of Ruth’s called shot, see JOHN M. ROSENBERG, *THE STORY OF BASEBALL* 94-97 (1966).

262. Variations on this theme are usually attributed to Williams. See, e.g., WILLIAMS & UNDERWOOD, *supra* note 220, at 7.

Baseball is said to be a game of inches for good reason. Results turn on events that last milliseconds and physics that involve millimeters. Nowhere is this more evident than in hitting, the single most meaningful event in a baseball game. A baseball thrown at a speed of ninety miles per hour takes less than one-half second to travel the sixty feet six inches from the pitcher's mound to home plate.²⁶³ In this scant amount of time, a hitter literally has only a fraction of a second²⁶⁴ to decide when, where, and how to swing the bat. Not surprisingly, only a small percentage of all pitches are hit, a smaller percentage are hit into fair territory, and only about one-quarter of those balls hit into fair territory are hit in an area unpatrolled by a fielder.²⁶⁵ There is but a brief interval in which the hitter may make a successful swing. Therefore, successful hitting must be a learned reflex.²⁶⁶

No wonder a top hitter strives not to hit the ball to a particular location, but merely to get "good wood" on the ball. He tries to strike it squarely on the widest part of the bat²⁶⁷ with the maximum velocity. Theoretically, a ball hit in this manner will travel at its maximum velocity and in its straightest path, maximizing its potential to avoid being caught.

But a hitter's ability to get "good wood" does not necessarily translate into success afield (getting a base hit). Hall of Fame right fielder "Wee Willy" Keeler²⁶⁸ attributed his success to the fact that he "hits 'em where they ain't."²⁶⁹ Keeler's adage holds more than a grain of truth. Getting a hit means driving the ball to a location where it will not be caught or fielded timely. There is not necessarily a direct correlation between a ball that is well-hit and a base hit. A well-hit ball may be caught (e.g., a line-out, a deep drive to the warning track, etc.) A poorly hit ball will not necessarily be caught (for example a

263. See ROBERT K. ADAIR, *THE PHYSICS OF BASEBALL* 28 (2d ed. 1994). A baseball thrown at 98 m.p.h. crosses home plate at 90 m.p.h. and spends 400 milliseconds (.4 seconds) getting there. *Id.*

264. According to Williams, about 200 milliseconds (.2 seconds). WILLIAMS & UNDERWOOD, *supra* note 220, at 62-63.

265. For example, in 1992 the cumulative batting average was .252 in the National League and .259 in the American League. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 518, 520.

266. A batter whose swing misses the mark by as little as 200 milliseconds (.2 seconds) will not hit the ball with maximum velocity. See ADAIR, *supra* note 263, at 69.

267. This part of the bat, known as the "sweet spot" to ballplayers, is called the "center of percussion" by physicists. *Id.* at 71 (analysis of physics Professor Robert K. Adair). The collision of bat and ball lasts about 1 millisecond (.001 second). *Id.*

268. Outfielder, Baltimore Orioles and other teams, 1892-1910. Admitted to Hall of Fame, 1939. Career batting average, .343. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 1086.

269. *E.g.*, WARD & BURNS, *supra* note 27, at 252.

“Texas Leaguer,”²⁷⁰ a ball with “eyes,”²⁷¹ etc.). Hitting success is not nearly as correlated to how well the ball is hit as it is to the less predictable phenomenon of where the ball will land. Thus, the mechanics of the game ensure randomness.

By contrast, football and basketball are “directed” sports. In these sports, the principal offensive player, the quarterback in football or the shooter in basketball, knows exactly what he has to do to succeed. In baseball, what the hitter has to do to succeed is less certain. But that is not all. In football and basketball—indeed, in every professional American sport except baseball—the offensive player controls the ball at the start of play. In baseball, the *defense* controls the ball.²⁷² So a hitter’s success is defined less by what he does than by what his defensive counterparts—the pitcher and fielders—fail to do. Whereas the matter of offense in basketball and football is proactive, in baseball it is reactive.

Compare the mechanics of baseball with those of basketball and football. In baseball, a perfectly hit ball will produce a base hit a certain percentage of the time, perhaps 30% but certainly much less than 100% of the time. In basketball, by contrast, a perfectly shot basketball produces a basket 100% of the time. By definition, a perfectly shot basketball is one that concludes its trajectory in the center of the basket. Basketball is a directed sport in which players aim for a specific location and success in effort translates directly into success. Randomness in result is minimized by this direction.

This is also true of football. The object in a football game is to advance an eligible offensive player possessing the football beyond the goal line. The entire team is directed to moving the ball down the field. If all the blocks are adequate and the run is long enough or the pass is accurate enough, the ball will advance. The less optimal the blocking and rushing or passing, the less likely the ball will advance. Once again, success in effort translates into success in result.

2. *The Rules: Equal and Limited Participation*

Baseball is fundamentally more unpredictable in result than basketball or football for another reason. The rules of the games of basketball and football allow a team to maximize the advantage that obtains from the participation of its best players, and the best players in each

270. A ball weakly hit behind the infield but in front of an approaching outfielder for a base hit.

271. A ball hit sharply on the ground between infielders for a base hit.

272. See, e.g., WARD & BURNS, *supra* note 27, at xix.

sport participate in the majority of plays. The rules of the game of baseball are different.

(a) *The Hitting Lineup.*

If a basketball team has an extraordinary scorer, then he will shoot more often than his teammates. If the team has an excellent rebounder, then he will be positioned defensively to maximize the rebounds he pulls down. If a football team has an extraordinary runner, then he will carry the ball more frequently. If the team is better at passing, then the team will pass more often (and then, probably to its best receivers). In each sport a team may exploit to its advantage rules permitting its ablest athletes to maximize their participation.

But if a baseball team has an extraordinary hitter, he gets just one chance to bat every nine times his team takes a turn. The rules of the game do not permit a player to bat out of order or more than once every nine turns.²⁷³ So a baseball club, unlike a basketball or football team, cannot maximize the participation of its best players. Of course, a club may minimally exploit the advantage it obtains from good or powerful hitters by their positioning in the lineup, but the advantage is trivial when compared to that in basketball or football.²⁷⁴

(b) *The Endgame.*

The advantage that a basketball or football team obtains from the maximum participation of its best players is heightened at the conclusion of each game. If it is the fourth quarter, the score is close, and one of the teams is the Chicago Bulls of the 1990s, then it would go without saying Michael Jordan (at least before his twenty-one-month "retirement") would be taking most of the shots. For the Los Angeles

273. See OFFICIAL RULES OF BASEBALL rule 6.01(a) (SPORTING NEWS ed. 1994) ("Each player of the offensive team shall bat in the order that his name appears in the batting order.").

274. For example, a lead-off hitter will probably have more at-bats than a hitter at the lower end of the lineup. But this advantage is minimal. In fact, the lead-off hitter will bat no more than one extra at-bat per game than, say, the last hitter. A power hitter's advantage is actually created by batting fourth, the "clean-up" spot. But after the first inning, this advantage largely disappears because the clean-up hitter's spot could fall almost anywhere in the order in the succeeding innings.

By contrast, basketball rules permit an individual player to participate disproportionately more frequently in a given game. For example, during the 1961-62 season, Philadelphia Warriors' center Wilt Chamberlain averaged a whopping 50.4 points, or 40% of his club's total points that year. See NEFT & COHEN, *PRO BASKETBALL*, *supra* note 199, at 164.

For a baseball player to deliver a performance comparable to Chamberlain's, he would have to drive in 273 runs. But no major leaguer has ever batted in as many as 200 runs in a single season. In 1930, Chicago Cubs slugger Hack Wilson set the major league record of 190, or 19% of his club's total runs that year. See *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 243.

Lakers of the 1980s, at the conclusion of a close game it would be inconceivable for the team to run a play without putting the ball in the hands of Earvin "Magic" Johnson; likewise for the Boston Celtics and Larry Bird. For years, fans of the San Francisco 49ers (and later the Kansas City Chiefs) and the Denver Broncos have routinely expected their quarterbacks—Joe Montana and John Elway, respectively—to shoulder the burden of participation at the conclusion of close games.

But in baseball, there is no guarantee that San Francisco Giant slugger Barry Bonds will bat in the ninth inning (or indeed, at any crucial moment) no matter how close the game. The game's rules equalize the offensive participation of every player, stars and role players alike, during the endgame.

(c) *Limited Offensive Participation.*

The participation of the best players is not only roughly equal with those of lesser players but also minimal to begin with. On average, a hitter comes to the plate only four times per a game. Even a truly extraordinary hitter, somebody batting .400, can expect to average no more than 1.6 hits a game. Even the best hitters go hitless in nearly one-third of the games.²⁷⁵ In short, a great performer has a limited number of opportunities to perform. Contrast this with basketball or football, where a good offensive player may be the primary focus of thirty or forty offensive plays and involved, in one way or another, in nearly every offensive play.²⁷⁶

(d) *Limited Defensive Participation.*

In basketball or football, defensive players are involved in nearly every single play. To the extent that a weakness exists in the defense, the offensive teams in these sports will purposely exploit the advantage. The basketball team will give the ball to the player guarded by the weak defensive link and clear that side of the court so the game devolves to a one-on-one contest. In football, the quarterback will pass to the "open" receiver or the one guarded by the weakest defensive back. Exploiting the weak defensive link in both sports is a func-

275. See *supra* notes 219-23 and accompanying text.

276. For example, in basketball a good shooter may shoot as many as 30 times per game and participate in nearly every offensive play, even plays in which he is not shooting, by passing the ball, setting offensive screens, acting as a decoy to permit teammates to get open for shots, etc. In baseball, however, an offensive player spends eight of nine (or nearly 90%) of his team's offensive chances in the batting order sitting on the bench or roaming the basepaths, where his contributions are not as significant.

tion of their directedness and the fact that the offensive team possesses the ball.

In baseball, however, a weak defensive player cannot be exploited effectively. The hitter cannot direct the ball. In contrast to the defense in basketball or football, the defense in baseball possesses the ball (thus largely explaining why baseball is not an offensively directed game).

Conversely, in basketball and football the participation of the best defensive player can be maximized by his position on the court or field and he may be involved in, directly or indirectly, the majority of plays. In baseball, however, although a good defensive player's advantage can be maximized by positioning such as moving the short-stop or center fielder, his participation is limited to begin with. On average, any particular fielder will be involved in about only 10% of the plays in which a ball is hit for an out.²⁷⁷

3. *The Playoffs: Advancing Under the New Format*

The lack of a strong predictive correlation between talent and success is exacerbated by a third factor: the playoff system. If success is defined as making the playoffs (a prerequisite to competing for league pennants and, in turn, the World Series), then baseball's new format practically guarantees that teams with mediocre (.500 or less) records will be eligible for the post-season.

From 1947 to 1968 (the last year of play before the National and American Leagues each split into two divisions, creating a four-team playoff system), a team had to win about 60% of its games to qualify for the World Series.²⁷⁸ During this time only two teams qualified for post-season play: the first place finishers in each league. In 1969 each league split into East and West divisions. From 1969 to 1993, four

277. In general, a baseball team gets 27 outs per game. In 1992, each club averaged 5.6 strikeouts per game. See *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 518, 520. This left 21.4 "hitting" put-outs in which position players in the field could participate. Therefore, each individual fielder participated in an average of 2.38 outs (about 8.8%) of all "hitting" put-outs. The actual figure is probably a little higher. When the home team is leading after 8½ innings, something that happens perhaps half the time, the game is over because there is no point in giving the home team three more outs in which to pad its victory margin. See *OFFICIAL RULES OF BASEBALL* rule 4.11(a) (SPORTING NEWS ed. 1994).

Consider also major league fielding averages. In 1992 the American and National League each posted a collective fielding average of .981. Errors do not occur very often and, for that reason, fielding may not be all that significant in determining which club wins or loses the average baseball game.

278. From 1947 to 1968, the team entering the World Series having the fewer number of regular season victories won an average of 94.7 games per season, or .605. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 304-88.

teams qualified each year for post-season competition. The average minimum winning percentage required to qualify for post-season play dropped from 60% before the end of the 1968 season to 55% afterward.²⁷⁹

Beginning in the 1994 season, the playoff format was scheduled to expand once again. Now there are three divisions in each league. Four teams from each league (the division winners and one "wild card" team) qualify for post-season competition. If the minimum winning percentage required to qualify for post-season play dropped from 60% to 55% when the format expanded from two to four teams, then we should reasonably expect the minimum to drop from 55% to about 50% when the format expands from four to eight teams.²⁸⁰

We predict, on average, the new format will produce at least one team having a random or nearly random record. That team will nevertheless qualify for the playoffs each year and have a chance to make, and win, the World Series. The preliminary results of the strike-shortened 1994 season bear this out. One division leader, the Texas Rangers of the American League East, lost more games than it won.²⁸¹ Another division leader, the Los Angeles Dodgers of the National League West, flirted with a losing record.²⁸²

All of which means even a team that is not comparatively successful in the regular season can remain a contender for the World's Championship. This is a random system in action: a team which is just as likely to win or lose a given game still has a chance to win it all.²⁸³

279. From 1969 to 1993 (excluding the strike-shortened 1981 season), the club qualifying for the playoffs having the fewest wins during the regular season won an average of 89.6 games per season, or .554. *Id.* at 389-521.

280. Actually, 50% may slightly overstate the case because under the new format it is unlikely the "wild card" team will have the worst record among the qualifying teams from each league. In any event, ignoring wild card teams and considering only the six division winners invited under the expanded playoff format, we estimate the minimum winning percentage still dropping to about 52%.

But history suggests mediocre teams will play in the World Series even without an expanded playoff format. The 1973 New York Mets nearly won the championship despite having won just 50.9% of their regular season games. The 1987 Minnesota Twins did win the championship despite having won only 52.5% of their regular season games.

281. As the strike began on August 12, 1994, the Texas Rangers led the American League West despite being 10 games under .500 (52-62, .456). *Final 1994 Major League Baseball Standings*, L.A. TIMES, Sept. 15, 1994, at C12.

282. On August 12, 1994, the Los Angeles Dodgers led the National League West at just two games over .500 (58-56, .509). *Final 1994 Major League Baseball Standings*, L.A. TIMES, Sept. 15, 1994, at C12.

283. For example, from 1947 to 1993, the NBA team having the best record in its conference at the end of the regular season advanced to the finals 72.2% of the time. Of course, over time the NBA's playoff format has expanded to be much broader than Major League Baseball's. Today in the NBA, 16 teams qualify for post-season play. Moreover, during the same period,

D. *The Salary Cap Revisited*

Baseball's track record without a salary cap, at least during the free agent era dating to 1975, proves a club cannot buy a division title or league pennant, much less a World Series ring.²⁸⁴ The sport enjoys remarkable competitive balance. No salary cap is needed to ensure what baseball already has.

Owners justify their demand based on the experience of professional basketball²⁸⁵ and other sports having salary caps. The comparison is misplaced. A better, but by no means conclusive,²⁸⁶ case can be made for a salary cap in basketball. A basketball team fields only five players on the court. Each one plays a key role in the majority of a game's offensive and defensive plays in a directed and meaningful fashion. The play of one or two players can dramatically affect the outcome. The entire history of NBA championships is the history of the dominance of a few great players—from George Mikan in the 1950s and Bill Russell in the 1960s to Magic Johnson and Larry Bird in the 1980s and Michael Jordan in the 1990s.²⁸⁷ If Michael Jordan,

the NFL team having the winningest record after the regular season advanced to the championship game 74.1% of the time. Today, 10 NFL teams qualify for post-season play.

By contrast, from 1969 to 1993, the MLB team having the best record among divisional winners following the regular season advanced to the World Series just 66.7% percent of the time. Of course, during that period, only two teams in each league qualified for the playoffs.

284. See *supra* notes 171-216 and accompanying text.

285. If a salary cap makes sense in NBA basketball, then it is because the purchase of even one outstanding player's contract can mean the difference between a good season and a championship season. The success of the 1993-94 NBA champion Houston Rockets, led by center Hakeem Olajuwon, is a case in point. *E.g.*, *Loose Cannon Talk with Steve Hartman and Chet Forte*, XTRA-FM, San Diego, Calif., radio broadcast June 22, 1994 (remarks of basketball commentator Sonny Vicaro) (describing Houston team as Olajuwon and four players "you could pick up in a YMCA league").

286. As noted above, see *supra* note 237 and accompanying text, we express no opinion about the efficacy of a salary cap in either the NBA, which has operated under a cap since 1982, or the NFL, which adopted a cap in 1993. See WEILER & ROBERTS, *supra* note 11, at 300-04. Recently, however, players in both leagues have expressed skepticism about the need for such a system. See, e.g., Scott Howard-Cooper, *Players Dunked in a Hard Court*, L.A. TIMES, July 19, 1994, at C1; *NFL Players Don't Like Cap*, LAS VEGAS REVIEW-JOURNAL SUN, Aug. 13, 1994, at C4.

287. The championships won by the clubs on which these four men played constitute over 50% of all the NBA championships ever won:

Player	Club	Years Won	Total
Bill Russell	Boston Celtics	1957, 1959-1966, 1968-1969	11
George Mikan	Minneapolis Lakers	1949-1950, 1952-1954	5
Magic Johnson	Los Angeles Lakers	1980, 1982, 1985, 1987-1988	5
Michael Jordan	Chicago Bulls	1991-1993	3

See NEFT & COHEN, *PRO BASKETBALL*, *supra* note 199.

Magic Johnson, and Larry Bird all played for the same club, they could practically guarantee a championship every year.²⁸⁸

The same is not true of baseball.²⁸⁹ Many of the game's greatest players, including Ernie Banks,²⁹⁰ Rod Carew,²⁹¹ Ty Cobb,²⁹² Ted Williams, and Carl Yastrzemski,²⁹³ never won a championship.

It is fair to ask whether our focus on unpredictability means baseball is merely a game of chance in which talent has little or nothing to do with producing winners and losers. We make no such claim. Such a contention is a disservice to exemplary players such as San Diego Padres outfielder Tony Gwynn,²⁹⁴ who year in and year out is among the National League leaders in batting average. Much of the reason for success in baseball over the long run must be based on talent, and teams with more of it will win more often than teams without it. But in baseball winning also involves a complex maze of factors that make *predicting* success—the focus of this Article—quite difficult,²⁹⁵ whether we are inquiring about individual players or the teams they play for.²⁹⁶ Baseball results are not purely random, but due to the game's unpredictability, its results are more random than those in other enterprises, such as professional basketball or football. In short,

288. The one time this trio played together for the same team, the United States' "Dream Team" of the 1992 Summer Olympic Games, they not only won the gold medal, but also outscored their opponents by an incredible average margin of 44 points per game. See NEFT & COHEN, *PRO BASKETBALL*, *supra* note 199, at 573.

289. Even the New York Yankees' four-decade-long dynasty has to be questioned as a product of an era when so many of the game's best players, African-Americans, were excluded from the major leagues. See *supra* note 197 and accompanying text. For a discussion of the period when the three New York teams dominated the game, see generally ROGER KAHN, *THE ERA, 1947-1957: WHEN THE YANKEES, THE GIANTS, AND THE DODGERS RULED THE WORLD* (1993).

290. Shortstop and first baseman, Chicago Cubs, 1953-1971. Admitted to Hall of Fame, 1977. Career home runs, 512. *BASEBALL ENCYCLOPEDIA*, *supra* note 174, at 636.

291. Second baseman and first baseman, Minnesota Twins, 1967-1978, first baseman, California Angels, 1980-1985. Admitted to Hall of Fame, 1991. Career batting average, .328. American League batting titles won, 6. *Id.*, at 738.

292. Outfielder, Detroit Tigers, 1905-1927, Philadelphia Athletics, 1927-1928. Admitted to Hall of Fame, 1936. Career batting average, .367 (1st all-time). American League batting titles won, 12 (1st all-time). *Id.*, at 770.

293. Left fielder and first baseman, Boston Red Sox, 1961-1983. Admitted to Hall of Fame, 1989. American League batting titles won, 3. Triple Crown Winner, 1967 (last in MLB). *Id.*, at 1639-40.

294. Outfielder, San Diego Padres, 1982-present. Career batting average, .333. National League batting titles won, 4. *Id.*, at 972. Gwynn is one of the more unfortunate 1994 strike victims. With over two-thirds of the season completed, he had batted .394 and threatened to become the first major leaguer to hit .400 or better since Ted Williams batted .406 in 1941.

295. See *supra* notes 217-55 and accompanying text.

296. Which probably explains why oddsmakers typically do not offer "point spreads" to baseball bettors. By contrast, predicting the winner of a basketball or football contest is much easier. As a result, basketball and football bettors must not only pick the winner but also "beat the spread."

because an owner cannot simply predict success, he cannot simply buy it either.²⁹⁷ If the sole legitimate justification for the salary cap is maintaining competitive balance, then the salary cap strikes out.

IV. CONCLUSION

[W]ho says there have to be owners in baseball?

Ken Burns²⁹⁸

We are under no illusion that demonstrating how the salary cap flunks the "rule of reason" test will stop owners from wanting one anyway. Given a lawful chance, few employers in *any* industry could resist putting a ceiling on payrolls. The reason is as fundamental to labor relations in baseball as it is to labor relations in any industry: the people who do the work feel entitled to share the profits, while the people they work for view workers' feelings (if not the workers themselves) as nettlesome costs standing in the way of keeping those profits.²⁹⁹

The result of this irreconcilable conflict is the persisting labor strife we have come to expect of Major League Baseball. Certainly other American industries have their troublesome workplace disputes, but professional baseball's eight work stoppages in twenty-two years stand out as particularly contentious. There are at least two reasons for this.

First, of course, is the sport's special antitrust exemption. As we have explained,³⁰⁰ the exemption is quite broad, and its breadth has both dulled the owners' competitive edge and exacerbated their poor relations with the players.

Second is something rarely found on labor's side of the equation: real bargaining power. At an average salary of \$1.2 million³⁰¹ and a minimum salary of \$109,000,³⁰² today's major league playing-field

297. See, e.g., Allan D. Frank, *Top Dollar Isn't Top Dog*, FORBES, Apr. 4, 1988, at 62 ("Baseball owners usually break their hearts trying to buy a pennant. The owners of the Pittsburgh Pirates are going at it another way—assembling the low-cost producer."). Although the 1988 Pirates did not win their division, the 1990, 1991, and 1992 teams did. BASEBALL ENCYCLOPEDIA, *supra* note 174, at 493-521.

298. Filmmaker, *quoted in* Ken Burns, *Preface to* Geoffrey C. Ward & Ken Burns, *Baseball: The Way It Was*, U.S. NEWS & WORLD REP. Aug. 29-Sept. 5, 1994, at 54, 58 (excerpting GEOFREY C. WARD & KEN BURNS, *BASEBALL: AN ILLUSTRATED HISTORY* (1994)) [hereinafter Burns, *Preface*].

299. For a thoughtful discussion of labor-management conflict in the context of the summer 1994 baseball strike, see Neal Gabler, *The Owners: Baseball's Newest Heroes*, L.A. TIMES, Aug. 7, 1994, at M1.

300. See *supra* notes 112-66 and accompanying text.

301. See *supra* note 55 and accompanying text.

302. See *supra* note 56 and accompanying text.

employee has a lot more money than his working counterpart in just about any business one can name. One ballplayer alone possesses unique skills that may be difficult, but not impossible, to replace. But all ballplayers together possess skills that cannot be replaced.³⁰³ Acting in concert, as they did last summer, major leaguers can bring the game to a halt. Since 1969, they have not hesitated to do so when they felt owners threatened their fundamental interests.

As momentous as it may seem, the salary cap proposal merely manifests a continuing struggle between labor and capital for control of the industry. This struggle has always percolated beneath the surface of the professional game.³⁰⁴ Only recently has it boiled over for everyone to see. If somehow we could make the salary cap or its cousins, such as the "luxury tax" plan, go away, then surely, over time, owners would come up with other, equally provocative, proposals.

The key question, then, is not whether the salary cap is a good idea, but rather what can be done to address the fundamental causes of baseball's persistent industrial warfare.

An idea that captured the public's imagination for a time last fall was expressed in legislation offered by several members of Congress finally to repeal baseball's antitrust exemption.³⁰⁵ The MLBPA and players' spokesmen promised to play ball again,³⁰⁶ even without a new collective bargaining agreement in place, if the exemption were repealed because owners then would be vulnerable to some or all of the potential liabilities we have considered here.³⁰⁷ Repeal would dangle an incentive, if not pose a threat, persuading owners to take the salary cap proposal off the table and thereby to seek a settlement.

Repeal is tempting, but it would create new problems. Tearing down the antitrust shield certainly would place in the union's hands another weapon, litigation, that might temporarily be used against owners in lieu of the strike. But threatening antitrust litigation neither precludes strikes and lockouts nor guarantees any dispute will be settled out of court. Indeed, it does not even promise the players would prevail on any of their potential theories of antitrust liability. For those who believe the solution to conflict is avoiding rather than inviting litigation, repeal is not much of an answer.

303. For a discussion of labor's bargaining power in Major League Baseball, see Christopher D. Cameron, *Lessons for Labor Unions*, USA TODAY, Oct. 20, 1994, at A13.

304. See *infra* notes 152-55 and accompanying text.

305. See *supra* note 113 (collection of proposed legislation).

306. See, e.g., Murray Chass, *Baseball; Union Talks of Solidarity, and of Return*, N.Y. TIMES, Feb. 17, 1995, at B9; *Baseball Legislation Introduced*, L.A. TIMES, Feb. 15, 1995, at C2.

307. See *supra* notes 116-32 and accompanying text.

Other, more systemic changes deserve the attention of combatants and commentators alike. For example, if owner-player relations are the root of the trouble and if the game can be played without owners but not without players, then why not eliminate the owners? Among the alternatives that would do so are public ownership of baseball franchises,³⁰⁸ purchased perhaps through the government's powers of eminent domain;³⁰⁹ creation of a new major league,³¹⁰ perhaps by a players' collective or a joint venture with private investors;³¹¹ and player ownership of the clubs themselves, accomplished perhaps by leveraged buyout. After all, the average major leaguer is wealthy enough to buy a stake in his club and to start working for himself. As workers at other employee-owned enterprises have learned, people who own the company tend to avoid going on strike against themselves. And their stake in the business helps provide stable service to consumers.

Whatever the solution, it must account for baseball's special status not only as American industry, but also as an integral element of American culture.³¹² We should honor, as filmmaker Ken Burns has said, "a sense that those who play and those who own the teams are custodians not [merely] of their tangible assets or their bankable skills but [also] of something larger for the country."³¹³

308. See, e.g., Bob Katz, *Seize Every Team!*, NATION, Sept. 26, 1994, at 297.

309. See, e.g., *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (1982). For an analysis of wielding the eminent domain power to condemn professional sports franchises, see generally Charles Gray, *Keeping the Home Team at Home*, 74 CALIF. L. REV. 1329 (1986).

310. E.g., WARD & BURNS, *supra* note 27, at 39-40 (describing original Players' League founded by John Montgomery Ward in 1890 and crushed by owners the same year).

311. *Id.* The only rival league to make any headway in this century, the Federal League, was composed of private owners who could not crack the National or American Leagues. It folded after two seasons in 1915. *Id.* at 121-27.

312. WARD & BURNS, *supra* note 27 at 58.

313. Burns, *Preface*, *supra* note 298, at 58.

