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THE DEVELOPMENT AND ROLE OF FREE AGENCY IN MAJOR LEAGUE BASEBALL

Susan H. Seabury†

INTRODUCTION

On November 26, 1996, owners of the Major League Baseball teams approved a new contract with the Major League Baseball Players Association, ending a labor dispute that did what a depression and two world wars could not—cancel a World Series.[1] Three weeks earlier, owners had rejected the exact same contract, a contract that Randy Levine, the negotiator they hired late in negotiations to reach a settlement, had worked hard to sell to the players.[2] What changed? In between the two votes, one of the leaders of the salary hardliners, Jerry Reinsdorf of the Chicago White Sox, signed player Albert Belle to a record-setting $51 million contract.[3] It seems that the owners realized what many who closely watched the progression of the labor situation in baseball knew: "the owners' enemy is not Donald Fehr, the players association executive director, nor Albert Belle. It is themselves."[4]

To understand how relations between players and owners reached the current level of acrimony, it is essential to study the developments of one element of the controversy—free agency.[5]

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1. *See* Mike Fish, *Baseball '94: The Shortest Season: Anatomy of a Strike: The End Comes Without Fanfare*, ATLANTA J. & CONST., Sept. 15, 1994, at D3.
2. *See* Dave Kindred, *Reinsdorf-Belle Deal Opened Owners' Eyes*, ATLANTA J. & CONST., Dec. 1, 1996, at E3.
3. *See id.*
4. Dave Kindred, *Trust Baseball Owners? No!*, L.A. TIMES, Dec. 8, 1996, at C1.
5. *See* 1 MARTIN J. GREENBERG, SPORTS LAW PRACTICE 429-32 (1993) (discussing free agency).

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Tracing the path from complete free agency in the late 1800s, through the Reserve System,[6] and to the current compromise between the two labor market extremes shows not only the development of free agency, but also the shifts in power between the two parties. The exploration of the shift of power from the clubs to the players is key to a more robust understanding of how free agency has shaped the labor market and the game of baseball.

Part I of this Article traces the early development of professional baseball and the activities that led to the two-league structure that exists today. Part II explores players' attempts to join forces in order to extract more favorable terms and conditions of employment from the owners. Specifically, this Part analyzes both the failed early attempts at unionization as well as the formation and development of the current Major League Baseball Players Association (Players Association). Part III discusses an aberration in Supreme Court jurisprudence, namely *Flood v. Kuhn*,[7] and the impact of this decision on the legal structure of Major League Baseball. Part IV traces the development of actual free agency from Catfish Hunter's breach of contract action, to the Messersmith/McNally arbitration decision and subsequent court cases, to the inclusion of free agency in the collectively-bargained basic agreement of 1976. Part V carefully analyzes the collusive practices engaged in by the owners in the 1980s, decisions from grievances filed by the Players Association, and the settlement of these cases. Part VI reviews the steps that led up to the 1994 strike as well as the strike itself, and Part VII discusses the effect of the strike's aftermath on the business of baseball. Part VIII explores the role free agency plays in setting the salaries of all baseball players, the role the owners have played in the upward spiral of salaries, where free agency may take the baseball labor market, and the future of the game.

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6. *See generally id.* at 35-36 (discussing the fall of the reserve system).
7. 407 U.S. 258 (1972).

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I. HISTORY OF THE BASEBALL LABOR MARKET

A. Early Development

Organized professional baseball began in the early 1870s with the formation of the National Association of Professional Baseball Players, which included teams from different cities of varying sizes.[8] Owners rarely profited until a group of owners within this organization, seeking greater stability, formed the National League in 1876.[9] They found stability in a series of collusive practices including territorial franchises, limiting franchises to only cities meeting minimum size requirements, and splitting gate receipts.[10]

However, the owners took several additional years to develop controls for their largest expense—player salaries.[11] At the time, all players enjoyed what we now call free agency, then known as "revolving."[12] Under the revolving system, a player signed a contract before each season with the owner who offered him the most money in a competitive bidding environment.[13] While the players were happy with this salary structure, the owners were not, and the owners began taking steps to gain control of salaries.[14] By 1879, the owners implemented, via a secret agreement, the beginnings of the reserve system.[15] Initially, owners "reserved" the rights to five star players per team.[16] Even with the reserve agreement, owners worried about the effects of salaries on their team's survival and their ability to make a profit.[17] In 1881, Albert Spalding, an owner and sporting goods manufacturer, made the first prediction that baseball would end because of the size of players' salaries when he stated: "Salaries must come down or the interest of the public

8. *See* GERALD W. SCULLY, THE BUSINESS OF MAJOR LEAGUE BASEBALL 1 (1989).
9. *See id.* at 2.
10. *See id.*
11. *See* JAMES B. DWORKIN, OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING 41-44 (1981).
12. *Id.*
13. *See id.* at vii.
14. *See id.*
15. *See* SCULLY, *supra* note 8, at 2.
16. *See* DWORKIN, *supra* note 11, at 44.
17. *See* JOHN HELYAR, LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL 5, 54 (1994).

must be increased in some way. If one or the other does not happen, bankruptcy stares every team in the face."[18] Bankruptcy did not destroy the league, and by 1887 every player's contract contained a reserve clause.[19] In effect, the clause not only bound the player to a team for that year, but also the next.[20] As far as the owners were concerned, this bound a player perpetually.[21] By 1889, the owners had even implemented a league-wide salary cap system setting the maximum salary at $2500.[22]

The players first attempted to take back some control in 1885 by forming the National Brotherhood of Professional Ball Players.[23] To combat the new salary cap, among other problems, the organization formed the Players League, which began play in 1890.[24] However, because the Players League lost approximately $300,000 and its financiers did not believe baseball could exist with two leagues, the league lasted only one season.[25] Once again, the players had no options, and the owners had no competition. This situation lasted for approximately ten years.[26]

In 1900, the newly formed American League posed the first real competition to the monopolistic control exercised by the owners of National League teams.[27] Unlike the Players League, the American League's organization attracted star players, such as Napoleon Lajoie, Jimmy Collins, and Cy Young, who were dissatisfied with the salary cap system.[28] For a few short years the leagues competed for players;[29] however, in 1903, a peace meeting led to the formation of Major League Baseball.[30] At that time, the owners of both leagues agreed to respect a

18. *Id.* at 5.
19. *See* DWORKIN, *supra* note 11, at 45.
20. *See id.* at 10.
21. *See id.*
22. *See* HELYAR, *supra* note 17, at 5.
23. *See* DWORKIN, *supra* note 11, at 11.
24. *See id.*
25. *See id.* at 12.
26. *See* HELYAR, *supra* note 17, at 5.
27. *See* ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTTIME 7 (1992).
28. *See id.*
29. *See id.*
30. *See id.*; SCULLY, *supra* note 8, at 14.

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common reserve system and to implement a structure that would be run by a National Commission, made up of presidents of each of the leagues and a neutral party agreed upon by the two league presidents.[31] Along with an increased interest due to the inception of the World Series, this agreement made baseball an extremely profitable business for the owners for the next ten years.[32]

B. Emergence of the Federal League

The Federal League, formed in 1913, provided the final real threat to the monopoly power of the Major League owners.[33] The threat of league-jumping nearly doubled the average salary in the two-year span from 1913 to 1915.[34] However, the owners of Federal League teams could not compete with the established leagues for quality players, due partly to major league owners' threatening to blacklist players who actually jumped leagues.[35]

The owners of the Federal League attempted to increase their ability to compete by suing under the Sherman Antitrust Act of 1890,[36] alleging that the agreements that ruled the American and National Leagues were illegal restraints of trade.[37] The Federal League owners strived to have a federal judge in Chicago, known for making unusual decisions, hear the case because they believed he would be sympathetic to their cause.[38] The judge was Kennesaw Mountain Landis, who later became the commissioner of Major League Baseball.[39]

Judge Landis never issued a decision.[40] Before the case could be heard, the battling leagues signed a "peace treaty" in 1915.[41] As a result of this treaty, many of the Federal League owners were bought out and allowed to sell their players to other teams, a couple of Federal League teams were folded into the Major

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31. *See* HELYAR, *supra* note 17, at 5.
32. *See* DWORKIN, *supra* note 11, at 50.
33. *See* ZIMBALIST, *supra* note 27, at 8-10.
34. *See* HELYAR, *supra* note 17, at 6.
35. *See* DWORKIN, *supra* note 11, at 54.
36. 15 U.S.C. §§ 1-7 (1994).
37. *See* DWORKIN, *supra* note 11, at 54.
38. *See* HELYAR, *supra* note 17, at 7.
39. *See id.*
40. *See id.* at 8.
41. *See* DWORKIN, *supra* note 11, at 54.

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Leagues, and all player eligibility was reinstated.[42] The rights of any player not sold back reverted to the team in the National or American League that previously owned them.[43]

After the signing of this treaty, one team remained dissatisfied.[44] The Baltimore Federals were not allowed to buy the St. Louis Cardinals and move the team to Baltimore.[45] The Federals sued the National League, the American League, the presidents of each league, the neutral member of the National Commission, and the three persons administering the Federal League, alleging they violated the Sherman Antitrust Act by attempting to monopolize the business of baseball.[46] While the Federals prevailed in the District Court, the Court of Appeals for the District of Columbia overturned the decision.[47] The Federals then appealed the case to the United States Supreme Court where it became the first case in the so-called "baseball trilogy."[48]

In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[49] the leagues' actions appeared to be the type of behavior Congress meant to prohibit with both sections 1 and 2 of the Sherman Antitrust Act. In pertinent part, the Act provides:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . .
>
> § 2. 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

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42. *See id.*

43. *See id.*

44. *See id.* at 55.

45. The owners did not allow this move because they believed, as Charles Comiskey, owner of the Chicago White Sox, put it, Baltimore was "a minor league city and not a hell of a good one at that." *See* ZIMBALIST, *supra* note 27, at 9.

46. *See* Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs, 269 F. 681, 682-83 (D.C. Cir. 1920); DWORKIN, *supra* note 11, at 55.

47. *See Federal Baseball*, 269 F. at 688.

48. *See* Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs, 259 U.S. 200 (1922); DWORKIN, *supra* note 11, at 55.

49. 259 U.S. 200.

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> or commerce among the several States . . . shall be deemed guilty of a felony. . . .[50]

For the Act to apply, the business of baseball had to meet two criteria.[51] First, baseball had to be a "trade or commerce" as specified by the Act.[52] Second, this trade or commerce had to be interstate.[53] According to the Supreme Court, baseball failed on both counts.[54]

In *Federal Baseball*, the Supreme Court decided that the Sherman Act did not apply to the business of baseball.[55] In his famous opinion, Justice Holmes stated: "[t]he business is giving exhibitions of base ball, which are purely state affairs."[56] He reasoned that the actual business was the game, and the fact that the players and equipment crossed state lines was incidental rather than essential.[57] Therefore, baseball did not affect interstate commerce.[58] Further, "the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words."[59] These determinations gave Major League Baseball an antitrust exemption.[60]

C. Post Federal League Cases

After the decision in *Federal Baseball*, the players again attempted to defeat the reserve system through the courts.[61] A minor league player named George Toolson refused to accept an assignment from the Newark International Baseball Club to the

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50. Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1994).
51. *See Federal Baseball*, 259 U.S. at 208-09.
52. *Id.* at 209.
53. *See id.* at 208-09.
54. *See id.* at 209.
55. *See id.*
56. *Id.* at 208.
57. *See id.* at 209.
58. *See id.*
59. *Id.*
60. *See* DWORKIN, *supra* note 11, at 55. The exemption lasted until 1998 when the Curt Flood Act became law. *See* Addendum, *infra* page 379.
61. *See* Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 59-60 (1997). An outfielder named Danny Gardella also challenged the reserve clause after being blacklisted for playing in the Mexican League. *See id.* Though the case was dismissed by the district court, the case was settled for $60,000 after the Second Circuit declared the dismissal improper and remanded the case. *See id.* Clearly, the owners did not want further litigation of their victory in *Federal Baseball*. *See id.*

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New York Yankees' Binghamton farm team.[62] This resulted in the Yankees placing Toolson on the "ineligible list," thereby blacklisting him from professional baseball.[63] Toolson then sued the Yankees alleging a violation of the Clayton and Sherman Antitrust Acts.[64] In *Toolson v. New York Yankees, Inc.*, the District Court dismissed the case, and the Ninth Circuit Court of Appeals upheld the decision based on *Federal Baseball*.[65] On appeal, the Supreme Court did not reach the merits of the case; instead, the Court stated that *Federal Baseball* had been in place for thirty years, and if Congress did not like the ruling it would have acted.[66] The legality of the reserve system was not challenged in court again for twenty years.[67]

II. UNIONIZATION OF PROFESSIONAL BASEBALL PLAYERS

A. Early Attempts at Unionization

The players also attempted to get their fair share of the business of baseball—both in court and through unionization.[68] The players' first attempt at organization and more effective competition in the business of baseball occurred in 1885 with the formation of the National Brotherhood of Professional Ball Players.[69] The players elected John Montgomery Ward, a ballplayer who put himself through law school on his baseball earnings, as president of the new association.[70] This group attempted to fight many inequities in the game including the reserve rule, which at the time was simply a "secret" agreement between owners.[71] Ward called the agreement "a fugitive slave law which denied the player a harbor or a livelihood and carried him back, bound and shackled to the club from which he

62. *See id.* at 60.

63. *Id.*

64. *See* Toolson v. New York Yankees, Inc., 101 F. Supp. 93 (S.D. Cal. 1951).

65. *See id.*; Toolson v. New York Yankees, Inc., 200 F.2d 198 (9th Cir. 1952), *cert. granted*, 346 U.S. 356 (1953).

66. *See* Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953).

67. *See* Thomas C. Picher, *Baseball's Antitrust Exemption Repealed: An Analysis of the Effect on Salary Cap and Salary Taxation Provisions*, 20 VT. L. REV. 559, 570 (1995).

68. *See* DWORKIN, *supra* note 11, at 11.

69. *See id.*

70. *See* Kevin A. Rings, *Baseball Free Agency and Salary Arbitration*, 3 OHIO ST. J. ON DISP. RESOL. 243, 246 (1987).

71. DWORKIN, *supra* note 11, at 11.

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attempted to escape. Once a player's name is attached to a contract, his professional liberty is gone forever."[72] But even Ward realized baseball needed some form of reserve system.[73] The union, however, wanted some say in what that system should be.[74] When the parties met, the owners agreed to limit the number of players reserved and to repeal the salary limits that had been imposed.[75] However, the owners kept few of the promises made at that meeting, and the union faded away.[76]

The players' next attempt at unionization came in 1900 when they formed The League Protective Players' Association (LPPA).[77] The reasons for the players' attempt at organization in this case were much the same as in 1885—poor working conditions.[78] However, to employ its power, the union needed to convince the National League owners that, in exchange for better working conditions, players would not "jump" leagues.[79] Unfortunately, the union did not have the clout to keep players from taking better offers with the American League and, thus, failed to gain a foothold.[80] When the American and National leagues joined forces in 1903, the LPPA ceased to exist.[81]

The next attempt at unionization came as a result of punishment dealt to Ty Cobb for assaulting a spectator who had been insulting him.[82] The American League President suspended Cobb indefinitely, and his teammates went on strike in support.[83]

The league threatened sanctions against the players, and they returned to work at the urging of Cobb, who received a ten-day suspension.[84] Cobb also received a fine as did each of his striking teammates.[85] These actions, along with the continued

72. *Id.* at 45.
73. *See id.*
74. *See id.*
75. *See id.* at 45-46.
76. *See id.*
77. *See id.* at 12-13.
78. *See id.* at 13.
79. *Id.* The presence of the rival American League gave the union bargaining power that it otherwise would have lacked. *See id.*
80. *See id.* at 13-14.
81. *See id.*
82. *See id.* at 15.
83. *See id.*
84. *See id.* at 16.
85. *See id.*

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poor working conditions, moved the players towards organization.[86] The players formed The Baseball Players' Fraternity (the Fraternity) in 1912.[87] As with the earlier incarnations of players' unions, the presence of a new league—this time the Federal League—increased the players' power.[88] But as with the LPPA, the inability to keep players from jumping leagues greatly reduced the union's ability to capitalize on the opportunity.[89]

The Fraternity, however, gained a few concessions from the owners, including convincing the owners to pay for uniforms, a cost previously incurred by the players, and giving players with ten or more years of service an unconditional release rather than allowing the owners the right to sell them to a lower division.[90] Despite taking a few steps in the right direction, this incarnation of the players' union did little to improve the working conditions for the players or alter the terms of the reserve system.[91] The Fraternity folded in 1918.[92]

The last failed attempt at unionization occurred in 1946 when a lawyer named Robert Murphy formed The American Baseball Guild.[93] Murphy believed that the time was right for player unionization because of the passage of the National Labor Relations Act in 1935.[94] Additionally, the presence of the final "rival" league—the Mexican League—increased the union's chances of success.[95] The Guild made few major advances, primarily because of Murphy's tactical errors.[96] However, the Guild succeeded in establishing the pension plan and payment for spring training games, still known as "Murphy Money."[97]

In an attempt to prevent future unionization, the owners established a system in which each team elected a representative to deal with problems relating only to that team,

86. *See id.*
87. *See id.* at 15.
88. *See id.* at 16.
89. *See id.*
90. *See* HELYAR, *supra* note 17, at 6.
91. *See* DWORKIN, *supra* note 11, at 17.
92. *See id.*
93. *See* ZIMBALIST, *supra* note 27, at 12.
94. *See* DWORKIN, *supra* note 11, at 18.
95. *See* ZIMBALIST, *supra* note 27, at 12.
96. *See* SCULLY, *supra* note 8, at 34.
97. DWORKIN, *supra* note 11, at 20.

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and each league elected a representative to sit on the Executive Council.[98] This system made it appear that the owners were making an effort, but two major loopholes prevented players from making any real changes.[99] First, while the players "sat" on the Executive Council, they did not vote.[100] Second, all decisions by the owners were final.[101] In 1953, as *Toolson* was proceeding through the courts, the players decided that they needed a lawyer to advise them on the upcoming pension plan negotiations and hired J. Norman Lewis.[102] The move toward forming the Major League Baseball Players Association (MLBPA) had begun.[103]

B. The Major League Baseball Players Association

1. Formation of the Union

Team player representatives formed the MLBPA during the All-Star break in 1954.[104] The players involved insisted the MLBPA was merely an association of players and not a union.[105] The first president, Bob Feller, did not urge the players to make the organization a union for collective bargaining purposes because he felt that players were too individualistic for collective bargaining to work.[106] Further, if the organization was a union, it may have violated the Taft-Hartley Act[107] because funding for the MLBPA came from the All-Star Game proceeds.[108] In two separate places, the Taft-Hartley Act prohibits the funding of a union with management's money.[109]

The MLBPA contentedly proceeded to only negotiate over small issues, like Murphy Money and moving expenses, until 1965, when several of the players began a search for a full-time

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98. *See id.* at 26.
99. *See id.* at 26-27.
100. *See id.* at 27.
101. *See id.*
102. *See id.*
103. *See id.*
104. *See id.*
105. *See id.*
106. *See* SCULLY, *supra* note 8, at 34.
107. *See* 29 U.S.C. §§ 141-187 (1994).
108. *See* MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL 8 (1991).
109. *See id.*; 29 U.S.C. §§ 158, 186 (1994).

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executive director.[110] With negotiations over a new pension plan pending, the players believed they needed some real representation.[111] They hired Marvin Miller from the Steelworkers Union.[112] The owners, who had hoped to have someone a little more "owner friendly" installed in the position, did not greet the decision warmly.[113] Unbeknownst to the players, they were about to get their first taste of management overtly attempting to destroy a union.

First, management attempted to discredit Miller.[114] The owners and their allies spread rumors suggesting Miller would bring traditional labor woes, such as racketeering and possibly the Teamsters union, into baseball.[115] Management's second move made the union legal under Taft-Hartley, but was done for all the wrong reasons.[116] The owners withdrew funding of the union, citing the Taft-Hartley prohibition against management funding.[117] Ironically, with this action the owners were admitting that they had violated the law for years, but, even then, no one thought this unusual.[118] Many of the owners felt withdrawal of funding would destroy the union because the players would be unwilling to pay to support an untried entity.[119] But the owners were wrong, and by the 1967 season, funding for the MLBPA came from players' dues.[120]

2. Early Achievements

The first contract negotiated by the new union was the new pension funding agreement in 1966.[121] Interestingly, the owners unilaterally decided what the terms of the agreement would be and then called Miller to let him know the terms just prior to their making a public announcement.[122] The owners'

110. *See* SCULLY, *supra* note 8, at 34; ZIMBALIST, *supra* note 27, at 17.
111. *See* HELYAR, *supra* note 17, at 16-17.
112. *See* ZIMBALIST, *supra* note 27, at 17.
113. *See id.*; MILLER, *supra* note 108, at 43-46.
114. *See* MILLER, *supra* note 108, at 43-46.
115. *See id.* at 42-46.
116. *See id.* at 68.
117. *See id.*
118. *See id.*
119. *See id.*
120. *See id.* at 91.
121. *See* ZIMBALIST, *supra* note 27, at 18.
122. *See* MILLER, *supra* note 108, at 88-89.

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representative, Commissioner William Eckert, showed genuine surprise when Miller informed him that announcing terms without bargaining with the players' collective bargaining representative violated labor law.[123] Eckert did not announce the terms at the press conference, and this may have been the first indication to the owners that relations with the players were changing.[124] In the next few months, Miller discovered that the owners had not only violated the provisions of the National Labor Relations Act, but they had also failed to fund the pension plan in accordance with their contractual agreement with the players.[125] Miller's actions in enforcing the owners' obligations confirmed the owners' earlier suspicions regarding the change in the player/owner relationship.[126]

Though the 1966 contract represented the first collective bargaining agreement in sports, the contract only covered the benefit plan.[127] Efforts to negotiate the first complete basic agreement began in early 1967.[128] When completed, the deal covered the 1968 and 1969 seasons.[129] The players received several rewards for effectively standing up to the owners.[130] First, the agreement contained the Uniform Players Contract (UPC), which prohibited unilateral changes in the terms of an individual player's contract.[131] Second, the agreement established a grievance procedure.[132] The MLBPA brought up the reserve system as an issue, but made no progress.[133] The owners had decided prior to negotiating that no changes would be made to their ace in the hole.[134]

The first real indication of union solidarity came with the negotiation of the 1969 benefits package.[135] The owners

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123. *See id.* at 89.
124. *See id.*
125. *See id.* at 89-90.
126. *See id.*
127. *See id.* at 95.
128. *See id.* at 95-97.
129. *See id.* at 97.
130. *See id.*
131. *See id.*
132. *See id.* at 98.
133. *See id.*
134. *See id.*
135. *See id.* at 99-104.

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attempted to stall negotiations.[136] To combat this, the players engaged in the first mass holdout.[137] All players refused to sign contracts until a deal was done because a benefits package was an essential part of their contract.[138] This strategy succeeded, and the parties signed a new, acceptable contract in time for spring training.[139] Subsequent collective bargaining agreements improved the working conditions for the players, including grievance arbitration.[140] There was, however, no progress on the reserve system.[141]

III. THE RESERVE CLAUSE—CHALLENGED AGAIN

A. Curt Flood's Challenge

In 1969, a multi-player trade between the St. Louis Cardinals and the Philadelphia Phillies involved Curt Flood, Tim McCarver, and Dick Allen.[142] The Cardinals neither asked Flood how he felt about the trade nor informed him before the trade's completion.[143] Flood decided to fight the reserve clause after consulting with Miller about the ramifications of his decision, coming to terms with the fact that his career may well be over, and getting support from the union.[144] In December 1969, Flood notified the Commissioner of Baseball, Bowie Kuhn, that he did not wish to play for the Phillies and wanted Kuhn to notify other teams of his availability.[145] Kuhn rejected Flood's request, and Flood filed an anti-trust suit in *Flood v. Kuhn*.[146]

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136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.* at 105.
140. *See id.*
141. *See id.* at 106.
142. *See id.* at 171-72.
143. *See id.* at 172.
144. *See id.* at 173-88.
145. *See id.* at 190-92.
146. 316 F. Supp. 271 (S.D.N.Y. 1970). Making this claim forced Curt Flood to sit out the 1970 season. However, Flood did play again. The Phillies traded Flood's rights for the 1971 season to the Washington Senators (now the Texas Rangers). The parties to the lawsuit agreed that by playing, Flood would not affect his standing in the case as it proceeded through the courts. Washington offered Flood a generous salary, and he signed. However, Flood played only thirteen games. He struggled at the plate and, with a .200 batting average, decided that his career was over. He had been out of the game too long to come back. *See* MILLER, *supra* note 108, at 201.

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Flood and the MLBPA had good reason to believe the outcome of this case would be different than the outcomes of *Federal Baseball* and *Toolson*.[147] Between the time *Toolson* was decided and the *Flood* case was initiated, the law had changed in several areas.[148] Primarily, the Supreme Court decided that other sports were not entitled to exemption from antitrust legislation.[149] However, the Court, once again, ruled against the players.[150] In a very unusual decision, the Court implied *Federal Baseball* and *Toolson* were wrongly decided, but Congressional action would be necessary to overrule these decisions.[151] The Court admitted that the game of baseball involved interstate commerce and, as such, normally would be covered by the Sherman Act.[152] The Court also stated that since *Federal Baseball*, several pieces of legislation aimed at overriding baseball's exemption had been proposed in Congress and none had passed.[153] The *Flood* case resulted in the preservation of baseball's antitrust exemption, despite the changes in the environment in which the game was played (national broadcasting included) and the surrounding law, but limited the exemption to the game of baseball.[154]

B. Aftermath of the Flood *Case*

The first real test the young MLBPA faced came in 1972 with the decision to go on strike.[155] Management refused to offer any increase in the pension plan, the only issue open for negotiation.[156] After the players set a strike date, the owners gave them a reason to stand firm: Gussie Busch, the owner of the Cardinals, publicly stated, "[w]e voted unanimously to take a stand . . . . We're not going to give them another goddamn

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147. *See* 259 U.S. 200 (1922); 346 U.S. 356 (1953).
148. *See* Rings, *supra* note 70, at 249.
149. *See* United States v. International Boxing Club of N.Y., 348 U.S. 236 (1955) (boxing); Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (basketball); Rings, *supra* note 70, at 249.
150. *See* Flood v. Kuhn, 407 U.S. 258, 282-85 (1972).
151. *See id.*
152. *See id.* at 282.
153. *See id.* at 283.
154. *See id.* 282-85.
155. *See* HELYAR, *supra* note 17, at 110-17.
156. *See id.* at 110.

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cent. If they want to strike—let 'em."[157] And so they did. The first strike in sports history lasted thirteen days and resulted in the players getting what they wanted.[158] More importantly, the players showed the owners that the relationship between the two parties had changed forever. No longer would the players accept having the terms and conditions of their employment dictated to them by the owners.[159]

Perhaps the most significant change in the aftermath of *Flood* came when the owners proposed final-offer salary arbitration during negotiations for the 1973-75 basic agreement.[160] This gave players with the requisite number of years' service the right to have their salary decided by a neutral party.[161] The owners wanted final-offer arbitration to limit the flexibility of the arbitrator.[162] The plan put in place for the 1974 season (and still in place today) provided that if an eligible player and his team cannot reach a salary agreement, the player and the team tender their final offers to an arbitrator who, within twenty-four hours of hearing the case, selects one proposal.[163] The decision to offer salary arbitration to the players was driven by the owners' desire to take away some of Marvin Miller's weapons[164]—perhaps the reserve system did not sound as bad with salaries being determined by neutral parties. The owners also believed that the financial impact of arbitration would not be significant.[165] By the time they realized that these premises were wrong, it was too late.[166]

157. *Id.* at 113.
158. *See id.* at 116-17.
159. *See* MILLER, *supra* note 108, at 220-22.
160. *See* SCULLY, *supra* note 8, at 36.
161. *See id.*
162. *See id.*
163. *See id.*
164. *See* HELYAR, *supra* note 17, at 51.
165. *See id.* at 152.
166. *See id.* at 151-53.

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IV. FREE AGENCY COMES TO MAJOR LEAGUE BASEBALL

A. "Catfish" Hunter—The First Free Agent

The first "free agent" in modern baseball gained his freedom in 1974.[167] Jim "Catfish" Hunter did not gain his free agent status by suing in antitrust or from the other lofty principles Marvin Miller used to fight the reserve system. He gained his free agent status because of something significantly more basic—a breach of contract.[168] Hunter's contract for the 1974 season required that Charlie Finley and the Oakland A's pay half of his salary in cash and half in any way Hunter chose.[169] Hunter designated the money be used to purchase an annuity.[170] After signing the contract, Finley realized the payments to the insurance company were not tax deductible for that year and reneged on the contract.[171] Paragraph 7(a) of the Uniform Players Contract specified a straightforward remedy in case of a breach.[172] If, after being notified of the breach, the owner failed to remedy the breach within ten days, the owner was deemed to have defaulted on the contract and the player was no longer bound.[173] The MLBPA notified Finley of the violation, but Finley would not cure the breach, though he did attempt to pay Hunter in cash.[174] On October 4, 1974, Hunter and Miller notified Kuhn of the situation and asked that he inform the other clubs in the league of Hunter's free agent status.[175] Kuhn refused the request.[176] The players' association then filed a grievance on Hunter's behalf.[177] One of the early successes of the MLBPA, grievance arbitration, was bearing fruit.

On December 13, 1974, Arbitrator Peter Seitz announced his decision.[178] "Finley would have to pay the second $50,000 in the

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167. *See id.* at 140; MILLER, *supra* note 108, at 228-29.
168. *See* HEYLAR, *supra* note 17, at 131-40.
169. *See id.* at 137.
170. *See id.*
171. *See* DWORKIN, *supra* note 11, at 71.
172. *See* MILLER, *supra* note 108, at 228.
173. *See id.*
174. *See id.* at 229.
175. *See id.*
176. *See id.*
177. *See id.* at 230.
178. *See id.*

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manner specified by the contract *and* . . . the contract with Hunter was terminated *and* . . . Hunter was a free agent who could negotiate with any major league team."[179] The decision made Catfish Hunter available to the highest bidder.[180] In the end, Hunter signed with the Yankees for a five-year package valued around $3.75 million.[181] This was in stark contrast to the $200,000 offer from Finley and the A's.[182]

B. Messersmith/McNally—Free Agency Spreads

While the union had little luck with challenging the reserve clause issue on an antitrust basis in the courts, they were more successful on a contract theory in an arbitration setting.[183] Therefore, the MLBPA next moved to defeat the system using arbitration.[184]

Controversy always existed over exactly what the reserve clause meant. The owners believed the reserve clause gave them a perpetual right to a player, while the players took a much more limited view.[185] Under the MLBPA's theory, if a player played one season under his old contract after such contract had expired, he had played out his "reserve year" and was then free to find employment with any club he chose.[186] With the filing of the Messersmith/McNally grievance, the MLBPA sought to have its reading of the provision approved.

Two pitchers, Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos, signed contracts for the 1974 season.[187] Following that season, neither could reach an agreement with his respective team.[188] Consequently, the Dodgers and the Expos invoked the reserve clause and both players played the 1975 season without a new contract.[189]

179. *Id.* at 233.

180. *See* DWORKIN, *supra* note 11, at 72.

181. *See* HELYAR, *supra* note 17, at 147-48.

182. *See* MILLER, *supra* note 108, at 237.

183. *See* Rings, *supra* note 70, at 247-49.

184. *See* Moorad, *supra* note 61, at 64.

185. *See* MILLER, *supra* note 108, at 41. Interestingly, John Gaherin, the owners' negotiator, later admitted that upon reading the clause, his view was more in line with the players' view than the owners'. *See* HELYAR, *supra* note 17, at 35-36.

186. *See* MILLER, *supra* note 108, at 41.

187. *See* Rings, *supra* note 70, at 250.

188. *See id.*

189. *See id.*

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Towards the end of the season, Messersmith and Marvin Miller began discussions about filing for free agency if Messersmith completed the season without a new contract.[190] These discussions were complicated because negotiations between Messersmith and the Dodgers were still ongoing.[191] Miller contacted McNally to ensure standing to file a grievance. McNally, who began the season without a new contract, left the game in the middle of the season and did not plan to return.[192] McNally agreed to add his name to the grievance in case Messersmith settled.[193] According to Miller, McNally was the ideal candidate to test the meaning of the reserve clause because he did not plan to play again and, thus, had no downside risk.[194] When the season ended, both Messersmith and McNally had effectively played out their option year without a new contract.[195] They filed the grievance on the last day of the 1975 season.[196]

Peter Seitz, the arbitrator in the Hunter case, in what turned out to be his last act as a baseball arbitrator, heard the case.[197] On December 23, 1975, after a three-day hearing, Seitz ruled in favor of Messersmith and McNally.[198] The owners fired Seitz immediately.[199] Seitz had not been the sole decisionmaker in the Hunter and McNally/Messersmith grievances; Miller and a representative for the owners, John Gaherin, were also on the panel.[200] However, as the "neutral" party, his votes decided each case.[201]

The owners attempted to fight the arbitration decision in Messersmith/McNally by filing suit in federal court alleging the arbitration panel exceeded the scope of its authority.[202] The

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190. *See* MILLER, *supra* note 108, at 242.
191. *See* HELYAR, *supra* note 17, at 154.
192. *See* MILLER, *supra* note 108, at 243.
193. *See id.*
194. *See id.*
195. *See* Rings, *supra* note 70, at 250.
196. *See* MILLER, *supra* note 108, at 244.
197. *See* Rings, *supra* note 70, at 250.
198. *See* MILLER, *supra* note 108, at 250.
199. *See id.*
200. *See id.*
201. *See id.*
202. *See* Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233 (W.D. Mo.), *aff'd by* 532 F.2d 615, 618 (8th Cir. 1976).

owners argued that Article XV of the collective bargaining agreement specifically excluded the "core" or "heart" of the reserve system from the grievance procedures outlined in Article X.[203] In determining whether the issues should have been arbitrated, the Eighth Circuit Court of Appeals looked at the Labor Management Relations Act and the cases construing that Act.[204] The court determined arbitration covered a provision or grievance except in two instances: "(1) where the collective bargaining agreement contains an express provision clearly excluding the grievance involved from arbitration; or (2) where the agreement contains an ambiguous exclusionary provision and the record evinces the most forceful evidence of a purpose to exclude the grievance from arbitration."[205] The court concluded that the provisions in Article X and Article XV taken together were ambiguous as to whether the case should have been heard by the arbitrator and applied the second prong of the test.[206] After analyzing the three collective bargaining agreements made between the two parties after 1968 and reviewing testimony about the negotiations of the agreement then in force, the court concluded the test for exclusion from arbitration had not been met.[207]

The owners further argued the panel had exceeded its authority by altering the terms of the agreement through its decision.[208] Following a strong tendency to support arbitration decisions in labor cases, and citing previous decisions affirming the findings of an arbitrator as long as the decision was consistent with the "essence" of the agreement, the court found that the panel acted appropriately.[209] The court stated that "[w]e cannot agree that the 1973 collective bargaining agreement embodied an understanding by the parties that the reserve system enabled a club to perpetually control a player."[210] The court noted that this was especially true since the MLBPA argued that the construction urged by the owners was never

203. *See id.* at 245.
204. *See Kansas City Royals*, 532 F.2d at 620 (citing 29 U.S.C. § 173(d) (1984)).
205. *Id.* at 621.
206. *See id.* at 621-23.
207. *See id.* at 629.
208. *See id.* at 630.
209. *See id.* at 630-31.
210. *Id.* at 631.

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their understanding of the clause.[211] Free agency had come to baseball.[212]

C. *Collectively Bargained Free Agency—The 1976 Basic Agreement*

1. *The Negotiations*

After the Messersmith/McNally decision, the owners finally agreed to negotiate on the question of free agency.[213] The owners proposed free agency be available only to players with nine years of major league service time.[214] The players rejected this offer.[215] Interestingly, the number of free agents during a given year concerned both parties. The owners wanted only a few free agents so that they would have stability in their rosters.[216] Meanwhile, the MLBPA knew that if there were too many free agents, the glut on the market would drive down salaries.[217]

After the appellate court upheld the Messersmith/McNally decision, the owners decided to lock the players out of spring training during the negotiating process.[218] The lockout lasted seventeen days and was lifted even though no contract had been negotiated.[219] When reached, the Basic Agreement of 1976 spelled out the terms for free agency in Article XVII—Reserve System.[220]

2. *Terms of the New Agreement on Free Agency*

The new agreement's terms covering free agency were specific and, to some degree, complex. Players with contracts signed before August 9, 1976, who had played out their reserve year, were eligible for free agency.[221] Those who had a contract

211. *See id.*
212. *See* MILLER, *supra* note 108, at 258.
213. *See id.* at 256.
214. *See id.*
215. *See id.*
216. *See id.* at 259.
217. *See id.*
218. *See id.* at 258.
219. *See id.* at 264.
220. *See* DWORKIN, *supra* note 11, at 105-12.
221. *See* Basic Agreement Between the American and National League Professional

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signed on or after August 9, 1976 were covered by the new procedures, which stated:

> [A]ny Player with 6 or more years of Major League service who has not executed a contract for the next succeeding season shall become a free agent, subject to the provisions of Section C below, by giving notice as hereinafter provided within the 15-day period beginning on October 15 (or the day following the last game of the World Series, whichever is later).[222]

Section C covered reentry procedures.[223] Section C(1) covered who could negotiate with a given free agent, as the structure did not allow a player to negotiate with anyone he chose.[224] Under the agreement, eligible players informed the Players Association, which in turn notified the Players Relations Committee (PRC) of their status, and the teams met.[225] In inverse order of standing in the season just concluded, teams selected players with whom they wished to negotiate.[226] Each team continued to select "until each eligible Player [had] been selected by 12 Clubs (13 beginning in 1977) or until each Club . . . indicated that it desire[d] to make no further selections."[227] If less than two teams selected a player, that player could negotiate with any team.[228] If none of the teams negotiated an agreement with the selected player by February 15 of the following year, the player had until February 22 to resubmit himself for another round of selections.[229] This time only four clubs could select the player.[230]

Baseball Clubs and Major League Baseball Players Association, Effective Jan. 1, 1976, Article XVII–Reserve System, Section B. Free Agency, Paragraph 1, *Player Contracts Executed Prior to Aug. 9, 1976*, *reprinted in* DWORKIN, *supra* note 11, at 105 [hereinafter 1976 Basic Agreement].

222. *Id.*, Section B. Free Agency, Paragraph 2, *Player Contracts Executed On or After Aug. 9, 1976*, *reprinted in* DWORKIN, *supra* note 11, at 105-06.

223. *See id.*, Section C. Reentry Procedure, *reprinted in* DWORKIN, *supra* note 11, at 106.

224. *See id.*, Section C. Reentry Procedure, Paragraph 1, *Negotiation Rights Selection Procedure*, *reprinted in* DWORKIN, *supra* note 11, at 106-07.

225. *See id.*

226. *See id.*

227. *Id.*

228. *See id.*, *reprinted in* DWORKIN, *supra* note 11, at 107.

229. *See id.*

230. *See id.*

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The terms of the agreement also limited the number of free agents that any one club could sign. This number was determined according to the number of free agents available; the fewer available, the fewer any one team could sign.[231] Regardless of the number of free agents available, however, a team could sign at least as many players as it lost.[232] Further, the terms of the collective bargaining agreement provided that if a team signed a free agent, then, under certain conditions, the team that lost the player would receive compensation in the form of a selection in the following year's amateur draft.[233] While these procedures did not return baseball to the "revolving system," they represented a vast improvement over the straight reserve system.[234]

The owners insisted on the insertion of a final paragraph into the Reserve System Clause—Paragraph G. This paragraph, which later cost the owners millions of dollars, read as follows:

> The utilization or non-utilization of rights under this Article XVII is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.[235]

With this provision, the owners imposed a restriction on themselves that the players had not been able to impose through enforcement of antitrust laws.[236] The owners contractually agreed not to enter into collusive agreements regarding free agency.[237]

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231. *See id.,* Section C. Reentry Procedure, Paragraph 2, *Contracting With Free Agents, reprinted in* DWORKIN, *supra* note 11, at 107. This provision specifies:

> If there are 14 or less players on the Eligible List no Club may sign more than one Player. If there are from 15 to 38 Players on the Eligible List, no Club may sign more than 2 Players. If there are from 39 to 62 Players on the Eligible List, no Club may sign more than 3 Players. If there are more than 62 Players on the Eligible List, the Club quotas shall be increased accordingly.

Id.

232. *See id., reprinted in* DWORKIN, *supra* note 11, at 107-08.

233. *See id., reprinted in* DWORKIN, *supra* note 11, at 108-09.

234. *See* discussion, *supra* Part I.A.

235. 1976 Basic Agreement, *supra* note 221, Article XVII–Reserve System, Section G. Individual Nature of Rights, *reprinted in* DWORKIN, *supra* note 11, at 112.

236. *See* discussion, *supra* Parts I.B-C.

237. *See* 1976 Basic Agreement, *supra* note 221, Article XVII–Reserve System, Section

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3. New Rights for Players with Less Than Six Years of Service

Players with less than six years of service also gained under the new contract. Specifically, Section D—Right to Require Assignment of Contract—gave players with five or more years of service the right to demand a trade at the end of a given season.[238] When a player gave notice of his demand, he also had the right to refuse to be traded to as many as six clubs.[239] If the team failed to trade the player before March 15 of the following year, the player became an immediate free agent.[240] The player could retract this demand until March 15 or until his contract was assigned to another club, whichever came first.[241]

4. Limits on the New Rights

Section E, Paragraph 1 of Article XVII—Repeater Rights—specified one of the limitations on the exercise of the new rights.[242] This paragraph stated that any player who became a free agent under Section B or D of Article VIII could not do so again until he acquired five more years of service.[243] Further, a player who became a free agent pursuant to Section B or D was not "eligible to exercise his right to require the assignment of his contract" until he acquired three more years of service.[244] These limitations served to restrict further the number of players in transition in a given year either through demanded trades or through free agency.

G. Individual Nature of Rights, *reprinted in* DWORKIN, *supra* note 11, at 112.

238. *See id.*, Section D. Right to Require Assignment of Contract, *reprinted in* DWORKIN, *supra* note 11, at 110.

239. *See id.*, Section D. Right to Require Assignment of Contract, Paragraph 2, *Procedure, reprinted in* DWORKIN, *supra* note 11, at 110-11; *see also* DWORKIN, *supra* note 11, at 88.

240. *See* DWORKIN, *supra* note 11, at 88.

241. *See* 1976 Basic Agreement, *supra* note 221, Article XVII-Reserve System, Section D. Right to Require Assignment of Contract, Paragraph 3, *Retraction by Player, reprinted in* DWORKIN, *supra* note 11, at 111.

242. See id., Section E. Repeater Rights, Paragraph 1, *Free Agency, reprinted in* DWORKIN, *supra* note 11, at 111-12.

243. *See id.*

244. *Id.*, Section E. Rėpeater Rights, Paragraph 2, *Trade Demand, reprinted in* DWORKIN, *supra* note 11, at 111-12.

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5. Remaining Rights Important to Free Agency

The 1976 agreement retained the important right of final-offer salary arbitration from the 1973 agreement.[245] Article V, Section E—Salary Arbitration—spelled out this right. While the provisions for arbitration were almost as complex as those for free agency, the basic idea was that any player with at least two years of service, over at least three seasons, but not more than six years of total service, was eligible for salary arbitration.[246] A player with over six years could request salary arbitration.[247] The terms of this provision further specified that the arbitration would follow the final offer method, in which each side would submit a salary proposal and the arbitrator would select one or the other.[248] The arbitrator would then simply insert the salary figure into an otherwise completed Uniform Players Contract without giving any explanation for the decision.[249] Arbitration, combined with the new free agency rights, fueled the rapid rise of player salaries since 1976.[250]

D. The 1981 Strike

The 1976 agreement expired in 1980.[251] As the 1980 collective bargaining process proceeded, another strike appeared inevitable. At the last minute, the parties avoided a strike by resolving all differences except those regarding the largest issue, free agency, and assigning that issue to a study group for one year of analysis.[252] However, during that year, the committee failed to resolve the issues, and, in 1981, another

245. *See* DWORKIN, *supra* note 11, at 143.
246. *See* 1976 Basic Agreement, *supra* note 221, Article V, Section E. Salary Arbitration, Paragraph 1, *Eligibility, reprinted in* DWORKIN, *supra* note 11, at 187.
247. *See id.*
248. *See id.*
249. *See id.*, Section E. Salary Arbitration, Paragraph 4, *Form of Submission, reprinted in* DWORKIN, *supra* note 11, at 188.
250. *See* Rings, *supra* note 70, at 258-59. In fact, the effect was immediate. The average salary in 1976 rose $24,565, from $51,501 in 1975 to $76,066 in 1976. Prior to the agreement, the largest increase in average salary occurred in 1968—that year the increase was $4394. By the time negotiations of the next collective bargaining agreement came in 1980, the average salary was $143,756. *See* Moorad, *supra* note 61, at 66 n.100.
251. *See* MILLER, *supra* note 108, at 286.
252. *See id.* at 291.

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work stoppage occurred in baseball.[253] Free agency compensation—what a team received when it lost a player to free agency—was the sole issue in dispute.[254] The scheme in place provided for compensation via the amateur draft.[255] The owners wanted compensation to come in the form of a player from the signing team's major league roster.[256] The MLBPA proposed several different compensation schemes; some involved major league players, but none included direct "punishment" of the signing team.[257] The MLBPA knew that any compensation in this form would chill the free agent market.[258] By refusing to accept anything less, the owners forced the first mid-season strike in sports history.[259] When the strike ended after fifty days, the owners had a different method of free agent compensation, but had not achieved any of their goals.[260]

V. THE OWNERS STRIKE BACK—COLLUSION

A. The 1985 Negotiations and Aftermath

Once again, the negotiations over a new collective bargaining agreement caused a brief, mid-season work stoppage in 1985.[261] After a two-day strike, the players, for the first time, agreed to "give back" to the owners.[262] The players accepted a change in the formula for pension fund contributions that resulted in them receiving less money and they agreed to an increase from two to three years for salary arbitration eligibility.[263] The agreement also simplified free agency by abolishing the

253. *See* HELYAR, *supra* note 17, at 258-64.
254. *See* MILLER, *supra* note 108, at 309.
255. *See* HELYAR, *supra* note 17, at 222-23.
256. *See id.*
257. *See id.*
258. *See* MILLER, *supra* note 108, at 298. The "Rozelle Rule" in the NFL refers to the requirement that a team acquiring a free agent "fairly and equitably" compensate the team losing the free agent. This compensation can be in the form of players, draft choices, or a combination of the two. This tends to have a drag on the number of "free agents" that actually change teams. *See* PAUL C. WEILER & GARY R. ROBERTS, CASES, MATERIALS AND PROBLEMS ON SPORTS AND THE LAW 156-57 (1993).
259. *See* MILLER, *supra* note 108, at 298.
260. *See id.* at 319.
261. *See* HELYAR, *supra* note 17, at 329.
262. *See id.*
263. *See* MILLER, *supra* note 108, at 338-39.

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complicated bidding structure and eliminating the professional players compensation system.[264]

After the signing of this agreement, any team could negotiate with any free agent.[265] However, a funny thing happened after the 1985 season: the market for free agents appeared to dry up. Prior to the 1984 season, sixteen clubs signed free agents.[266] However, after the 1985 season, only one player, Carlton Fisk, received a bona fide offer from a team other than his current club.[267] Lee MacPhail, the outgoing director of the PRC, and Peter Uberroth, the Commissioner of Baseball, encouraged the owners to take some "fiscally responsible" actions, including avoiding long-term contracts and agreeing not to negotiate with another team's free agent unless the player had been released by his current team.[268] Uberroth preached this fiscal responsibility not only to the owners, but also to the general managers.[269] He berated and humiliated both groups and, to some degree, bullied them to stay in line.[270]

B. Grievances

Early in 1986, the MLBPA filed Grievance No. 86-2 (*Collusion I*) alleging that the owners acted in concert prior to the 1985 season to boycott free agents in violation of Paragraph H of Article XVIII of the 1985 Basic Agreement.[271] An arbitration panel headed by Thomas T. Roberts heard *Collusion I*.[272] Before Roberts could deliver an opinion regarding the clubs' actions, the MLBPA filed a second action, Grievance No. 87-3 (*Collusion II*), alleging collusion prior to the 1986 season.[273] A

264. *See id.* at 319. *See generally* HEYLAR, *supra* note 17, at 322-31.
265. *See* Stephen L. Willis, *A Critical Perspective of Baseball's Collusion Decisions*, 1 SETON HALL J. SPORT L. 109, 119 n.94 (1991) (referring to decision in Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 87-3, Panel Dec. No. 79 (1988) (Nicolau, Arb.) [hereinafter Collusion II]).
266. *See* SCULLY, *supra* note 8, at 40.
267. *See id.*
268. *See id.*
269. *See* HELYAR, *supra* note 17, at 335.
270. *See id.* at 332-35.
271. *See* Willis, *supra* note 265, at 109 (citing Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 86-2, Panel Dec. No. 76 (1987) (Roberts, Arb.) [hereinafter *Collusion I*]).
272. *See id.*
273. *See id.* at 110 (citing *Collusion II*).

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panel chaired by George Nicolau heard *Collusion II*.[274] In January 1988, the players filed a third complaint, Grievance No. 87-3 (*Collusion III*), alleging the continuation of this practice prior to the 1988 season.[275]

1. Collusion I

On September 27, 1987, the panel hearing *Collusion I* determined that the owners had, in fact, made agreements not to pursue free agents prior to the 1986 season in violation of Article XVIII of the collective bargaining agreement.[276] In making his decision, the arbitrator said that the exchange of information between clubs was not prohibited.[277] However, "[w]hat is prohibited, is a common scheme involving two or more Clubs and/or two or more players undertaken for the purpose of a common interest as opposed to their individual benefit."[278] Further, these agreements need not be in writing.[279] Circumstances, taken as a whole, may be sufficient to infer the conspiracy.[280] The arbitrator determined that there was a " 'common understanding that no Club [would] bid on the services of a free agent until and unless his former Club no longer desire[d] to sign' him" and that this violated the Basic Agreement.[281] The panel set interim damages at $10,528,086.71.[282]

2. Collusions II *and* III

On August 3, 1988, the MLBPA won *Collusion II* as well.[283] As in *Collusion I*, the panel construed the clause under which the grievance was filed, Article XVIII(H), and determined that a

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274. *See id.*
275. *See* Willis, *supra* note 265, at 110 n.6 (citing Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 87-3, Panel Dec. No. 1 (1990) (Nicolau, Arb.)); *see also* Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW. J. 183, 197-98 (1994).
276. *See* Willis, *supra* note 265, at 109.
277. *See id.* at 122 (citing *Collusion I*, *supra* note 271, at 5).
278. *Id.* (quoting *Collusion I*, *supra* note 271, at 5).
279. *See id.*
280. *See id.*
281. *Id.* at 123 (alteration in original) (quoting *Collusion I*, *supra* note 271, at 8).
282. *See id.* at 109-10.
283. *See id.* at 110.

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violation of the agreement occurred if a "common scheme for a common benefit" could be inferred from the totality of the circumstances.[284] After reviewing the circumstances surrounding the cases of such star players as Jack Morris, Tim Raines, Andre Dawson, and Lance Parrish, the panel concluded that the owners had put a common plan or scheme in place.[285] The panel set interim damages at $102.5 million for players harmed by collusion prior to the 1987 and 1988 seasons.[286]

The owners also lost *Collusion III*.[287] The owners owed interim damages of more than $113 million based on a provision of the collective bargaining agreement that they had insisted on inserting.[288] The owners were constrained in a way the MLBPA could not previously effectuate in court, and the owners now faced the possibility of punitive damages.[289]

C. Settlement

To head-off the possibility of another multi-million dollar judgment and to put these cases to rest, the owners offered, and the players accepted, a $280 million settlement.[290] To preclude this type of collusive behavior in the future, the players sought to strengthen their hand. In the 1990 basic agreement, the players sought and gained a revision to what became Article XX(F)—Individual Nature of Rights.[291] As a result, a single, simple paragraph in the 1976 agreement became nine significantly more complicated ones.[292] One of these new paragraphs (Article XX(F)(2)) provided for treble damages if a player proved collusion in violation of paragraph one (the initial paragraph from the 1976 agreement).[293]

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284. *Id.* at 125 (quoting *Collusion II, supra* note 265, at 23).
285. *See id.* at 125-27.
286. *See id.* at 110.
287. *See id.*
288. *See id.* at 109-10.
289. *See id.* at 142.
290. *See id.* at 148.
291. *See* Basic Agreement Between the American and National League Professional Baseball Clubs and Major League Baseball Players Association, Effective Jan. 1, 1990, Article XX–Reserve System, Section F. Individual Nature of Rights, at 58-60 (available in Georgia State University College of Law Library).
292. *See id.*
293. *See id.* at 59.

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VI. LABOR DISPUTES IN THE 1990S

A. The 1990 Basic Agreement

The end of collusion meant a return to rapidly increasing salaries,[294] and the owners sought to control their largest cost of doing business by other means. Before the beginning of the 1990 labor negotiations, the owners were determined to control players' salaries and were prepared to lock the players out of spring training to do so.[295] Free agency was not the major issue in this round of negotiation; rather, arbitration and a salary cap took center stage.[296] The owners' opening proposal would have capped players' salaries at 48% of revenue and replaced salary arbitration with a complicated formula that would have based the salaries of players with less than six years of service on their statistics.[297] The players had a different plan in mind. They believed they had been deceived in the last negotiation in which they gave back a year of eligibility for salary arbitration because of the owners' complaints of financial hardship.[298] After that agreement, attendance, television contracts, and profits all set new records.[299] The players' opening proposal called for a return to two years for salary arbitration eligibility, an increase in the minimum salary from $68,000 to between $100,000 and $125,000, and an increase in the roster size from twenty-four to twenty-five players.[300]

The reason the owners wanted to do away with arbitration and the reason the players wanted to increase the eligible pool was simple—money. In 1989, arbitration-eligible players received an average salary increase of 102%.[301] Players whose contracts were assigned (those not eligible for arbitration or free agency) received decidedly smaller increases, even if they had better years on the playing field.[302] The owners argued that the size of

294. *See* HELYAR, *supra* note 17, at 395.
295. *See id.* at 396.
296. *See* Manny Topol, *Peace in Extra Innings: Baseball Pact Signed After Night of Talks, Caucuses*, NEWSDAY, Mar. 20, 1990, at 3.
297. *See id.*
298. *See id.*
299. *See id.*
300. *See id.*
301. *See* Craig Neff, *The 17% Solution*, SPORTS ILLUSTRATED, Apr. 2, 1990, at 13.
302. *See id.*

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the increase was due to a problem with the system of salary arbitration and made dire predictions about baseball's financial future if arbitration was not eliminated.[303] In making this argument, owners ignored the fact that the use of arbitration marked the first time market factors were taken into consideration in the setting of a player's salary. Therefore, the sizeable percentage increase was not a result of overcompensation due to arbitration, but rather a result of under compensation created by the pre-arbitration contract.[304]

The lockout did occur, and during the course of negotiations two things became clear to the owners: they were not going to get what they wanted, and Fay Vincent, the Commissioner of Baseball they had installed to fight for them, did not know how to get what they wanted.[305] When the parties finally reached a settlement, it looked significantly more like the players' proposal than the owners'. Highlights of the final agreement included an increase in the minimum salary to $100,000; a $19 million increase in the owners' annual contribution to the pension fund; arbitration-eligibility for players in the top seventeen percent of those with two years of service time, who had played in at least eighty-six games the previous season; provisions for a plan to increase the roster to twenty-five players; and a provision providing treble damages to any player harmed by owner collusion.[306] The new agreement ran for four years, through the 1993 season, but allowed either side to re-open the contract after three years if dissatisfied.[307]

B. The End of the Commissioner

The owners were not happy with the agreement.[308] Something needed to be done, and somebody had to take the fall so that the owners could finally "win" the next deal.[309] The first step was to

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303. *See* John P. Gillard, Jr., *An Analysis of Salary Arbitration in Baseball: Could a Failure to Change the System be Strike Three for Small-Market Franchises?*, 3 SPORTS LAWS. J. 125, 127 (1996).
304. *See* John L. Fizel, *Play Ball: Baseball Arbitration After 20 Years*, 49 DISP. RESOL. J. 42, 45 (1994).
305. *See* HELYAR, *supra* note 17, at 424.
306. *See* Topol, *supra* note 296.
307. *See id.*
308. *See* Moorad, *supra* note 61, at 75.
309. *See id.* at 75-76.

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get a new labor negotiator.[310] The owners hired Richard Ravitch in late 1991.[311] Immediately, Fay Vincent was unhappy.[312] The owners had not been satisfied with the way Vincent behaved during the 1990 lockout and did not want him involved in the labor process.[313] The owners first attempted to limit Vincent's involvement by proposing an amendment to the Major League Agreement that regulated the role of the Commissioner.[314] The owners wanted to make clear that the PRC, not the Commissioner's office, handled all labor negotiations.[315] Vincent refused even to discuss the possibility of modifying the agreement.[316] While the PRC still favored the amendments, Vincent prevented their passage with a speech made to the entire group of owners.[317]

This skirmish clearly showed that some of the most powerful owners were dissatisfied with Vincent.[318] A group of these owners started talking about ways to get rid of Vincent, including drawing up articles of impeachment.[319] As the situation got darker, Vincent appeared to act more dictatorial, which further angered the owners.[320] After much public debate

310. *See id.*
311. *See* HELYAR, *supra* note 17, at 471.
312. *See id.* at 471-72.
313. *See id.* at 479-81.
314. *See id.* at 478-79.
315. *See id.*
316. *See id.* at 479-80.
317. *See id.* at 484-88.
318. *See id.* at 495.
319. *See id.* at 494.
320. *See id.* at 489-98. Vincent, over the objection of the owners, put St. Louis and Chicago in the National League West and Atlanta and Cincinnati in the National League East. The Chicago Cubs sought and received an injunction of this order in federal district court. This move was a particular problem for the Cubs because of their ownership by the Tribune Company. Being in the Western division meant less favorable air times for Cubs games. *See id.* at 489. This was compounded by the fact that the White Sox, Yankees, Phillies, Rockies, Dodgers, and Angels all had local television deals with stations owned by Tribune. *See* Tony DeMarco, *Vincent Resigns Rather than Fight: Commissioner Cites "Best Interest of Baseball" for His Decision*, FORT WORTH STAR-TELEGRAM, Sept. 8, 1992, at 1 (available in 1992 WL 10798486). Vincent's handling of Steve Howe's drug arbitration hearing is but one example of acts that angered the owners. In the Howe case, Vincent effectively told Yankee's manager Buck Showalter, General Manager Gene Michael, and Yankee's vice president Jack Lawn that by testifying on Howe's behalf, they had violated their agreement with baseball and would be disciplined, even going so far as to tell them they were out of baseball. *See* HELYAR, *supra* note 17, at 501-04. They were not, but Vincent was.

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on whether Vincent could or should be fired, Vincent finally decided to resign when it became even more apparent that the owners did not support him.[321]

C. Preparing for Battle

In getting rid of Vincent, the owners put the first step of their battle plan into place. On December 7, 1992, during their annual meeting, the owners voted fifteen to thirteen to re-open the collective bargaining agreement.[322] The following day, the owners sent notice to the Federal Mediation and Conciliation Service and the New York State Mediation Board that they may lock-out the players.[323] However, after further consideration, the owners elected not to take this course of action. The 1990 Basic Agreement ran its course and expired on December 31, 1993.[324]

On January 18, 1994, owners, for the first time, approved a revenue-sharing proposal.[325] However, the proposal required the acceptance of a salary cap by the MLBPA, something the players adamantly opposed.[326] To further strengthen their position, during the summer of 1994, the owners voted to change the provisions for settling a labor dispute.[327] Previously, if fifteen of the twenty-eight clubs voted for a new labor agreement, it passed.[328] Under the new terms, twenty-one votes were needed to reach a new agreement.[329]

With the consent of both sides, the 1994 season began under the terms of the expired agreement while negotiations continued.[330] On June 14, 1994, the owners gave the players their much anticipated proposal.[331] After an eighteen-month delay,

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321. *See* DeMarco, *supra* note 320.
322. *See* Moorad, *supra* note 61, at 76.
323. *See Baseball '94: The Shortest Season Strike Chronology*, ATLANTA J. & CONST., Sept. 15, 1994, at D3 [hereinafter *Chronology*].
324. *See* Moorad, *supra* note 61, at 76.
325. *See* Tom Verducci, *What's All the Shouting About?*, SPORTS ILLUSTRATED, Jan. 31, 1994, at 86.
326. *See id.*
327. *See* Marc Topkin, *Lousy Day, Perfect End/Strike Date Set*, ST. PETERSBURG TIMES, July 29, 1994, at 1C.
328. *See id.*
329. *See id.*
330. *See* Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 251 (S.D.N.Y. 1995).
331. *See Chronology*, *supra* note 323.

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the owners proposed the elimination of salary arbitration and a salary cap under which the players would receive 50% of the revenue.[332] As a part of the proposed salary cap, each team's salary would have to be in the range of 84% to 110% of the average payroll.[333] Eligibility for free agency would be reduced to four years of major league service time, with the player's current club having the right to match any offer for players with between four and six years of service.[334] This proposal included the owners' ancillary revenue sharing agreement.[335] On July 18, the players rejected the owners' offer and made a counter offer with several changes.[336] The owners rejected this offer. On August 12, 1994, the longest work-stoppage in sports history began.[337]

D. The Strike

The 1994 baseball season ended on August 12 without the playoffs or World Series.[338] The parties made no progress on reaching an agreement during 1994 though several offers were exchanged.[339] On December 9, 1994, the MLBPA made a new offer.[340] On that same day the PRC, representing the owners, rejected the new offer and declared an impasse.[341] As a result of

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332. *See* Steve Marantz, *Next Up: The Players. A Long-Awaited Proposal by the Owners Does Little to Secure a Season on the Brink*, SPORTING NEWS, June 27, 1994, at 14. The owners wanted revenue sharing for the small market clubs, but interestingly, this proposal appeared to state that the funds to be redistributed should come first from the players, then from other teams. *See* Moorad, *supra* note 61, at 75.

333. *See* Marantz, *supra* note 332, at 14.

334. *See id.*

335. *See id.*

336. *See* Moorad, *supra* note 61, at 77.

337. *See id.*

338. *See* Kindred, *supra* note 2.

339. *See* Moorad, *supra* note 61, at 77-78.

340. *See id.* at 79-80.

341. *See id.* at 80; ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 448 (1976).

> The definition of an "impasse" is understandable enough--that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless--but its application can be difficult. Given the many factors commonly itemized by the Board and courts in impasse cases, perhaps all that can be said with confidence is that an impasse is a "state of facts in which the parties, despite the best of faith, are simply deadlocked." The Board and courts look to such matters as the number of meetings between the company and the union, the length of

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this impasse, the owners announced that they were unilaterally implementing the salary cap proposal, eliminating free agency, and eliminating the provision of the Free Agency Article that prohibited collusion.[342] The players did not agree that an impasse had been reached.[343] Further, the PRC announced that until an agreement was reached, individual clubs were not authorized to negotiate contracts with members of the MLBPA.[344] Though this changed the normal process of contracting, the PRC argued that this change affected a permissive area of collective bargaining rather than a mandatory one.[345] Despite declaring an impasse, the PRC continued to negotiate with the MLBPA.[346] As these negotiations continued, the owners prepared to begin the 1995 season with replacement players.[347]

The players filed an unfair labor practice claim with the National Labor Relations Board (NLRB) over the PRC's actions.[348] The PRC filed cross-claims.[349] The NLRB found in favor of the players and went to federal court seeking to enjoin the PRC from enacting either of their plans.[350] The court had two decisions to make in this case: whether the actions taken by the PRC involved areas of mandatory bargaining, and whether to grant the injunction.[351] If the issues covered by the PRC's unilateral action were mandatory subjects of bargaining, the rules of the previous contract would govern until a good faith impasse was reached.[352] If the issues covered by the owners'

> those meetings and the period of time that has transpired between the start of negotiations and their breaking off. There is no magic number of meetings, hours or weeks which will reliably determine when an impasse has occurred.

Id. (citations omitted).

342. *See* Moorad, *supra* note 61, at 80.

343. *See* Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 252 (S.D.N.Y. 1995).

344. *See id.*

345. *See id.*

346. *See id.*

347. *See id.* Peter Angelos, owner of the Baltimore Orioles, who made his fortune representing unions, decided not to field a team of replacement players. *See id.*

348. *See id.*

349. *See id.*

350. *See id.* at 254.

351. *See id.*

352. *See id.* at 253 (citing NLRB v. Katz, 369 U.S. 736, 746 (1962)).

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action were permissive subjects of bargaining, the status quo would not have to be maintained.[353]

In her opinion, Judge Sonia Sotomayor determined that the items changed by the owners did fall into the mandatory category.[354] Further, she granted the requested injunction.[355] With the issuing of the injunction, the players went back to work, but nothing was solved.[356] The owners appealed the decision but did not lock out the players. The Second Circuit Court of Appeals denied a stay and did not hear arguments on the case until May 11, 1995.[357] The Second Circuit later affirmed the decision of the district court.[358]

VII. AFTER THE STRIKE

A. Free Agency and the 1995 Season

In the immediate aftermath of the strike, premier free agents got deals commensurate with those they might have received prior to the strike.[359] However, "role-players" and lesser talents found a very different market.[360] Their phones were not

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353. *See id.* The National Labor Relations Act requires good faith bargaining over "mandatory subjects," which are defined as "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1998). By deeming them mandatory subjects for bargaining, the rule of *NLRB v. Katz* is imposed: terms and conditions regarding mandatory subjects must be bargained over until an impasse is reached before new terms may be implemented. Otherwise, the implementing party is deemed to have committed an unfair labor practice. *Katz*, 369 U.S. 736, 741-43 (1962). This is not true if the subjects have been deemed "permissive." Terms regarding permissive subjects may be changed unilaterally at the expiration of the prior agreement. *See* Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187-88 (1971).

354. *See Silverman*, 880 F. Supp. at 257-58.

355. *See id.* at 259.

356. *See* Thomas Stinson, *Baseball '95: The State of the Game: The Pastime's Back, Problems Unsolved*, ATLANTA J. & CONST., Apr. 23, 1995, at H4.

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

358. *See id.*

359. *See* Ronald Blum, *Baseball Salaries Drop 10 Percent*, LEDGER (Lakeland, Fla.), Apr. 30, 1995, at 3D. Top players got record-high contracts. Among them were: Cecil Fielder, Detroit Tigers, $9,237,500; Barry Bonds, San Francisco Giants, $8,000,183; and, David Cone, Toronto Blue Jays, $8 million. *See id.*

360. *See* Sean McAdam, *Strike's Orphans in Search of Homes: A Competitive Group of Players Still Remain in the Free Agent Camp, Waiting for Teams to Come Calling*, PROVIDENCE J.-BULL., Apr. 13, 1995, at 1C.

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ringing.[361] To help these players get ready for the season, the MLBPA established a spring training facility in Homestead, Florida.[362] By the time they left, many of these players had taken a sizeable pay cut. Examples include Pat Border who saw his salary go from $2.5 million to $310,000, Dave Stewart who went from making $4.25 million to $1 million, and Mike Devereax who made $800,000 in 1995 after making $3.375 million in 1994.[363] Several players in the Homestead facility did not sign before the season began, including Lonnie Smith, Keith Mitchell, and Craig Lefferts.[364] Overall, salaries fell for the first time since free agency with the exception of 1987, when collusion was in full force.[365] While the teams' tight financial situations, due to the cost of the strike, definitely played into the decreasing market for free agents, the MLBPA suspected there might have been other factors as well.[366] Don Fehr, head of the MLBPA, closely monitored the situation for any signs of collusion.[367] Because the terms of the previous agreement were still in place, the owners would be liable for treble damages if found guilty of collusion.[368]

B. The New Collective Bargaining Agreement

1. The General Terms

The 1995 and 1996 baseball seasons were played without a new basic agreement.[369] On September 18, 1995, the owners

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361. *See id.*
362. *See id.*
363. *See* Mel Antonen, *Strike Costs Trickle Down to Players*, USA TODAY, Apr. 10, 1995, at 1C.
364. *See* Rob Rains, *Coach Charts Homestead Alumni's Success*, BASEBALL WEEKLY, May 17, 1995, at 10.
365. *See* Blum, *supra* note 359.
366. *See* Tom Haudricourt, *Rumblings Remain Beneath the Surface: Players, Owners Have Not Met Since Strike Ended*, MILWAUKEE J. & SENTINEL, Apr. 25, 1995, at 3C.
367. *See id.* Fehr acknowledged that 1995 was an unusual year but was watching closely for any return to the collusive practices of the 1980s. *See id.* Further, former union chief Marvin Miller stated that he believed there was collusion, citing a memo from Bud Selig stating that there were insufficient resources to keep salaries at their previous levels. *See* Jim Souhan, *Threat of Strike Looms, Former Union Chief Says*, STAR-TRIBUNE: NEWSPAPER OF THE TWIN CITIES, Apr. 12, 1995, at 1C.
368. *See* Souhan, *supra* note 367.
369. *See* Peter Schmuck, *Labor Chronology*, BALTIMORE SUN, Nov. 27, 1996, at 5D [hereinafter Schmuck I].

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named Randy Levine, New York City's labor relations commissioner, as their lead negotiator.[370] Over the next year, Levine and Don Fehr worked on a labor deal.[371] Levine and Fehr thought that they had reached an agreement during the 1996 World Series.[372] The owners rejected the proposed agreement by an eighteen to twelve vote.[373] One of the leading opponents to the agreement, Jerry Reinsdorf, owner of the Chicago White Sox, argued that the deal did not go far enough and doomed the small market clubs.[374] On November 19, however, Reinsdorf signed free agent Albert Belle to a $55 million, five-year contract, the largest in baseball history.[375] The owners revoted on the proposed agreement on November 26 and approved the contract by a twenty-six to four vote, assuring a basic labor structure through the 2000 season.[376] Reinsdorf still voted against the agreement.[377]

When all was said and done, the owners did not meet either of their major objectives in labor negotiations: there was no salary cap, and salary arbitration was still in place.[378] The new contract runs through the 2000 season, but the players have the option of extending it one year.[379] The contract does not contain a salary cap, but does include a "luxury tax."[380] In 1997, the contract taxed salary expenditures over $51 million at a rate of 35%.[381] Under the contract, the tax threshold was raised to $55 million in 1998.[382] In 1999, team salaries in excess of $58.9 million will be subject to the 35% tax.[383] After 1999, the

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370. *See id.*

371. *See* Peter Schmuck, *Finally, Baseball Makes a Deal; Four-Year Dispute Ends as Owners OK Labor Agreement*, BALTIMORE SUN, Nov. 27, 1996, at A1 [hereinafter Schmuck II].

372. *See id.*

373. *See id.*

374. *See* Terence Moore, *Belle Signing Cynical Move by Reinsdorf*, ATLANTA J. & CONST., Nov. 22, 1996, at 1D; Kindred, *supra* note 2.

375. *See* Schmuck I, *supra* note 369.

376. *See id.*

377. *See* Schmuck II, *supra* note 371.

378. *See* Mark Conrad, *What New Contract Means for Baseball*, N.Y.L.J., Dec. 6, 1996, at 5.

379. *See id.*

380. *Id.*

381. *See id.*

382. *See id.*

383. *See id.*

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agreement does not provide for a luxury tax.[384] The effectiveness of this tax is unclear. Teams capable of paying large salaries may simply consider the tax another "cost of doing business."[385] The contract also calls for a 2.5% payroll tax to be paid by the players.[386]

The contract also modifies salary arbitration so that eventually all cases will be heard by a three-person panel rather than a single arbitrator.[387] In 1998, fifty percent of the cases were heard by a panel; in 1999, this increased to seventy-five percent; and in 2000, all cases will be heard by a panel.[388] Other major provisions of the new contract include an increase in the minimum salary[389] and the restoration of service time for games canceled by the strike.[390] The contract also includes a provision for revenue sharing between owners. Under this provision, the thirteen most profitable teams transfer a portion of their profits to the thirteen least profitable clubs.[391] More than any other

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384. *See id.*
385. *Id.*
386. *See id.*
387. *See id.*
388. *See id.*
389. *See id.* The minimum rate of payment to a player for each day of service on a Major League Club shall be as follows:

> 1996 - at the rate per season of $109,000 from the beginning of the championship season up to and including July 30, 1996, and at the rate per season of $150,000 beginning on July 31, 1996 up to and including the end of the 1996 championship season.
> 1997 - at the rate per season of $150,000.
> 1998 - at the rate per season of $170,000.
> 1999 - at the rate per season of $200,000.

Basic Agreement Between the American and National League Professional Baseball Clubs and Major League Baseball Players Association, Effective Jan. 1, 1997, Article VI–Salaries, Section B. Minimum Salary, Paragraph 1, at 9-10 [hereinafter 1997 Basic Agreement] (available in Georgia State University College of Law Library). This provision also sets the minimum salary for 2000 and 2001 at $200,000 plus a cost of living adjustment. *See id.*; Conrad, *supra* note 378.

390. *See* Conrad, *supra* note 378.
391. *See id.* This is a simplification of the structure that is contained in The Revenue Sharing Plan of the 1997 Basic Agreement, which takes ten pages to explain in detail. "The intent of the revenue sharing plan is to effect a net transfer of Net Local Revenue among Participating Clubs of $70 Million at 100% implementation of the plan, based on 1994 projections." 1997 Basic Agreement, *supra* note 389, Article XXV–The Revenue Sharing Plan, Section B. General Principles, Paragraph 1, *Intent of the Plan*, (a) Net Transfer Value, at 88.

provision of the basic agreement, the revenue sharing provision does the most to help the struggling, small market clubs.[392]

As a part of this contract, the MLBPA agreed to end any pending litigation that arose from the strike.[393] This provision effectively ends all unfair labor practice claims, which, in turn, ends the need for the injunction granted by Judge Sotomayor in *Silverman v. Major League Baseball Player Relations Committee, Inc.*[394] It may also terminate the latest collusion investigation, the significance of which is heightened by the automatic nature of the treble damages if the players prove collusion.

2. An Overlooked Provision

The significance of one of the provisions of the new agreement can be tied directly to the decision issued by Judge Sotomayor and affirmed by the Second Circuit in *Silverman*.[395] In those decisions, the courts determined that free agency and the reserve system were mandatory subjects for collective bargaining.[396] This means that changes may not be unilaterally imposed by the owners unless and until an impasse in collective bargaining has been reached.[397] In other words, the terms covering the last year of the agreement continue to govern while the sides attempt to negotiate a new agreement even past the termination date.[398] Whether or not the union exercises its option for the 2001 season, the last year of the collective bargaining agreement will not contain a luxury tax or salary cap of any sort.[399] This implies that when the collective bargaining process resumes, the players will once again bargain without a

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392. *See* Conrad, *supra* note 378.

393. *See id.*

394. 880 F. Supp. 246 (S.D.N.Y. 1995); *see id.;* discussion, *supra* Part VI.D.

395. *See* Silverman v. Major League Baseball Player Relations Comm., Inc., 67 F.3d 1054 (2d Cir. 1995); Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246 (S.D.N.Y. 1995).

396. *See Silverman*, 67 F.3d at 1061-62.

397. *See supra* note 353.

398. *See* Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187-88 (1971).

399. *See* 1997 Basic Agreement, *supra* note 389, Article XXIII–Luxury Tax, Section B. Determination of Luxury Tax, Paragraph 1, *Calculation of Tax*, at 66-67.

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penalty in place on high salaries; thus, the players appear to be bargaining from a position of relative strength.

VIII. EMERGING ROLE OF FREE AGENCY IN MAJOR LEAGUE BASEBALL

A. Setting the Salary Structure

After *Messersmith/McNally* made free agency a possibility,[400] the question placed before both players and owners was what should this new structure of the labor market look like. Both parties agreed that the number of free agents should be limited in a given year.[401] The reasons for this desire were, however, very different. Owners wanted to limit the number so as to maintain some degree of control over the structure of their teams and recoup some of their investment in players coming up through the minor league system.[402] The players wanted to limit the number of free agents to keep demand, and thus free agent salaries, high.[403] The players knew that if the threshold for free agency was set correctly, this new institution would drive up all salaries, not only free agent salaries.[404] Phil Garner of the Oakland A's stated: "[The players] wanted to let the very best players establish the scale."[405]

The parties established a free agency threshold of six years in the 1976 collective bargaining process.[406] This number had two advantages for the players. First, only a small number of players actually stay in the league for six years; thus, those who do are premier players.[407] Second, this threshold gave the

400. *See* Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 618 (1976).
401. *See* MILLER, *supra* note 108, at 266-67.
402. *See* HELYAR, *supra* note 17, at 171.
403. *See id.* at 172.
404. *See id.*
405. *Id.*
406. *See* MILLER, *supra* note 108, at 267. This threshold is still in place in the 1997-2000 agreement. *See* 1997 Basic Agreement, *supra* note 389, Article XX-Reserve System, Section B. Free Agency, Paragraph 1, *Eligibility*, at 54.
407. *See* HELYAR, *supra* note 17, at 172. The Oakland A's Phil Garner said "the odds of a player getting to six years weren't very good . . . . Somewhere around three years people began to drop off. If you made it to six, the odds were very high you'd make it to ten. Your very best players were the only ones who made it to six." *Id.*

extraordinary player the possible opportunity to be a free agent after both six and twelve years in the game.[408]

The bidding by multiple teams clearly pulls up the salaries of the premier players in the free agent market. What is less obvious, but equally true, is that bidding on free agents also pulls up the salaries of those in the arbitration-eligible labor market as well.[409] The reason for this effect is established by the very terms of the collective bargaining agreement regarding salary arbitration.[410] One of the limited criteria an arbitrator can use in determining the salary of an arbitration-eligible player is the salary of comparable players, regardless of how that salary was determined.[411] Therefore, the free agent salary, which has been increased by competitive forces, is a key determinant in an arbitrator's decision as to whether the offer of the team or the request of the player is the correct salary for the player.[412]

B. The Law of Increasing Desperation

Part of the reason that salaries escalated rapidly during the non-collusion, pre-strike years can be attributed to the owners rather than the players.[413] Good business sense did not control the market for free agency during this period; "The Law of Increasing Desperation" did.[414] The theory behind this "law" is that when one team signs a quality free agent, all the other teams in the League panic because one of their competitors just became stronger.[415] Therefore, they go out looking for a free agent either to become stronger themselves or to prevent a rival

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408. *See id.*

409. *See* Rings, *supra* note 70, at 258-59.

410. *See* 1997 Basic Agreement, *supra* note 389, Article VI–Salaries, Section F. Salary Arbitration, Paragraph 12, *Criteria*, at 16-17.

411. *See id.*, Section F. Salary Arbitration, Paragraphs 12-13, at 16-17.

412. *See* Rings, *supra* note 70, at 259-60. This effect does not, however, appear to trickle down to those still covered by the pure reserve system—those with less than three years of service time. The salaries of these players, while "negotiated," can be unilaterally set by the owners. *See* Moorad, *supra* note 61, at 72-73. In 1995, one-half of major league players were in this labor sub-market. In that year, the average salary for these players was $170,778 (the major league minimum was $109,000), while the average salary when looking at all players was $1,110,766. *See id.*

413. *See* Rings, *supra* note 70, at 251.

414. *Id.*

415. *See id.*

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club from getting the talent.[416] This caused the price of free agents to escalate according to "supply and demand instead of in relation to the player's talent."[417] As a result, the salaries of even marginal free agents escalated rapidly.[418] Many factors fueled this desperation, including the tendency to believe that the team was just one big free agent away from winning it all, not to mention the insistence on winning from both the fans and the press.[419] While this appears to have slowed since the 1994 strike, the effects are still being felt.[420]

C. The Future Role of Free Agency

Free agency has changed the landscape of Major League Baseball. As power has shifted from owners to players, subtle but significant modifications are coming into focus. Although many recognize the obvious changes free agency has wrought in the labor market, many have failed to appreciate the impact the institution has had on other aspects of the game.

First, owners cannot police themselves. The actions, for example, by Jerry Reinsdorf in signing Albert Belle are just the most recent in a long line of miscalculations by owners almost from the inception of the professional version of the game.[421] Whether it is the "law of increasing desperation," egos, incompetence, or bad luck, the fact remains that owners will continue to divert resources to chase the marquee players. Salary cap or not, marquee players will get richer.

Second, as marquee players command even more resources, their power vis-a-vis management will increase. For example, some star players can already demand a day off. "So what?" one may ask. The problem is that players may seek greater control of the game itself. Take Magic Johnson, formerly of the National Basketball Association's (NBA) Los Angeles Lakers, for example, who many believe had his first coach fired.[422] With

416. *See id.*

417. *Id.*

418. *See* Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORT L. 301, 314 (1992).

419. *See id.*

420. *See* Blum, *supra* note 359.

421. *See Woes Could Jeopardize '93 Season*, USA TODAY, Mar. 4, 1992, at 3C.

422. *See* Dan Garcia, *Powerful Players Are Getting Some Good Coaches Fired*, STAR-LEDGER, Mar. 2, 1997, at 7. Magic Johnson is not alone. Other players who reportedly got

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relatively few players locking up greater proportions of team salaries, owners may think twice about crossing their star players.

Third, free agency may (and free agency plus a salary cap most definitely would) have a downward effect on the salaries of many mid-level veterans. As previously mentioned, stars will command ever-increasing dollars. The resource pool is not, however, endless. Therefore, owners will fuel the increase in part through a reduction of salaries of mid-level veterans.[423] The NBA may provide a glimpse of possible things to come. Star NBA players are getting richer while mid-level veterans are often experiencing salary cuts in the millions of dollars.[424]

Finally, the shift of power from owners to marquee players (and those who are confident that they will become marquee players someday) has changed the complexion of ownership itself. Not too long ago, it was easy to identify owner, management, and player. Today, the lines are beginning to blur. Key stars have management clout. The MLBPA will seek more power in both the business and management of baseball. The question of whether marquee players will achieve this position is premature. But the trend is undeniable.

CONCLUSION

In the early years of baseball the balance of power between the players and the owners rested with the players. In order to gain the upper hand, the owners instituted the reserve system. Under this structure, the balance of power rested with the owners, and the players were little more than indentured

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their coaches fired include: Penny Hardaway, Michael Jordan, and Derrick Coleman. *See id.*

423. *See id.*

424. *See* Stefan Fatsis, *New Math Dunks NBA Vets: Being Good Enough Doesn't Pay What It Used To*, WALL STREET J., Nov. 1, 1996, at B6. Among the NBA veteran players squeezed in the 1996 season by the economics of the salary cap and marquee players making large salaries were: Spud Webb, who did not have a contract when the season started; Rex Chapman, who went from making $2 million to the minimum salary; Walt Williams, who passed up a contract for $2.5 million for free agency and ended up with a minimum salary; and Craig Ehlo, who went from $1.8 million to $450,000. *See id.* Overall, salary cap economics caused the median salary to drop considerably. (A median measure is the middle salary and is not affected by very high highs or very low lows.) *See id.*

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servants. This system lasted for nearly one hundred years. In 1976, a form of free agency returned to baseball. Since then, the balance of power has shifted back toward the players because they stick together through labor disputes, whereas the owners cannot seem to get past their distrust of each other and their differing personal interests. As a result, the players have achieved two major victories that have made some of them rich—free agency and salary arbitration—and have proven the value of a strong union in the sports industry. Free agency is not, however, a riskless institution. The superstar players will continue to get ever-escalating superstar salaries. The average player faces a tougher road. Even without illegal collusion, in the face of financial constraints, the "law of increasing desperation" no longer seems to apply to free agents across the board the way it did at free agency's onset. Whether the new luxury tax or a future salary cap will make this road even rougher is yet to be seen.

ADDENDUM

On October 27, 1998, President Clinton signed the Curt Flood Act of 1998 (Flood Act),[425] overturning part of the court-crafted exemption from antitrust law long enjoyed by Major League Baseball.[426] The exemption, traced to the *Federal League*[427] case, deprived major league baseball players of antitrust protections enjoyed by athletes in other professional sports.[428] As President Clinton observed, "[i]t is sound policy to treat the employment matters of Major League Baseball players under the antitrust laws in the same way such matters are treated for athletes in other professional sports."[429]

Section 3 of the Flood Act states that "the conduct, acts, practices, or agreements of persons in the business of organized

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425. 15 U.S.C.A. § 27(a) (Supp. 1999).

426. *See* Sonya Ross, *Baseball Antitrust Bill is Signed*, AP ONLINE, Oct. 28, 1998, *available in* 1998 WL 21780535.

427. 259 U.S. 200 (1922).

428. *See* Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 208-09 (1922); William J. Clinton, *Clinton Statement on Curt Flood Act of 1998*, U.S. Newswire, Oct. 27, 1998, *available in* 1998 WL 13606886 [hereinafter *Clinton Statement*].

429. *Clinton Statement, supra* note 428.

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professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws."[430] Essentially, the Flood Act is designed to place the major league baseball labor market on the same footing with other professional sports.

Although the Flood Act has obvious application to some of the issues discussed in the Article, its effect will be limited by the Supreme Court's opinion in *Brown v. Pro Football, Inc.*[431] In *Brown*, the Supreme Court held that unionized employees of National Football League employers may not file antitrust actions.[432] Therefore, the case may mean that the MLBPA would have to decertify before baseball players could mount antitrust attacks on the labor market.[433] Such action is particularly unlikely given the antitrust-like protections provided by the anti-collusion provisions of the collective bargaining agreement and the very nature of a long-standing, effective labor union.[434]

430. 15 U.S.C.A. § 27(a) (Supp. 1999).
431. 518 U.S. 231 (1996).
432. *See id.* at 249-50.
433. *See* Jim Abrams, *Baseball Losing an Antitrust Exemption*, THE PLAIN DEALER, Oct. 8, 1998, at A12.
434. *See* 1997 Basic Agreement, *supra* note 389, Article XX-Reserve System, Section E. Individual Nature of Rights, at 62-64.

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