



Hope and Faith: The Summer of Scott Boras's Discontent

Matthew J. Parlow*

ABSTRACT

The 2018 Major League Baseball (MLB) free agency period drew great attention from fans and commentators alike because of the seeming lack of lucrative contracts offered to this year's players. Theories abounded about the reasons for the slow and anomalous free agent market. Some saw it as simply a relatively weak group of free agents. Others viewed the 2018 free agent market as representing a more systemic shift in the business and operation of baseball, particularly with the rise of data analytics. Still, others pointed to the increase in the "tanking" phenomenon in MLB as the reason for the change in free agency. While each of these theories provides some explanation for what MLB experienced during the 2018 offseason, these narratives provide only an incomplete picture of the changes that MLB experienced. In particular, they overlook how the competitive balance reforms contained in the latest MLB collective bargaining agreement (CBA) contributed to these changes in the free agent market. In an attempt to create better competitive balance among teams, the MLB CBA may have created a context within which teams are incentivized to move away from established approaches to roster development and payroll. Given the unique legal status of CBAs, the players are likely stuck with this new normal in the free agent market until the current MLB CBA expires in 2021. This article explores

* Dean and Donald P. Kennedy Chair in Law, Chapman University Dale E. Fowler School of Law. I would like to thank Sherry Leysen and Nicole Shay for their research and administrative support and to Associate Dean Donald Kochan and Professor Janine Kim for reviewing earlier drafts of this article.

the various theories regarding the 2018 free agent market within the context of the MLB CBA and the law related to professional sports leagues and their CBAs. In doing so, this article provides greater clarity to these free agent changes and forecasts what it may portend for the next round of collective bargaining between owners and players.

I. INTRODUCTION

The free agency market during Major League Baseball's ("MLB") 2018 offseason sparked a great deal of controversy. Some, including players and agents, claimed that it was an unprecedented offseason because of how few free agents were signed to new contracts. These commentators also pointed out that the free agent contracts that *were* secured were proportionately smaller—in value and length—than such contracts in past off-seasons.¹ Others, like the MLB Commissioner's Office, said that the offseason was consistent with past years and that the changes in free agency were due to teams making adjustments in the free agent marketplace.² Much ink was spilled speculating as to the causes of the slow free agent offseason, but one thing was clear: something had changed.

To be sure, MLB has surged in terms of revenue during the past decade, and teams and players alike have benefitted from the league's extraordinary growth.³ This revenue swell followed a period where MLB struggled with a competitive imbalance among its teams. At the turn of the century, success in MLB seemed tied to payroll, with small-market teams being perpetually out of contention for the playoffs because of their inability to compete with larger-market teams' player salaries.⁴ Then-Commissioner Bud Selig famously stated that "every fan has to have hope and faith. If you

¹ See Gabe Zaldivar, *MLB's Slow Offseason Hints at Larger Problems, Possible Strike*, FORBES, Jan. 29, 2018, <https://www.forbes.com/sites/gabezaldivar/2018/01/29/mlbs-slow-offseason-hints-at-larger-problems-possible-strike/#27ef2b661ca0>, [https://perma.cc/H462-7SYW] (on file with the Harvard Law School Library).

² See Tyler Kepner, *Rob Manfred Defends Changing Paces, of Free Agency and of the Game*, N.Y. TIMES, Feb. 15, 2018, available at <https://www.nytimes.com/2018/02/15/sports/baseball/rob-manfred-free-agency.html>, [https://perma.cc/KJ97-Z4T5].

³ See Maury Brown, *MLB Sets Record for Revenues in 2017, Increasing More Than \$500 Million Since 2015*, FORBES, Nov. 22, 2017, <https://www.forbes.com/sites/maurybrown/2017/11/22/mlb-sets-record-for-revenues-in-2017-increasing-more-than-500-million-since-2015/#3825c3717880>, [https://perma.cc/C9AB-AEE7] (hereinafter "Brown, *MLB Sets Record*") (on file with the Harvard Law School Library).

⁴ Gerald Schifman, *How Much Hope and Faith is in Major League Baseball?*, FANGRAPHS.COM, Jan. 23, 2017, <https://www.fangraphs.com/tht/how-much-hope-and->

remove hope and faith from the mind of a fan, you destroy the fabric of the sport.”⁵ MLB studied this disparity and implemented a variety of revenue-sharing strategies—along with other reforms aimed at competitive balance—to help ensure hope and faith for fans of most, if not all, teams every year (or in the near future).⁶ The results can be seen in MLB’s incredible revenue growth, and there was relative happiness and labor peace between the owners and players until the 2018 offseason.

However, despite these gains, the players reacted in a visceral, negative manner to what some believed to be the slowest free agent offseason in MLB’s modern history. Statistics seemed to support the players’ view in terms of the number and amounts of free agent contracts.⁷ The Major League Baseball Players Association (“MLBPA”)—the union for the players—was sufficiently concerned about this changing marketplace that they formed their own training camp during spring training to help unsigned free agents prepare for the start of the season.⁸ Moreover, the MLBPA thought something far more nefarious than a market correction was occurring: they believed that MLB teams were colluding.⁹ MLBPA Executive Director Tony Clark claimed that the lack of free agent contracts—despite record revenues and franchise valuations for MLB—“threaten[ed] the very

faith-is-in-major-league-baseball/, [https://perma.cc/KR5V-HEV7] (on file with the Harvard Law School Library).

⁵ *Id.*

⁶ Section V.B.1, *infra* notes 127-138.

⁷ See Travis Sawchik, *This is the Slowest Offseason Ever*, FANGRAPHS.COM, Feb. 6, 2018, <https://www.fangraphs.com/blogs/this-is-the-slowest-offseason-ever/>, [https://perma.cc/3XWC-AWRU], (on file with the Harvard Law School Library).

⁸ See Ben Lindbergh, *Baseball’s Economics Aren’t as Skewed as They Seem*, THERINGER.COM, Feb. 21, 2018, <https://www.theringer.com/mlb/2018/2/21/17035624/mlb-revenue-sharing-owners-players-free-agency-rob-manfred>, [https://perma.cc/Y97W-SJ6M] (hereinafter “Lindbergh, *Baseball’s Economics*”) (on file with the Harvard Law School Library). The creation of a special training camp for unsigned free agents happened at least once before in 1995, making this a rare—but not unprecedented—move; see Lindbergh, *Baseball’s Rumored Spring Training for Free Agents Has Happened Before*, THERINGER.COM, Jan. 30, 2018, <https://www.theringer.com/mlb/2018/1/30/16946954/baseball-spring-training-for-free-agents-homestead-1995>, [https://perma.cc/K377-4WM7], (on file with the Harvard Law School Library).

⁹ See Scott Davis, “I Have No Idea What the Hell is Happening:” MLB’s Bizarre Free Agency Has Created a Rift in the League and Both Sides are Pointing Fingers, BUSINESS INSIDER, Mar. 3, 2018, <http://www.businessinsider.com/mlb-free-agency-drama-rift-2018-3>, [https://perma.cc/6PNW-WJYN] (on file with the Harvard Law School Library).

integrity of our game.”¹⁰ The MLBPA even filed a grievance against four teams, claiming that the teams were violating the collective bargaining agreement (“CBA”) by not using money received through MLB revenue sharing for their respective payrolls.¹¹ MLB disagreed with the union’s view of the offseason, releasing a statement saying “what is uncommon is to have some of the best free agents sitting unsigned even though they have substantial offers, some in nine figures.”¹² Indeed, the players’ charge of collusion against MLB seems unlikely because, as one commentator noted, “the owners would have to be extremely foolish to even consider colluding against the ball players.”¹³

While collusion was the main theory proffered by the MLBPA, the vast majority of explanations for the irregular 2018 free agent offseason came from elsewhere. Some attributed the change to the rise in data analytics usage by teams’ front offices.¹⁴ Others asked more existential questions: Was the economic structure of baseball broken?¹⁵ Or were owners choosing profit maximization over win maximization when winning a championship was not feasible—thus leading to a stingier free agent market?¹⁶ And various theories about this offseason seemed to show a structural shift for baseball: for example, front offices embracing data analytics in a manner that moved away from free agent contract norms of the past. Others suggested

¹⁰ Dan Gartland, *MLB and Union Chief Tony Clark Engaged in War of Words Over Continued Free Agent Freeze*, SPORTS ILLUSTRATED, Feb. 6, 2018, available at <https://www.si.com/mlb/2018/02/06/players-union-tony-clark-president-statement-free-agency>, [https://perma.cc/H3Q4-NY8L]. Player agents agreed, with one pointing out that even for top free agents, teams only offered salaries of \$20 million or more a year or contracts for more than three years, but not both: “It’s way too uniform. . . [t]he book has been printed. It’s out there.”; see Jeff Passan, *Here’s Why Baseball’s Economic System Might Be Broken*, YAHOO SPORTS, Jan. 16, 2018, <https://sports.yahoo.com/heres-baseballs-economic-system-might-be-broken-224638354.html>, [https://perma.cc/297W-WLUR] (on file with the Harvard Law School Library).

¹¹ Davis, *supra* note 9.

¹² *Id.*

¹³ Wayne G. McDonnell, Jr., *MLB Free Agency is Suffering from Owners’ Flawed Strategies and an Imperfect Agreement*, FORBES, Feb. 13, 2018, <https://www.forbes.com/sites/waynemcdonnell/2018/02/13/mlb-free-agency-is-suffering-from-owners-flawed-strategies-and-an-imperfect-agreement/#84f0e74792f8>, [https://perma.cc/P63P-K8KR] (on file with the Harvard Law School Library); see also Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859, 875 (2016) (describing the \$280 million settlement the owners paid the players for settling various collusion claims and the ramifications for labor relations in MLB thereafter).

¹⁴ See Passan, *supra* note 10.

¹⁵ See *id.*

¹⁶ See John Vrooman, *Theory of the Perfect Game: Competitive Balance in Monopoly Sports Leagues*, 34 REV. INDUS. ORG. 5, 41-42 (2009).

more innocuous and less fundamental explanations: a weak free agent class in 2018; a strong upcoming free agent class in 2019; livelier baseball leading to exaggerated player statistics; teams favoring bullpen pitchers to starting pitchers; or sports agents like Scott Boras trying to push for contracts that were not justified by the market for the players.

While theories abounded, few—if any—scholars or commentators attempted to sift through them and piece together an explanation grounded in the law, business, and policy of MLB and professional sports leagues. One notable omission to popular discussion of the 2018 free agency period was how various terms of the MLB CBA may have played an important role in this more recent free agency period. In particular, the competitive balance reforms adopted over the past two decades may have inadvertently led to this anomalous offseason. Indeed, these well-intentioned changes aimed at parity among teams may have led to a structural shift in team payrolls and free agency.

This article aims to delve deeper into this controversy and provide the legal, business, and policy framework within which to analyze this past off-season and what may lie ahead for MLB. Part II provides a more in-depth analysis of the popular theories on the 2018 free agent market. Part III details the legal significance of CBAs, particularly with regard to professional sports leagues. Part IV explores the concept of competitive balance in professional sports and how various MLB CBA reforms over the past twenty years may help explain the 2018 offseason and how these reforms may have actually led to a systemic change in the business of baseball. Part V concludes with some reflections on what this potential shift in MLB's economic structure may mean for the next collective bargaining negotiations.

II. EXPLANATIONS FOR THE 2018 FREE AGENT MARKET

Commentators have offered a number of theories on the causes of the anomalous free agent market in 2018. They included a weak 2018 free agent class compared to a strong one in 2019; the rebuilding/tanking movement that has become popular in baseball; the rise of data analytics and the attendant move away from free agent contracts designed on past performance; unrealistic bargaining positions taken by player agents; and a variety of more minor explanations. While none of these theories fully explains what transpired during this free agency period, each provides a piece of the puzzle for better understanding what many viewed as a seismic shift in the economics of baseball.

A. A Weak 2018 Free Agent Class Versus a Strong 2019 Class

Many baseball industry observers pointed to a relatively weak free agent class in 2018 as the reason why there was a dearth of robust contracts.¹⁷ The top free agents in 2018 were J.D. Martinez, Yu Darvish, Jake Arrieta, Eric Hosmer, and Lorenzo Cain.¹⁸ As one commentator noted, “few of [those] top free agents are true game-changers, marquee guys who will sell tickets and fuel championship dreams.”¹⁹ This lack of elite free agents in 2018 may also help explain why the market as a whole seemed sluggish: studies suggest that marquee free agent players hold their contract value better than non-elite players.²⁰ It would thus follow that with a weaker top of the free agent class, the rest of the players might accordingly lag in their contract terms. Irrespective of whether this latter point is true, it seemed to many that the mediocre free agent class contributed to a lackluster offseason.

The manner in which the MLB free agent market treated this weaker free agent class may have been compounded by a particularly strong upcoming class in 2019, including Bryce Harper, Manny Machado, Charlie Blackmon, Andrew McCutchen, and others.²¹ Moreover, the already strong 2019 free agent class could include two superstar pitchers—Clayton Kershaw and David Price—if either opts out of his current contract.²² Given these upcoming free agents, many commentators posited that teams in 2018 simply decided to conserve their finite payroll resources, looking ahead to the 2019 free agent class.²³ Moreover, several high-payroll teams had planned to reset their luxury tax percentage—lowering it from 50% to 20%²⁴—by bringing their overall payroll below the \$197 million threshold for the 2018 MLB

¹⁷ See Tom Verducci, *Seven Reasons Why the Free Agent Market is so Incredibly Slow*, SPORTS ILLUSTRATED, Jan. 11, 2018, <https://www.si.com/mlb/2018/01/11/free-agent-hot-stove-slow-pace>, [https://perma.cc/X8MW-BHN3] (on file with the Harvard Law School Library).

¹⁸ See Jay Jaffe, *The Free Agent Market is Slow Partially Because It's Extremely Flawed*, SPORTS ILLUSTRATED, Jan. 19, 2018, <https://www.si.com/mlb/2018/01/19/free-agent-market-jd-martinez-eric-hosmer-jake-arrieta-yu-darvish>, [https://perma.cc/8TBZ-9TWG] (on file with the Harvard Law School Library) (hereinafter “Jaffe, *Free Agent Market*”).

¹⁹ *Id.*

²⁰ See Jay Jaffe, *Recent Results Offer Evidence that Teams Should Avoid the Free-Agent Market*, SPORTS ILLUSTRATED, May 7, 2013, <https://www.si.com/mlb/strike-zone/2013/05/07/hamilton-upton-greinke-bourn-free-agent-busts>, [https://perma.cc/9XBF-R6CH] (on file with the Harvard Law School Library).

²¹ See Verducci, *supra* note 17.

²² See *id.*

²³ See *id.*

²⁴ See *id.*

season.²⁵ In doing so, teams like the Los Angeles Dodgers and New York Yankees could thereafter increase their payroll above the luxury tax threshold and only be penalized at the 20% level rather than the elevated 50% payable by teams that exceed the luxury tax for a number of consecutive years.²⁶ The absence of these higher-revenue teams in the free agent marketplace undoubtedly created less competition and thus may have impacted agents' abilities to negotiate more lucrative contracts for their free agent clients.²⁷ In any event, while the appeal of next year's free agent class may have contributed to the results of the 2018 free agent market, the 2019 free agent market may well demonstrate whether this past offseason was an anomaly or a new normal.

B. *The Rebuilding/Tanking Trend*

During the 2018 offseason, MLB Commissioner Rob Manfred stated that while owners want to win, “[i]n Baseball, it has always been true that Clubs go through cyclical, multi-year strategies directed at winning.”²⁸ While there is truth to this statement, the number of teams rebuilding this past offseason seemed to many to be higher than historically was the case.²⁹ Specifically, MLB appeared to have more teams that had determined that they could not compete for a championship that year, so they did not spend money on free agent contracts to be more competitive. Instead, these teams oftentimes cut their payroll—by trading away higher-priced contracts—and planned for their team to compete for a championship some number of years in the future.³⁰ In paring down their payroll, these teams often also made

²⁵ See *id.*

²⁶ See *id.* Teams consistently exceeding the luxury tax also face other penalties, including a less desirable draft position in the annual amateur player draft; see *id.* Therefore, teams had other reasons for resetting their luxury tax penalties.

²⁷ See *id.*

²⁸ Dave Sheinin, *MLB's Dead Winter Has Union and Teams at Each Other's Throats as Free Agents Sit Unsigned*, WASHINGTON POST, February 6, 2018, available at https://www.washingtonpost.com/news/sports/wp/2018/02/06/mlbs-dead-winter-has-union-and-teams-at-each-others-throats-as-free-agents-sit-unsigned/?utm_term=.ed5d1deb3f5e, [https://perma.cc/2YFM-ATWT] (hereinafter, “MLB’s Dead Winter”).

²⁹ See Sam Miller, *In 2018, What is a Win? A Shift in Philosophy Has Changed MLB Forever*, ESPN, Mar. 23, 2018, available at http://www.espn.com/mlb/story/_/id/22815820/houston-astros-chicago-cubs-set-path-winning-losing, [https://perma.cc/U22P-JPFJ] (hereinafter “What is a Win?”).

³⁰ See Rachel Schaefer, *What Exactly is “Tanking?”*, DAILYCAMPUS.COM, Feb. 7, 2018, <http://dailycampus.com/stories/2018/2/7/mlb-column-what-exactly-is-tanking>, [https://perma.cc/SZ63-GA4J] (on file with the Harvard Law School Library).

themselves less competitive. This phenomenon in sports is known as “tanking.”³¹ While this approach oftentimes resulted in teams losing more games, they did benefit in at least two ways. First, by spending less, teams became more profitable, particularly with the robust revenue sharing that MLB has in place.³² Second, by having losing records, these teams received higher—and thus more desirable—draft picks in the annual MLB draft.³³ These draft picks turned into elite players—controllable at reasonable costs under MLB’s system of arbitration³⁴—and the teams then augmented their rosters with higher-priced free agent contracts in order to compete for a championship.

At first blush, this approach seems fraught with peril and risk. But it has worked—and not infrequently in recent years. For example, the last three World Series Champions—the Kansas City Royals (2015), Chicago Cubs (2016), and Houston Astros (2017)³⁵—all rebuilt their teams this way. In this regard, teams’ free agent spending may well be correlated with the likelihood of their competing for a championship. If a team cannot reasonably vie for the title, there are strong incentives, both financial and otherwise, to “tank”—that is, to cut costs and field a less competitive team in order to rebuild their teams and minor league farm systems with high draft picks. This trend seems to run contrary to our popular notion of sports: that teams want and try to win every game, every year. The former may be true—players compete each game wanting to win—but the latter may not. While they do not intentionally try to lose games, teams may design their rosters knowing that they will not compete for the playoffs—much less a World Series Championship—but do so with an eye to the future. In doing so, “teams [may] surrender seasons but not games.”³⁶

One might think that fans would revolt at this notion, but quite the opposite has occurred. Fan bases have seemingly embraced the notion that a

³¹ See Dave Sheinin, *No Longer Sports’ Dirty Little Secret, Tanking is on Full Display and Impossible to Contain*, WASHINGTON POST, Mar. 2, 2018, available at https://www.washingtonpost.com/sports/no-longer-sports-dirty-little-secret-tanking-is-on-full-display-and-impossible-to-contain/2018/03/02/9b436f0a-1d96-11e8-b2d9-08e748f892c0_story.html?noredirect=on&utm_term=.85e9d996a553, [https://perma.cc/9JJ2-JKFM].

³² See text accompanying *infra* notes 127-138.

³³ See Sheinin, *MLB’s Dead Winter*, *supra* note 28.

³⁴ See text accompanying *infra* notes 161-169.

³⁵ See Sheinin, *MLB’s Dead Winter*, *supra* note 28; see also Miller, *What is a Win?*, *supra* note 29 (noting *Sports Illustrated* had the Astros on the cover of their magazine in 2014—with the title “Your 2017 World Champs”—forecasting how their rebuilding plans might well pay off several years down the road, as they did).

³⁶ See Miller, *What is a Win?*, *supra* note 29.

losing season—or even two or three—is worth enduring if a potential championship lies ahead.³⁷ In fact, even studies predating the tanking/rebuilding phenomenon suggest that fans are less concerned about individual year competitiveness and look more to a three- to five-year horizon.³⁸ Fans thus view losing not as a reason for despair but as a vehicle for a more promising future for their team.³⁹ The rise of the rebuilding phenomenon has also coincided with greater parity in MLB, providing fans with even more reason to have faith in a process of losing for several years to then compete for a championship thereafter.⁴⁰ Juxtaposed with the historical trend of teams spending money to remain competitive in games but mediocre in standings—and almost certainly unlikely to make the World Series—this new rebuilding model provided hope for the future in ways that had not been the case for many teams.⁴¹

However, while fans may rejoice in the possibilities for their “tanking” team, the casualties of this new system may be free agents. If a significant number of teams are in a rebuilding mode—some estimate up to ten teams (one-third of MLB teams) in 2018⁴²—they are unlikely to spend much money during free agency as they seek to cut or contain their costs. With a significant number of teams essentially choosing to forgo signing free agents—or at least pricey ones—there is less competition for these players’ services, which may help explain some of the stagnation experienced during the 2018 offseason.

C. *Data Analytics*

Teams using data analytics also impacted the 2018 free agent market. The rise of analytics in professional sports was made famous—if not led by—the “Moneyball” approach taken by Oakland A’s general manager, Billy Beane, and his team in the early 2000s.⁴³ Today, every team has em-

³⁷ See Verducci, *supra* note 17.

³⁸ See Aaron Gordon, *The Myth of Competitive Balance*, SPORTSONEARTH.COM, Aug. 8, 2013, <http://www.sportsonearth.com/article/56193798>, [https://perma.cc/RRU8-2QVA] (on file with the Harvard Law School Library) (on file with the Harvard Law School Library).

³⁹ See Miller, *What is a Win?*, *supra* note 29.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See Billy Witz, *A Reluctant Team of Free Agents Scrimmages at “Camp Jobless”*, N.Y. TIMES, Feb. 27, 2018, *available at* <https://www.nytimes.com/2018/02/27/sports/baseball/free-agent-scrimmage-camp-jobless.html>, [https://perma.cc/W57C-RRA9].

⁴³ See Jaffe, *Free Agent Market*, *supra* note 18.

braced data to inform their decision-making, so much so that it has become a norm in baseball rather than a strategy employed by some teams to gain an advantage.⁴⁴ Teams use internal metrics to project a players' offensive and defensive statistics over the course of a potential free agent contract to help them better ascertain the players' value.⁴⁵ This shift towards data analytics runs contrary to the norms that historically ruled free agency. Teams would give expensive, long-term free agent contracts to stars based on past performance, knowing that they would likely only perform to the value of the contract in the first few years.⁴⁶ Teams were thus willing to get less productivity—indeed, below contract value, statistically—for the latter years of the star player's contract because of the near-certainty of a strong performance early in the contract.⁴⁷

However, as teams have become better at quantifying player performance and understanding the effects of players aging, they have become more reticent to offer contracts for the length of time and amount of money to which free agents had become accustomed.⁴⁸ Indeed, teams' internal projections would lead their front offices to determine that the extra few wins that a star player would bring did not justify the cost—and thus lost profit—for the team.⁴⁹ Therefore, teams had likely inflated the market with the multi-year, \$100 million plus contracts for free agent players in the past.⁵⁰ Armed with this knowledge, teams shifted from paying significant yearly salaries to free agents over long-term contracts to paying younger players less money for similar—though not equal—results.⁵¹ This more cost-efficient approach also dovetailed with the payroll flexibility that teams have embraced when needing to rebuild their rosters.⁵²

⁴⁴ See Miller, *What is a Win?*, *supra* note 29.

⁴⁵ See Jaffe, *Free Agent Market*, *supra* note 18.

⁴⁶ See Emma Baccellieri, *The MLBPA is Failing Its Players*, DEADSPIN.COM, Jan. 22, 2018, <https://deadspin.com/the-mlbpa-is-failing-its-players-1822305159>, [https://perma.cc/T9ST-NW4E] (on file with the Harvard Law School Library).

⁴⁷ See *id.*

⁴⁸ See Travis Sawchik, *This is the Slowest Offseason Ever*, FANGRAPHS.COM, Feb. 6, 2018, <https://www.fangraphs.com/blogs/this-is-the-slowest-offseason-ever/>, [https://perma.cc/3XWC-AWRU] (on file with the Harvard Law School Library).

⁴⁹ See Davis, *supra* note 9.

⁵⁰ See Wayne G. McDonnell, Jr., *MLB Free Agency is Suffering from Owners' Flawed Strategies and an Imperfect Agreement*, FORBES, Feb. 13, 2018, <https://www.forbes.com/sites/waynemcdonnell/2018/02/13/mlb-free-agency-is-suffering-from-owners-flawed-strategies-and-an-imperfect-agreement/#48bed34a792f>, [https://perma.cc/P63P-K8KR] (on file with the Harvard Law School Library).

⁵¹ See Jaffe, *Free Agent Market*, *supra* note 18.

⁵² See Verducci, *supra* note 18.

There appears to be compelling evidence to support this structural shift. While elite players continue to be paid well—even if less than what had been the case in previous offseasons—most free agents do not match or exceed their production in the year before their free agency.⁵³ Teams have also learned about the negative effects of aging on players' statistics and evaluate their projected productivity accordingly.⁵⁴ Moreover, study after study has shown that the vast majority of free agents do not yield the productivity needed to justify the contract's length and amount.⁵⁵ Finally, spending more on payroll did not necessarily correlate to greater success. For example, in 2013, five MLB teams from the top fifteen payrolls made the playoffs, as did five teams from the bottom fifteen payrolls.⁵⁶ For these and other reasons, the 2018 free agency period seems to have brought about a shift in how teams value long-term contracts and teams' willingness to overpay for the latter years of such contracts.

Some commentators question whether data analytics could have led all teams to the same conclusions during the very same offseason.⁵⁷ Indeed, one agent noted that teams uniformly offered free agents contracts of \$20 million or more per year or long-term contracts exceeding three years—but not both⁵⁸—leading the MLBPA to accuse the owners of collusion.⁵⁹ On the other hand, perhaps this trend culminated this past offseason when analytics informed the teams that the weak free agent class—whose stars had shown signs of performance regression and dealt with various injuries—might not

⁵³ See Jaffe, *Free Agent Market*, *supra* note 18.

⁵⁴ See generally Sam Miller, *What Happens as Baseball Players Age?*, ESPN, July 9, 2018, available at http://www.espn.com/mlb/story/_/id/23916211/major-league-baseball-aging-cycle-how-mike-trout-becomes-albert-pujols, [https://perma.cc/YCR3-HG6K]; see also Neil Weinberg, *The Beginner's Guide to Aging Curves*, FANGRAPHS.COM, Dec. 10, 2015, <https://www.fangraphs.com/library/the-beginners-guide-to-aging-curves/>, [https://perma.cc/9ZK2-YZDU] (on file with the Harvard Law School Library).

⁵⁵ See Jay Jaffe, *Recent Results Offer Evidence that Teams Should Avoid the Free-Agent Market*, SPORTS ILLUSTRATED, (May 7, 2013), <https://www.si.com/mlb/strike-zone/2013/05/07/hamilton-upton-greinke-bourn-free-agent-busts>, [https://perma.cc/9XBF-R6CH] (on file with the Harvard Law School Library).

⁵⁶ See Russell Yavner, *Minor League Baseball and the Competitive Balance: Examining the Effects of Baseball's Antitrust Exemption*, 5 HARV. J. SPORTS & ENT. L. 265, 310 (2014).

⁵⁷ See Baccellieri, *supra* note 46.

⁵⁸ See Passan, *supra* note 10.

⁵⁹ See Michael Hiltzik, *Are Major League Baseball's Owners Engaging in Collusion Again? Some Players and Agents Think So*, L.A. TIMES, Feb. 7, 2018, <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-mlb-collusion-20180207-story.html#>, [https://perma.cc/K8E6-58BQ].

be worth lucrative, long-term contracts.⁶⁰ In all events, it is clear that the rise of data analytics has impacted the way teams evaluate free agent contracts.

D. Agents (Not) Adjusting to a Changed Marketplace and Other Explanations

One popular explanation for the relatively meager activity in the 2018 free agent market was that player agents—in particular, the most famous and successful agent, Scott Boras—did not adjust to the changing market for free agents driven, at least in part, by the rise of data analytics.⁶¹ In fact, during the height of the public rhetoric regarding the 2018 free agency period, MLB Commissioner Rob Manfred seemingly took aim at Boras in response to the MLBPA questioning teams' commitment to winning.⁶² Specifically, he pointed to multiple unsigned free agents that had significant offers pending, including some worth more than \$100 million over the term of the contract being offered.⁶³ Commissioner Manfred thus blamed agents for failing to understand, and respond to, the changing free agent market informed by data analytics.⁶⁴

Many believed that Commissioner Manfred was targeting Boras with his comments because Boras controlled most of the top free agents, both in general and in 2018.⁶⁵ Boras is famous for negotiating directly with team owners—circumventing general managers and other front office personnel—and achieving significant long-term contracts with substantial average annual salaries for his players.⁶⁶ Understandably, Boras's approach frustrated many general managers, particularly because they viewed the contracts that he secured as economically unjustifiable.⁶⁷ However, as teams embraced data analytics, more decision-making power became vested in front office personnel steeped in using statistics and projections to make more economically-efficient roster, payroll, and contracts decisions.⁶⁸ By implication, Commissioner Manfred and others posited that Boras had not adjusted his

⁶⁰ See Jaffe, *Free Agent Market*, *supra* note 18.

⁶¹ See Verducci, *supra* note 17.

⁶² See Tyler Kepner, *Rob Manfred Defends Changing Paces, of Free Agency and of the Game*, N.Y. TIMES, February 15, 2018, available at <https://www.nytimes.com/2018/02/15/sports/baseball/rob-manfred-free-agency.html>, [<https://perma.cc/7YHE-PLH6>].

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See Verducci, *supra* note 17.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.*

style to these new realities and was doing his players a disservice in the process. Boras saw it differently, commenting that he achieved success with the contracts his clients ultimately secured in free agency.⁶⁹

There were also a variety of other theories—many related to data analytics—regarding the changed free agency market. For example, some hypothesized that because of the introduction of “livelier” baseballs in 2015, home runs increased by 46% from 2014 to 2017 and thus devalued the power-hitting sluggers in free agency.⁷⁰ Another data-driven trend that may have impacted the free agent market was teams shifting more to bullpen pitchers. Instead of relying on starting pitchers to go seven, eight, or nine innings as had traditionally been desired, teams instead sought to bolster their bullpens and required less from their starting pitchers.⁷¹ For example, the Los Angeles Dodgers famously made popular the trend of removing their starting pitchers after they went through the opposing team’s line-up twice because statistics showed that opposing line-ups had a dramatic spike in offensive productivity the third time seeing the same starting pitcher.⁷² Since teams rely on starting pitchers for fewer innings per game—and thus per year—it logically follows that they would also value their contributions less and not pay them as much. Indeed, relief pitchers are relatively inexpensive, so front offices were using data analytics to meet their pitching needs more cost efficiently.⁷³ Finally, many teams strategically chose to sign some of their top players during their arbitration years to long-term contracts, thus delaying their entry into the free agent market and causing fewer top free agents to be in the market each year.⁷⁴

All of these theories help explain what MLB experienced in the 2018 offseason. However, even collectively, they do not tell the whole story. To better comprehend and contextualize the changes in free agency, one must understand the role that the MLB CBA played in bringing about some of these changes. Indeed, in an attempt to create even greater competitive balance through various rules, policies, and limitations in the MLB CBA,

⁶⁹ See Bill Shaikin, *Offseason of Free-Agency Discontent Foreshadows a Possible Stormy 2021 Labor Deal*, L.A. TIMES, May 12, 2018, available at <http://www.latimes.com/sports/mlb/la-sp-mlb-shaikin-20180512-story.html>, [https://perma.cc/K8E6-58BQ].

⁷⁰ See Verducci, *supra* note 17.

⁷¹ See *id.*

⁷² See Mike Petriello, *Dodgers, Astros Redefining Starter Use—and Winning*, MLB.COM, Aug. 2, 2017), <https://www.mlb.com/news/dodgers-astros-not-pushing-starters-deep/c-245548128>, [https://perma.cc/A438-VEKA] (on file with the Harvard Law School Library).

⁷³ See Verducci, *supra* note 17.

⁷⁴ See Jaffe, *Free Agent Market*, *supra* note 18.

the owners and the MLBPA may have created various incentives for teams to make some changes in their approach to free agency that has hurt players.

III. THE CBA AND ITS UNIQUE LEGAL STATUS

Before delving into the terms of the MLB CBA, it is important to understand the special legal status afforded to CBAs negotiated in professional sports leagues. Referred to as “the supreme governing authority” regarding labor matters between professional sports teams and their players,⁷⁵ the CBA details many of the business, operational, and employment-related aspects governing the functioning of a professional sports league. A CBA is a negotiated agreement between management (all of the teams acting through the joint venture of the league⁷⁶) and its workers (the players represented by their union).⁷⁷ Consistent with the National Labor Relations Act, the leagues and their respective players’ unions negotiate a variety of matters governing the operation of their particular sport.⁷⁸ These matters include the terms and conditions of employment for players, including wages, hours, and other conditions of employment.⁷⁹ Because of their implications for player salaries, business terms among the teams—such as revenue sharing—can also be negotiated as part of the collective bargaining process and codified in a league’s CBA.⁸⁰ In short, many of the key terms governing player compensation, including team revenues, player contracts, and other related issues, are negotiated by the leagues and their players’ unions into the CBA.

⁷⁵ See Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L. REV. 167, 173 (1995).

⁷⁶ See Nadelle Grossman, *What is the NBA?*, 25 MARQ. SPORTS L. REV. 101, 103-04 (2014).

⁷⁷ See Christopher R. Deubert, I. Glenn Cohen, & Holly Fernandez Lynch, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 183 (2017).

⁷⁸ See 29 U.S.C. § 151-69 (2012); see also *Am. League of Profl Baseball Clubs v. Ass’n of Nat’l Baseball League Umpires*, 180 NLRB 190 (1969) (establishing the National Labor Relations Board’s jurisdiction over professional sports leagues).

⁷⁹ See Cody McElroy, *Take a Knee: Speech Considerations in the NFL*, THE CIVILIAN, Oct. 5, 2016, available at <https://sites.law.lsu.edu/civilian/2016/10/take-a-knee-speech-considerations-in-the-nfl/>, [https://perma.cc/F2J9-P6BC] (on file with the Harvard Law School Library).

⁸⁰ See Marc J. Coghlan, Note, *Why the NHL’s Current Expansion Criteria Will Continue to Deny Canadian Cities NHL Franchises*, 16 VA. SPORTS & ENT. L.J. 267, 284–85 (2017).

The collective bargaining process requires that the leagues and the players' unions negotiate in good faith and through arms-length negotiations.⁸¹ This legal requirement underscores the importance given to this process to ensure that the agreed-upon terms are acceptable to both sides and that the labor process was not manipulated nor disregarded.⁸² Labor law prescribes such a process because of the deference that courts give the terms of a CBA.⁸³ Indeed, the CBA's terms and conditions become somewhat sacrosanct under the law when the league and players' union negotiate, agree to, and execute a new CBA. The most significant legal protection afforded CBAs—at least for professional sports leagues like MLB—is the exemption from antitrust laws.⁸⁴ Many of the terms in a professional sports league's CBA, such as an amateur player draft, fixed salaries for drafted players, maximum salary amounts, and caps on the length of player contracts, would almost certainly violate antitrust laws as being unreasonable restraints on trade.⁸⁵ However, these CBA terms are insulated from antitrust laws because they are the product of collective bargaining between the league and its players. In this regard, both the players and the teams must abide by the terms of their CBA for the length of the negotiated contract because of the special status the law gives to these documents. These circumstances heighten the need for both sides to understand—and be relatively confident in their projections about—how the terms will play out over the length of the CBA. Otherwise, certain unintended consequences may disrupt one side's expectations, as the competitive balance reforms in the MLB CBA seemed to have done with their negative impact on players during the 2018 free agency period.

⁸¹ See *Brown v. Prof'l Football, Inc.*, 518 U.S. 231, 235–36 (1995).

⁸² See *id.*

⁸³ See Josh Mandel, Note, *Deflategate Pumped Up: Analyzing the Second Circuit's Decision and the NFL Commissioner's Authority*, 72 U. MIAMI L. REV. 827, 866 (2018).

⁸⁴ See Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 223 (2009).

⁸⁵ See John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705–06 (1977). The CBA's terms also tend to be transparent too all relevant stakeholders because of their immunity to antitrust laws; see also Evan S. Totty & Mark F. Owens, *Salary Caps and Competitive Balance in Professional Sports Leagues*, 11 J. FOR ECON. EDUC. 46, 47 (2011).

IV. COMPETITIVE BALANCE, MLB REFORMS, AND THE IMPACT ON FREE AGENTS

Over the course of the past two decades, MLB—similar to other professional sports leagues—has made a concerted effort to create greater competitive balance among its teams.⁸⁶ Specifically, MLB has adopted a number of reforms—codified in the MLB CBA—to help facilitate this goal of parity within the league. To better analyze these competitive balance reforms, one must first explore the meaning of competitive balance and its special place in professional sports. This context helps explain why MLB and other leagues have adopted similar reforms aimed at this goal. Moreover, it provides an opportunity to assess the efficacy of these reforms and, in all events, how the particular policies adopted by MLB negatively impacted free agents in the 2018 offseason.

A. *Defining Competitive Balance and Its Unique Role in Professional Sports*

Professional sports league commissioners view competitive balance among their teams as a “core responsibility” of their job.⁸⁷ But while there appears to be agreement in the conceptual goal of parity within a league, a universal definition of “competitive balance” remains elusive. One view is that competitive balance means that there is not much of a gap between a league’s strongest and weakest teams.⁸⁸ A league with competitive balance would be one where the teams were relatively equal in ability, creating unpredictability regarding the outcome of any given game.⁸⁹ A league lacking parity would be one where a small number of teams dominated the league each year and most teams were uncompetitive—leading to more predictable outcomes of seasons, if not individual games.⁹⁰ Others have identified different criteria to judge whether a league has achieved parity: These factors

⁸⁶ See Martin B. Schmidt & David J. Berri, *Competitive Balance and Market Size in Major League Baseball: A Response to Baseball’s Blue Ribbon Panel*, 21 REV. INDUS. ORG. 41, 52 (2002).

⁸⁷ John Urschel, *The Parity Ideal*, THE PLAYERS’ TRIBUNE, Jan. 4, 2016, <https://www.theplayertribune.com/en-us/articles/john-urschel-ravens-parity-ideal>, [<https://perma.cc/N9S9-RDYJ>] (on file with the Harvard Law School Library).

⁸⁸ See Matt D. Pautler, *The Relationship Between Competitive Balance and Revenue in America’s Two Largest Sports Leagues*, CMC SENIOR THESES, PAPER 86 (2010), (unpublished dissertation, Claremont McKenna College) http://scholarship.claremont.edu/cmc_theses/86/, [<https://perma.cc/H75E-4ZUB>] (on file with the Harvard Law School Library).

⁸⁹ See *id.*

⁹⁰ See *id.*

include the number of different teams that won a championship within a certain time period; the number of teams to reach the playoffs; the number of teams that failed to make the post-season for an extended period of time; whether there were teams that had long droughts of seasons with losing records; and how compressed the league's teams are around the .500 mark.⁹¹ Indeed, MLB's Blue Ribbon Panel that studied competitive balance in the early 2000s seemed to embrace this analysis by defining competitive balance as when teams that are effectively operated have a "regularly recurring hope of reaching postseason play."⁹²

Others focus more heavily on the uncertainty of the outcome of games and seasons. This concept relates to how easy it is to predict the winner of a game, the teams that will make the playoffs, and the team that will ultimately win the league championship.⁹³ If most teams are more evenly matched, it will be more difficult to predict which teams will win a game, make the playoffs, or win the championship.⁹⁴ Moreover, league parity does not require every team to be competitive each year. Rather, optimal competitive balance within a league provides an environment where a team may not be competitive every year, but there is a strong likelihood that it will be competitive in the near future.⁹⁵ As courts have noted, "[c]ompetitive balance means in essence that all of the league's teams are of sufficiently compatible playing strength that. . . fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching games, thus supporting the teams' television and gate revenues."⁹⁶ This uncertainty of outcome within a competitively balanced league should, in theory, increase fan interest.⁹⁷

⁹¹ See *Competitive Balance in Pro Sports Leagues: How Does the NBA Look?*, 82GAMES.COM, Jul. 11, 2018, <http://www.82games.com/balance.htm>, [<https://perma.cc/B4AW-NLAN>] (on file with the Harvard Law School Library).

⁹² Olugbenga Ajilore & Joshua Hendrickson, Unpublished Paper, *The Impact of the Luxury Tax on Competitive Balance in Major League Baseball*, 3 (2011) (unpublished paper), <https://works.bepress.com/gajilore/11/>, [<https://perma.cc/F2EQ-3CWS>] (on file with the Harvard Law School Library).

⁹³ See James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 Marq. Sports L. Rev. 517, 521 (2011).

⁹⁴ See *id.* at 522.

⁹⁵ See *id.* at 526.

⁹⁶ *Smith v. Pro-Football*, 420 F. SUPP. 738, 745 (D.C. Cir. 1976).

⁹⁷ See Michael Lopez, *Exploring Consistency in Professional Sports: How the NFL's Parity is Somewhat of a Hoax*, SLOANSPORTSCONFERENCE.COM, Jul. 11, 2018, http://www.sloansportsconference.com/mit_news/exploring-consistency-in-professional-sports-how-the-nfls-parity-is-somewhat-of-a-hoax/, [<https://perma.cc/KSU7-KHL7>] (on file with the Harvard Law School Library).

Indeed, the “uncertainty of outcome hypothesis” posits that greater parity among a league’s teams—and thus greater uncertainty among the outcomes of games and seasons—will lead to a corresponding increase in attendance, viewership, and overall interest.⁹⁸

This interconnectedness between the parity among teams and the overall economic health of the league has fueled various competitive balance reforms in professional sports leagues over the past two decades. However, the roots of the competitive balance debate date back further than that. As professional sports leagues grew and matured over the course of the twentieth century, they began to realize how important parity was for their long-term strength. MLB experienced this in the 1920s when it had significant attendance problems because of the New York Yankees’ dominance—who made the World Series six times within the decade, winning three of them.⁹⁹ The lack of balance among teams during that era lessened fan appeal because lack of parity led to predictable outcomes (namely, the Yankees winning).¹⁰⁰ MLB realized that it had to address such imbalance. In particular, it identified the need to create parity between larger-market and smaller-market teams.

In a true free market in professional sports, those teams with the most financial resources—usually those in the largest metropolitan areas—would be able to sign the best players and dominate their respective leagues.¹⁰¹ To temper this phenomenon, professional sports leagues over time adopted various policies and rules—like amateur drafts, restrictions to free agency, revenue sharing, and the like—to help level the playing field among their teams spread throughout different sized-markets and regions of the country. In-

⁹⁸ See P. Dorian Owen & Nicholas King, *Competitive Balance Measures in Sports Leagues: The Effects of Variation in Season Length*, 53 *ECON. INQUIRY* 731, 731 (2015); but see Kurt Badenhausen, *Does Competitive Balance Drive Interest in Sports?*, *FORBES*, Aug. 25, 2015, <https://www.forbes.com/sites/kurtbadenhausen/2015/08/25/does-competitive-balance-drive-interest-in-sports/#4975dc134f25>, [https://perma.cc/3GK7-5MX2] (on file with the Harvard Law School Library) (noting that some scholars have found that star players and new stadiums—as opposed to the uncertainty of outcome—drive fan attendance).

⁹⁹ See Daniel A. Rascher, *Competitive Balance: On the Field and in the Courts*, *THESPORTSADVISORYGROUP.COM*, <http://www.thesportsadvisorygroup.com/resource-library/business-of-sports/competitive-balance-on-the-field-and-in-the-courts/>, [https://perma.cc/KE7V-QXJV] (on file with the Harvard Law School Library).

¹⁰⁰ See *id.*

¹⁰¹ See *id.* Some have argued that the teams playing in the western United States also have an advantage because of warmer weather, but studies have shown this factor to only have a marginal effect; see also J.P.F., *Continental Divide*, *ECONOMIST.COM*, Dec. 16, 2013, available at <https://www.economist.com/game-theory/2013/12/16/continental-divide>, [https://perma.cc/AC5D-4D9D].

deed, with regard to MLB, there was good reason to do so. Economists and other social scientists studied issues related to parity, and some of the results were concerning. For example, since 1985, the amount of a team's payroll and its winning percentage were positively correlated.¹⁰² If there is a perception that larger-market, better-resourced teams have a competitive advantage over other teams in the league, it undermines the unpredictability of outcome that attracts fans to sports and thus poses a threat to a league's growth and sustainability.¹⁰³ Again, that is not to say that fans demand that every team be competitive every year. Indeed, as discussed above, one study suggested that fans look at their own team's competitiveness on a three- to five-year horizon.¹⁰⁴ So as long as fans think that their team will be in playoff contention (or better) within that timeframe, they are comfortable supporting their team and waiting for it to get better.¹⁰⁵

For these reasons, it has become well-accepted that a competitive balance is critical for the development, growth, and longevity of a professional sports league.¹⁰⁶ This is a special problem that is unique to sports leagues in attempting to create competitive balance among its teams to attract and retain fans.¹⁰⁷ Traditionally, economists have espoused the virtues of competition between individual businesses—which seek less or no competition—but professional sports may be the exception.¹⁰⁸ While competitor businesses seek to eliminate their competition for their own economic advantage, professional sports is such that competition is essential to the business.¹⁰⁹ Competition—that is, two teams playing against each other—is necessary for the functioning of a professional sports league.¹¹⁰ This need for competition similarly drives a need for cooperation and collaboration

¹⁰² See Evan Zepfel, *Have MLB's Efforts to Preserve Competitive Balance Done Enough?*, HARV. SPORTS ANALYSIS COLLECTIVE, Feb. 13, 2015, <http://harvardsportsanalysis.org/2015/02/have-mlbs-efforts-to-preserve-competitive-balance-done-enough/>, [https://perma.cc/ZXF2-58KR] (on file with the Harvard Law School Library).

¹⁰³ See Owen & King, *supra* note 100, at 731.

¹⁰⁴ See Gordon, *supra* note 38.

¹⁰⁵ See *id.*

¹⁰⁶ See Yong-zhen Cao, *Competitive Balance of Professional Sports Leagues—A Case Study on NBA 1*, 1 (2010), <https://ieeexplore.ieee.org/document/5660323/> (on file with the Harvard Law School Library), [https://perma.cc/3GN8-4427].

¹⁰⁷ See Rodney Fort & James Quirk, *Cross-Subsidization, Incentives, and Outcomes in Professional Sports Leagues*, 33 J. ECON. LIT. 1265, 1265 (1995).

¹⁰⁸ See Schmidt & Berri, *supra* note 86, at 41.

¹⁰⁹ See Rascher, *supra* note 99.

¹¹⁰ See *id.* Moreover, a large-market, high revenue team like the Los Angeles Dodgers benefits when a smaller-market team, like the Oakland Athletics, is competitive.

among the teams. In this regard, professional sports leagues are joint ventures where individual, team owners cooperate to co-produce their product of a competitive game.¹¹¹ So while teams compete with each other on the field or court, they work together to create the rules, structure, and other elements of their league to create a desired level of competitive balance that appeals to their fans and consumers.¹¹² In doing so, leagues optimize not just fan attendance, but also revenue from sponsorships, merchandise, television and radio broadcasting rights, trademark licensing, and other sources.¹¹³

Given this unique structure of professional sports leagues, many have argued that these entities need to be treated differently by antitrust laws.¹¹⁴ Teams, they contend, need to be able to cooperate to create the product of a professional sports game and ensure competitive balance with various rules, policies, and other measures to maintain the economic health and strength of the league.¹¹⁵ Courts have agreed and treated professional sports leagues differently under antitrust laws. Courts have allowed restrictive labor practices, which would otherwise violate antitrust laws—such as amateur drafts, salary caps, contract length limits, revenue sharing, and the like—in furtherance of this goal of competitive balance.¹¹⁶ In fact, the United States Supreme Court noted in *American Needle* that competitive balance is “unquestionably an interest that may well justify a variety of collective decisions made by the teams.”¹¹⁷ In this regard, courts have carved out preferential antitrust treatment of teams working collectively to achieve the competitive balance needed to sustain the league.

B. MLB's Competitive Balance Reforms

Professional sports leagues have thus used their CBAs to address a number of issues regarding the business and operation of their particular sport, including competitive balance. MLB did just that when it experienced its crisis with parity within the league in 2000.¹¹⁸ The New York Yankees had won four out of the five World Series spanning from 1996-

¹¹¹ See Cao, *supra* note 106, at 1.

¹¹² See McKeown, *supra* note 93, at 523.

¹¹³ See *id.*, at 524.

¹¹⁴ See Salil K. Mehra & T. Joel Zuercher, *Striking Out “Competitive Balance” in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L.J. 1499, 1500 (2016).

¹¹⁵ See generally *id.*

¹¹⁶ See generally *id.*

¹¹⁷ *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 204 (2010).

¹¹⁸ See Schiffman, *supra* note 4.

2000.¹¹⁹ Studies showed that the financial disparity between larger and smaller market teams was leading to a stark lack of parity where a significant number of teams were perpetually uncompetitive.¹²⁰ In response, then-MLB Commissioner Bud Selig formed a committee—MLB’s Blue Ribbon Panel led by Senator George Mitchell—to study the causes of revenue disparity, analyze their impact on the goal of competitive balance, and make recommendations for possible reforms that could be adopted to address these issues.¹²¹ Commissioner Selig believed that by creating greater parity in the league, MLB would experience higher attendance, more popularity, and greater revenues.¹²² The Blue Ribbon Panel concluded that the competitive imbalance in MLB was hurting the game and business of professional baseball.¹²³ The committee also made a number of recommendations, including more robust revenue sharing, a luxury tax, and changes to MLB’s drafting of players, aimed at creating greater parity within the league.¹²⁴ These recommendations were consistent with competitive balance reforms pursued by other professional sports leagues as well.

1. Revenue Sharing

To improve parity in their leagues, the National Basketball Association (“NBA”), National Football League (“NFL”), National Hockey League (“NHL”), and MLB have all implemented revenue sharing among their teams.¹²⁵ Revenue sharing is defined as an “allocation of certain revenue among all teams so as to shorten the gap between affluent and less affluent teams and fortify the stability of [the] league.”¹²⁶ Leagues pool and then

¹¹⁹ See Ajilore & Hendrickson, *supra* note 94, at 1.

¹²⁰ See Pautler, *supra* note 88, at 8; see also Gordon, *supra* note 38 (noting MLB’s Blue Ribbon Panel’s findings that from 1995-99 no teams from the lower two quartiles of payroll won a divisional or league championship series game and that no team from the lower three quartiles of payroll won a World Series game).

¹²¹ See Pautler, *supra* note 88, at 15.

¹²² See Schifman, *supra* note 4.

¹²³ See Richard C. Levin, George J. Mitchell, Paul A. Volcker, & George F. Will, *The Report of the Independent Members of the Commissioner’s Blue Ribbon Panel on Baseball Economics 1, 1-5* (2000), available at http://www.mlb.com/mlb/downloads/blue_ribbon.pdf, [https://perma.cc/MJ6Z-NE9Z].

¹²⁴ See *id.* at 8-10.

¹²⁵ See Lopez, *supra* note 97. However, while each league engages in this redistributive practice, the extent of the revenue sharing and the policies designed to effect it vary from league to league; see also Urschel, *supra* note 87. In some leagues, teams that perform particularly well in terms of revenue pay a higher percentage of their local money to the league for revenue sharing; see also Zepfel, *supra* note 102.

¹²⁶ See Cao, *supra* note 106.

redistribute some or all money from a variety of revenue categories such as national broadcasting contracts, intellectual property rights, box-office revenue, and the like.¹²⁷ Generally, teams share equally national broadcasting revenues, pooled intellectual property rights, and league-wide sponsorship agreements, while retaining most of their locally-generated revenue (ticket sales, local television and radio revenue, and sponsorships).¹²⁸

In MLB, the league distributes hundreds of millions of dollars among its teams each year.¹²⁹ The two main sources of revenue sharing derive from the central fund and locally-generated money.¹³⁰ Central fund revenues include national broadcasting deals and the pooled intellectual property rights licensed centrally through the league.¹³¹ Local revenue includes ticket sales, regional television and radio deals, and other revenues generated by a team related to baseball.¹³² MLB teams share evenly in the revenue from the central fund, so while markets like Los Angeles and New York bring greater value to national television deals and their intellectual property rights are exponentially more valuable than some smaller-market teams, all teams receive the same amount from this source.¹³³ All teams also contribute 34% of their locally-generated money to the league for revenue sharing.¹³⁴ Therefore, while the Los Angeles Dodgers' local television deal—\$140 million per

¹²⁷ See Jeremy M. Evans, *We Have Come Full Circle: Where Sports Franchises Derive Their Revenue*, ENT. & SPORTS LAW 12, 12-16 (2017). See also Cao, *supra* note 106.

¹²⁸ See Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, SPORTINGNEWS.COM, Sept. 5, 2014, <http://www.sportingnews.com/nfl/news/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap/gu0xok7mphu01x3vu875oeaq6>, [https://perma.cc/QN8J-5SF7] (on file with the Harvard Law School Library).

¹²⁹ See Andy Dolich, *MLB Revenue Sharing a Problem for A's, Raiders*, NBCSPORTS.COM, Feb. 29, 2016, <https://www.nbcsports.com/bayarea/athletics/mlb-revenue-sharing-problem-raiders>, [https://perma.cc/Y86Z-FD8U] (on file with the Harvard Law School Library) (noting that each MLB team got \$30 million in 2009).

¹³⁰ See Maury Brown, *Revenue Sharing is Making an Impact*, BASEBALLAMERICA.COM, Mar. 2, 2010, <https://www.baseballamerica.com/stories/revenue-sharing-is-making-an-impact/>, [https://perma.cc/W35P-4ERB] (on file with the Harvard Law School Library).

¹³¹ See *id.*

¹³² See *id.*

¹³³ See Evans, *supra* note 127, at 15.

¹³⁴ See Bloom, *supra* note 128; see also Maury Brown, *Breaking Down MLB's New 2017-21 Collective Bargaining Agreement*, FORBES, Nov. 30, 2016, <https://www.forbes.com/sites/maurybrown/2016/11/30/breaking-down-mlbs-new-2017-21-collective-bargaining-agreement/#5ce4724311b9>, [https://perma.cc/S5SR-8A34] (on file with the Harvard Law School Library) (noting that the percentage of industry revenue allocated to revenue sharing remained the same as the previous collective bargaining agreement, which was also 34%).

year—generates far more money than the San Diego Padres’ local television deal—\$50 million per year—the Dodgers pay a greater amount into the local revenue fund than the Padres.¹³⁵ Moreover, as described further below in section IV.C.2, luxury taxes paid by teams with high payrolls also are redistributed through a revenue-sharing plan to help keep lower-payroll teams competitive.¹³⁶ In redistributing such monies, MLB aims to create greater financial balance among teams and thus greater parity within the league.

2. Salary Caps

Some professional sports leagues have implemented a salary cap to help achieve competitive balance. In some ways, this should come as no surprise because player salaries are the greatest cost for a team, and if there is a limit on what a team can spend on their payroll, the more likely there will be parity in the league.¹³⁷ A salary cap is collectively bargained by the league and its players’ association and the amount of the cap is based off of league revenues.¹³⁸ In this regard, the amount of the salary cap and how the league intends to enforce it—including harsh penalties¹³⁹—is determined before a season begins.¹⁴⁰ The parity-driven theory behind the salary cap is that by creating a salary ceiling—a hard cap or a soft cap—professional sports leagues create a more level playing field for all teams, whether large-market or small-market, to compete for player talent.¹⁴¹ Accordingly, a salary cap prevents teams with higher revenues from securing a disproportionate amount of player talent and thus create competitive imbalance among the league’s teams.¹⁴² By spending a relatively similar amount on their respec-

¹³⁵ See Evans, *supra* note 127, at 15.

¹³⁶ See *id.*

¹³⁷ See Totty & Owens, *supra* note 85, at 46.

¹³⁸ See Michael Schottey, *How the NFL Became the Most Competitive League in All of Sports*, BLEACHER REPORT, Mar. 20, 2013, <https://bleacherreport.com/articles/1574285-how-the-nfl-became-the-most-competitive-league-in-all-of-sports>, [https://perma.cc/988X-PPZA] (on file with the Harvard Law School Library).

¹³⁹ See *id.*

¹⁴⁰ See Totty & Owens, *supra* note 85, at 46–47.

¹⁴¹ See Totty & Owens, *supra* note 85, at 48.

¹⁴² See *id.* Moreover, if larger-market, higher-revenue teams are not disproportionately more talented than other teams, they may experience a decrease in revenue while smaller-market, lower-revenue teams may increase their revenue if they are more competitive than would be the case without the salary cap; see Rascher, *supra* note 99. This potential consequence of the salary cap thus improves the revenue disparity in professional sports leagues, which also can lead to competitive imbalance.

tive payrolls, teams should more evenly distribute talent and thus improve the likelihood for parity within the league.¹⁴³ In fact, courts have recognized the important policy impact of a salary cap in professional sports in holding that salary caps do not violate federal antitrust law, despite being anticompetitive in decreasing competition for players.¹⁴⁴

Each league differs on how it approaches its salary cap. The NFL and NHL have “hard caps” which forbid their teams’ payrolls from exceeding this designated threshold for any reason.¹⁴⁵ Teams exceeding the cap can lose draft picks, receive hefty fines, and even have contracts cancelled.¹⁴⁶ The NBA has a “soft cap” which, by contrast to the “hard cap,” creates a payroll threshold for teams that they can exceed only under certain limited exceptions and conditions.¹⁴⁷ MLB does not have a salary cap. In fact, during the latest collective bargaining negotiations, the MLBPA was adamant that they would never agree to a salary cap, thinking that a lack of a cap

¹⁴³ See Rascher, *supra* note 99. Others have also argued that along with a salary cap, professional sports leagues must also adopt a salary floor or minimum payroll threshold to ensure that teams spend closer to the salary cap level and thus spread player salaries—and thus talent—around in a more balanced fashion; see Maury Brown, *As Free Agents Languish, Major League Baseball Faces a Nasty Problem That’s Hard to Fix*, FORBES, Mar. 2, 2018, <https://www.forbes.com/sites/maurybrown/2018/03/02/major-league-baseballs-nasty-problem-thats-hard-to-fix/#315497b95359>, [<https://perma.cc/8YSE-9QRJ>] (on file with the Harvard Law School Library) (hereinafter Brown, *As Free Agents Languish*). MLB super-agent Scott Boras proposed a salary floor during the 2018 free agent market debate; see Shaikin, *supra* note 69. A minimum payroll threshold also ensures that team owners do not merely keep as profit much of the money they receive through revenue sharing as well; see Schotthey, *supra* note 138. The NBA and the NFL have both adopted salary floors, though MLB has not. See *id.*

¹⁴⁴ See *National Basketball Ass’n v. Williams*, 857 F.SUPP. 1069, 1079 (S.D.N.Y. 1994). There appears to be good reason for this protected legal status, as some studies suggest that salary caps are effective tools for achieving greater competitive balance; see, e.g., Andrew Larsen, Aju J. Fenn, & Erin Leanne Spenner, *The Impact of Free Agency and the Salary Cap on Competitive Balance in the National Football League*, 7 J. SPORTS ECON. 474 (2006); but see Totty & Owens, *supra* note 85, at 47 (explaining that their research could not find evidence that supported the arguments advanced by advocates for salary caps). In fact, their research suggested that a salary cap may actually decrease competitiveness among teams; see *id.* One scholar even suggested that salary caps actually create competitive imbalance in professional sports leagues; see Vrooman, *supra* note 16, at 38.

¹⁴⁵ See Totty & Owens, *supra* note 85, at 47.

¹⁴⁶ See *id.*

¹⁴⁷ See Larry Coon, *Larry Coon’s NBA Salary Cap FAQ*, Jul. 13, 2018, <http://www.cbafaq.com/salarycap.htm#Q2>, [<https://perma.cc/L9D8-WGQ3>] (on file with the Harvard Law School Library).

would lead to more payroll spending by teams.¹⁴⁸ However, the principles underlying the imposition of a salary cap undergird the animating motivations for creating a luxury tax, as MLB and other professional sports leagues have done.

3. Luxury Tax

Often in conjunction with a salary cap, professional sports leagues have implemented a luxury tax as another tool for pursuing competitive balance. The luxury tax is a penalty tax assessed on a team's payroll on amounts above the designated threshold.¹⁴⁹ The penalty increases at set amounts above this threshold, and there are progressive taxes for those teams that exceed it year after year.¹⁵⁰ This design seeks to limit the ability for high-revenue, larger-market teams to outspend other teams in the league.¹⁵¹ The result of the luxury tax is that it becomes prohibitively expensive to employ a number of highly-paid stars (or to otherwise have disproportionately excessive payroll amounts vis-à-vis the rest of the league).¹⁵² MLB's luxury tax, referred to as the competitive balance tax ("CBT"), sets thresholds for each season above which teams are taxed for payroll amounts that exceed it.¹⁵³ There are also progressive penalties for teams whose payroll exceed the CBT threshold for consecutive years and/or for designated amounts in excess of the threshold. The first time a team exceeds the CBT threshold, the team must pay a twenty percent tax on the overage.¹⁵⁴ The second consecutive

¹⁴⁸ See Shaikin, *supra* note 69.

¹⁴⁹ See Richard A. Kaplan, Note, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1615 (2002). A team's payroll is calculated as the amount of money that a team pays its players in that season, with multi-year contracts and signing bonuses been evenly apportioned for each year of the contract; see Kristi Dosh, *Can Money Still Buy the Postseason in Major League Baseball?* DEN. U. SPORTS & ENT. L.J. 1, 20 (2007).

¹⁵⁰ See Ajilore & Hendrickson, *supra* note 92, at 3.

¹⁵¹ See Dan Messeloff, Note, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 562, (2000).

¹⁵² See Matt Mullarkey, *For the Love of the Game: A Historical Analysis and Defense of Final Offer of Arbitration in Major League Baseball*, 9 VA. SPORTS & ENT. L.J. 234, 241-42 (2010).

¹⁵³ See *Competitive Balance Tax*, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/glossary/transactions/competitive-balance-tax>, [https://perma.cc/6ZLL-8CUG] (on file with the Harvard Law School Library). The amounts are \$195 million for 2017; \$197 million for 2018; \$206 million for 2019; \$208 million for 2020; and \$210 million for 2021.

¹⁵⁴ *Id.*

year a team exceeds the threshold, it must pay a thirty percent tax on such overages, and fifty percent for every consecutive year thereafter.¹⁵⁵ However, a team can reset their penalty by dropping below the CBT threshold in a season.¹⁵⁶ In addition, the league assesses a twelve percent surtax if a team exceeds the CBT threshold by between \$20 million to \$40 million.¹⁵⁷ If a team exceeds the CBT threshold by more than \$40 million, MLB assesses a surtax of 42.5% for the first year it does so and by forty-five percent if it does so again the next year.¹⁵⁸

4. The Draft

Professional sports leagues also use their respective player drafts to promote competitive balance. To help distribute new player talent among their teams, leagues hold a draft for all players—amateur and/or international—seeking to enter the league.¹⁵⁹ In hopes of achieving competitive balance, leagues provide the best draft picks to those teams that were the least competitive the year before (i.e., had the worst records).¹⁶⁰ New players joining a professional sports league through the draft are inexpensive because of the rookie salaries and contracts that leagues prescribe.¹⁶¹ Therefore, those teams at the top of the draft have a better chance to obtain elite players with the built-in cost-control measures through each league's draft. The draft thus provides an avenue for a league's worst teams to improve more quickly—without needing to spend substantially to do so. It further promotes competitive balance because smaller-market teams cannot be outbid—financially or otherwise—by a large-market team for a player that they draft.¹⁶²

MLB has long held a draft for amateur players seeking to enter the league, and it has structured the draft in reverse order based on team's

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* There are also consequences related to a team's draft picks and status for exceeding the CBT threshold by \$40 million or more.

¹⁵⁹ See Michael Tannenbaum, *A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL*, 3 SPORTS L.J. 205, 205-06 (1996).

¹⁶⁰ See Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 573-74 (1997).

¹⁶¹ See Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 119-20 (2004).

¹⁶² See Yavner, *supra* note 56, at 307.

records the previous year.¹⁶³ In 2012, MLB also adopted “competitive balance draft picks” to further support both the teams from the smallest markets and/or those with the lowest revenues.¹⁶⁴ Eligible teams get to select an additional player in one of the special rounds held between the first and second rounds or the second and third rounds.¹⁶⁵ These teams also get additional international bonus pool money with which they can use to sign international players.¹⁶⁶ Finally, MLB provides for compensatory draft picks to teams that lose free agents to another team.¹⁶⁷ Not only does this approach provide disincentives to high-revenue teams to spend aggressively for free agents, it provides those teams losing elite free agents—perhaps because they cannot afford them—to gain back a draft pick that could well yield a very talented, cost-effective player.¹⁶⁸ Indeed, as data analytics have promoted cost-effectiveness within the league, teams now value these various draft picks highly—perhaps even more than free agents.¹⁶⁹ Through these various draft strategies, MLB seeks to promote competitive balance for its teams.

C. *Efficacy of MLB’s Competitive Balance Reforms*

In some ways, it is impossible to definitively say whether MLB’s competitive balance reforms were successful because it is an imperfect science to attempt to quantify fans’ feelings about the level of competition within a professional sports league. Moreover, any number of factors beyond those reforms adopted by MLB—and other professional sports leagues—can influence competitive balance in a way that makes it difficult to attribute success to particular policies. For example, technology, performance enhancing elements, field conditions, and rules of the game can impact competitiveness among teams.¹⁷⁰ Exceptional coaching, ownership, and front-office manage-

¹⁶³ See Nicholas A. Deming, *Drafting a Solution: Impact of the New Salary System on the First-Year Major League Baseball Amateur Draft*, 34 HASTINGS COMM. & ENT. L.J. 427, 438 (2012).

¹⁶⁴ See *Competitive Balance Draft Picks*, MLB.COM, <http://m.mlb.com/glossary/transactions/competitive-balance-draft-picks>, [https://perma.cc/4426-M5ZB] (on file with the Harvard Law School Library).

¹⁶⁵ See *id.* Moreover, the competitive balance draft picks—unlike the traditional draft picks in the amateur draft—can be traded by the teams that have them.

¹⁶⁶ See *id.*

¹⁶⁷ See Schottey, *supra* note 138.

¹⁶⁸ See *id.*

¹⁶⁹ See Davis, *supra* note 9.

¹⁷⁰ See Andrew S. Zimbalist, *Competitive Balance in Sports Leagues*, 3 J. SPORTS ECON. 111, 119 (2002).

ment can also positively influence a team's ability to win.¹⁷¹ In short, these various relevant factors and the difficulty in clearly defining the term "competitive balance" creates challenges for assessing the efficacy of the reforms aimed at achieving parity in MLB.

However, there are a number of data points which suggest that these reforms achieved the goals that then-Commissioner Selig set forth. For example, in the fifteen years following the Blue Ribbon Panel's report, all thirty MLB teams made the playoffs.¹⁷² This statistic is significant because fewer teams make the MLB playoffs each year—10 out of 30—than the other professional sports leagues (16 out of 30, 12 out of 32, and 16 out of the 30 make the playoffs in the NBA, NFL, and NHL, respectively).¹⁷³ In fact, since 2010, only four MLB teams have not made the playoffs.¹⁷⁴ Moreover, since the Blue Ribbon Panel's report, there have been twelve different World Series Champions and twenty different teams that were either National League or American League Champions.¹⁷⁵ Other evidence also suggests that the competitive balance reforms were successful. For example, in 2013, the teams in the top half of payrolls did not do any better than those in the bottom half.¹⁷⁶ Moreover, five playoff teams that year came from the former group, while the other five playoff teams came from the latter group.¹⁷⁷

On the other hand, some critics question whether these competitive balance reforms were as successful as some claim. For example, from 2004–2011, each World Series winner had a payroll in the top 10 in MLB.¹⁷⁸ Moreover, from 2004–2014, two teams—the Boston Red Sox and the San Francisco Giants—each won three World Series titles.¹⁷⁹ Indeed,

¹⁷¹ See *Competitive Balance in Pro Sports Leagues: How Does the NBA Look?*, *supra* note 91. For example, the "Moneyball" data analytics approach made popular by the Oakland A's demonstrated that a small-market team can find market inefficiencies and outperform competitors.

¹⁷² See Matt Snyder, *The NFL is a League of Parity, But So is Major League Baseball*, CBSSPORTS.COM, Jan. 23, 2016, <https://www.cbssports.com/mlb/news/the-nfl-is-a-league-of-parity-but-so-is-major-league-baseball/>, [<https://perma.cc/EX4W-NC7D>] (on file with the Harvard Law School Library).

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ *Id.*

¹⁷⁶ Yavner, *supra* note 56, at 310.

¹⁷⁷ *Id.*

¹⁷⁸ Reeves Wiedeman, *Is Parity Worth It?*, NEW YORKER, Sept. 28, 2012, <https://www.newyorker.com/news/sporting-scene/is-parity-worth-it>, [<https://perma.cc/HR9E-EZ24>] (on file with the Harvard Law School Library).

¹⁷⁹ Badenhausen, *supra* note 98.

one scholar noted that in his research, he did not find that any of the traditional measures to promote competitive balance—such as a salary cap or luxury tax—“had any statistically significant impact on balance in any of these [professional sports] leagues.”¹⁸⁰

D. *The Impact on Free Agents*

Irrespective of whether MLB’s competitive balance reforms achieved their desired goals, these policies seemed to have had a negative impact on the 2018 free agent market. Indeed, the effect of two of these reforms—revenue sharing and the CBT—provide insight into the anomalous 2018 free agent market. Revenue sharing was intended to provide more money to smaller-market teams with lower revenues so that they might expand their respective payrolls to compete with higher-revenue teams. MLB seems to imply this by stating in the MLB CBA, “[e]ach Club shall use its revenue-sharing receipts (including any distributions from the Commissioner’s Discretionary Fund) in an effort to improve its performance on the field.”¹⁸¹ In fact, the MLB CBA forbids using revenue sharing on a variety of team expenses, including servicing debt and tax obligations.¹⁸² If a team runs afoul of these restrictions, the MLB Commissioner can fine teams that improperly use these monies.¹⁸³ At the same time, the language quoted from the MLB CBA does not explicitly require teams to spend revenue-sharing money on their payroll to become more competitive.¹⁸⁴ This issue is the basis of the MLBPA’s grievance claiming that four teams were violating the MLB CBA by not spending the money gained through revenue sharing on enhancing

¹⁸⁰ See Gordon, *supra* note 38 (quoting Professor Dave Berri regarding his research on competitive balance); see also Mehra & Zuercher, *supra* note 114, at 1534–35 (citing several studies that did not find a relationship between competitive balance reforms and increased attendance); see also Vrooman, *supra* note 16, at 18 (arguing that the length of the MLB schedule—162 games, 81 of which are at home—“introduces considerable variance in attendance and high demand elasticity with respect to team quality”).

¹⁸¹ Sheryl Ring, *What the MLBPA’s Grievance Means*, FANGRAPHS.COM Feb. 28, 2018, <https://www.fangraphs.com/blogs/what-the-mlbpas-grievance-means/>, [https://perma.cc/RX8H-XZJ7] (on file with the Harvard Law School Library).

¹⁸² See *id.*

¹⁸³ *Players’ Union Raise Concerns with MLB on Pirates’ Use of Revenue-Sharing Income but MLB Sees No Wrongdoing*, PITTSBURGH POST-GAZETTE, Jan. 26, 2018, <http://www.post-gazette.com/sports/pirates/2018/01/26/MLB-players-union-mlbpa-investigation-revenue-sharing-income-Andrew-McCutchen-Gerrit-Cole/stories/201801260119>, [https://perma.cc/Q33R-MGAE] (on file with the Harvard Law School Library).

¹⁸⁴ See *id.*

their rosters.¹⁸⁵ In all events, without an express requirement to dedicate revenue-sharing money to payroll, teams receiving such monies seem to have prioritized profitability over spending more on free agents to make their teams more competitive.

This result may be due, in part, to how revenue sharing may influence teams in valuing players in the free agent marketplace. Some economists argue that redistributing revenue lessens the value of non-elite players, providing an incentive for owners to keep more of the shared money as profit rather than spend it on free agent players.¹⁸⁶ One study projected that revenue sharing reduced players' salaries by more than twenty percent.¹⁸⁷ This analysis comports with Professor Rodney Fort's theory that revenue sharing causes winning to become less valuable to teams, thus making players less valuable.¹⁸⁸ With winning becoming less valuable, it is unsurprising, then, that teams would not use money obtained through revenue sharing to increase their respective payrolls. Indeed, as one commentator noted, "[t]here has never been a time in baseball history when a team. . .got more money just for existing than it does today. The whole risk-reward scale has been skewed because of [revenue sharing]. . .Revenue sharing has hurt competitive balance by guaranteeing profitability irrespective of on-field success."¹⁸⁹

MLB's CBT has had a similar impact on team spending and thus the lack of a robust free agent market. While MLB revenues have continued to rise at an impressive rate, the CBT threshold has not followed proportionally.¹⁹⁰ For example, at \$197 million, the 2018 CBT threshold is just four percent more than it was four years ago.¹⁹¹ In fact, in the last ten years, the CBT threshold has increased by less than half (32%) of the growth in league revenues (67%).¹⁹² This phenomenon slows the growth of team payroll—lagging behind the league's overall economic growth—because of the CBT penalties imposed on teams exceeding that threshold. In this regard, the harsh CBT penalties have begun to create somewhat of a ceiling effect with regard to the luxury tax threshold.¹⁹³ Teams have a strong disincentive to

¹⁸⁵ See Ring, *supra* note 181.

¹⁸⁶ See Rodney Fort, *Competitive Balance in the NFL*, THE ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE 1, 216-17 (Kevin G. Quinn, ed. 2012).

¹⁸⁷ See Gordon, *supra* note 38 (citing to a study by John Solow and Anthony Krautmann).

¹⁸⁸ See *id.* (citing to a study by Rodney Fort).

¹⁸⁹ See Jaffe, *supra* note 18 (quoting Sports Illustrated writer Joe Sheehan).

¹⁹⁰ See *id.*; see also *Competitive Balance Tax*, *supra* note 153.

¹⁹¹ See *id.* (finding that penalties for offenders has increased during this same time); see also Verducci, *supra* note 17.

¹⁹² See Verducci, *supra* note 17.

¹⁹³ See *id.*

spend above this amount—either in a particular year and certainly any number of years in a row—thus depressing the market for free agents. Moreover, the significant penalties for repeat offenders have driven teams with high payrolls to reset their CBT penalties.¹⁹⁴ These penalties have thus helped create more salary compression among teams—at least over a period of a few years—which may also help explain some of the changes in free agency experienced in 2018.

The CBT threshold serving as a payroll ceiling dovetails with the revenue sharing phenomenon described above in a manner that impinges on the free agent market. If owners are profit maximizers, a luxury tax like the CBT will not primarily drive competitive balance but rather reduce team expenditures and increase profits.¹⁹⁵ In effectively limiting the amount a team can spend on its payroll, the CBT minimizes salary competition for players across the league, as the threshold keeps down costs driven by market and competitive inflation.¹⁹⁶ In this regard, if team owners prioritize profit maximization over winning—or only prioritize winning once profitable—the CBT and revenue sharing may well not lead to the competitive balance that it seeks to achieve.¹⁹⁷ This analysis seems consistent with one theory regarding these competitive balance reforms: they may be aimed more at controlling owners' payroll costs than at league parity.¹⁹⁸ One critic referred to the competitive balance narrative as a myth and stated that the term is “just a PR argument to try and hold down labor costs.”¹⁹⁹ Another commentator noted that one never hears the competitive balance argument applied to the National Collegiate Athletic Association because the costs for players is negligible (scholarships to cover tuition and some modest sti-

¹⁹⁴ See *id.* When these teams—like the Los Angeles Dodgers and the New York Yankees—cut their payroll to reset their CBT penalties, they also almost always take themselves out of the free agent market for that year, which could also explain, in part, why the 2018 free agent market was not more robust; see Brown, *As Free Agents Languish*, *supra* note 143.

¹⁹⁵ See Totty & Owens, *supra* note 85, at 47-48.

¹⁹⁶ See *id.*, at 48.

¹⁹⁷ See *id.*, at 47.

¹⁹⁸ See David Berri, *Major League Baseball is Less Competitive Than We Think*, TIME.COM, Oct. 7, 2014, <http://time.com/3479205/major-league-baseball-bud-selig-competitive-balance/>, [https://perma.cc/BTC5-E9RP] (on file with the Harvard Law School Library); see also Gordon, *supra* note 38 (noting that one scholar's work found that revenue sharing would create a scenario where winning was less valuable and thus labor costs would become less valuable for teams as well).

¹⁹⁹ See Gordon, *supra* note 38 (quoting sports economist J.C. Bradbury). A similar argument regarding the need for competitive balance was made to defend the reserve clause in MLB—which many also saw as a means to controlling labor costs; see *id.*

pend).²⁰⁰ Indeed, this theory may not be far-fetched: the MLB Blue Ribbon Panel linked the league's lack of competitiveness to the need to control team's payrolls.²⁰¹ Regardless, whether intended or not, the competitive balance reforms have seemed to negatively impact free agent contracts sufficiently so that they loom large for the next MLB collective bargaining negotiations.

V. CONCLUSION

MLB totaled more than \$10 billion in revenue last year,²⁰² and players are receiving roughly fifty percent of the league's revenue.²⁰³ So why was there such a meager free agent market in 2018? As this article shows, the answer is not as straightforward as some commentators think. A weak free agent class—with a strong free agent class looming a year later—probably played a role. After all, teams will not necessarily overpay for player productivity just because stronger players are not available in the market. Moreover, given the potential CBT penalties—and consistent with general budget planning—teams will plan their roster and payroll over a several-year horizon. The rise of data analytics no doubt played a role in this past offseason as well. Teams have become much more sophisticated in valuing player productivity and projecting future performance and its worth. Gone are the days of teams overpaying star players with long-term, nine-figure contracts that reward the player for past performance. Such contracts are widely disfavored today because of too many examples of them being budgetary albatrosses in the middle of the contract. Teams have become more cost-effective at finding the balance of productivity and cost. It is hard to argue that this analytics movement in MLB has not caused a structural shift in how teams approach long-term contracts—particularly lucrative ones—and, in particular, free agents.

This factor also has coincided with another rising trend: the tanking phenomenon. The number of teams that may be tanking this season is not a robust enough sample size to definitively say that tanking influenced the 2018 free agency period. But the strategy of rebuilding a team by shedding payroll and building back up through high draft picks is undeniably in vogue in MLB. Given that the last three World Series Champions followed

²⁰⁰ See Gordon, *supra* note 38.

²⁰¹ See Mehra & Zuercher, *supra* note 114, at 1513.

²⁰² See Schiffman, *supra* note 4. Team owners have seen additional gains as well with franchise values having increased from \$18.1 billion to \$46.1 billion since 2013; see Passan, *supra* note 10.

²⁰³ See Lindbergh, *Baseball's Economics*, *supra* note 8.

this strategy, it is hard to begrudge teams that follow their examples. However, as more teams rebuild, fewer teams are likely to be active in free agency. One might think that a team losing—and badly, for a while—would negatively impact fan interest, attendance, and revenue. But that has largely not been the case. In fact, with dreams of a championship, fans seem more than willing to continue to support their teams treating “competitiveness as an option, not a priority.”²⁰⁴ Perhaps such fan loyalty has exacerbated the historical tension for team owners between prioritizing winning versus profitability. If a team is not in a position to compete for a championship, one can see how a team owner may decide to cut payroll and become more profitable during that rebuilding period—particularly if the fan base will support it.

But there is more to understanding the changes in MLB that led to the 2018 free agent market. The competitive balance reforms that the MLBPA and the team owners negotiated into the MLB CBA also likely contributed to this shift. Over the past fifteen years, MLB has made significant strides in revenue sharing through the MLB CBA. MLB teams share more revenue now than ever before in the league’s history. It would be understandable for the MLBPA to believe that with more robust revenue sharing, more teams would spend actively in free agency. That did not occur in the 2018 off-season. Data analytics, the tanking phenomenon, and team owners prioritizing greater profits when they were not competing for a championship led to the revenue sharing money improving team’s profitability instead. Another unintended consequence, at least from the players’ perspective, was that the CBT threshold and penalties may have chilled the 2018 free agent market. With the CBT threshold growing at a slower rate than overall revenue, and with the severe penalties for teams exceeding the CBT threshold—particularly for multiple years in a row—the CBT threshold has become close to a hard salary cap. Teams have thus been careful in managing their payroll and more conservative in their spending to avoid those penalties. The consequence, at least in part, may be less spending in free agency as seen in 2018.

The challenge in both of these circumstances is that the MLBPA collectively bargained—and agreed to—these MLB CBA terms.²⁰⁵ There are

²⁰⁴ Passan, *supra* note 10.

²⁰⁵ The MLBPA has been criticized for focusing more on leisure and quality of life matters for its players rather than on economic and compensation issues; see Verducci, *supra* note 17. For example, the MLBPA pushed for—and got the owners to agree to—clubhouse chefs, team sports psychologists, and added seats on buses used in spring training; see also Brown, *Breaking Down*, *supra* note 134. While these player perks are valuable and probably even needed, they pale in comparison to the real monetary concessions that the MLBPA made to the owners—such as a slow-

limited legal options for the MLPBA given this fact. For example, there is no unintended consequences provision that allows the MLBPA to renegotiate those terms. The team owners may have sought these provisions as a means of keeping their labor costs down—as opposed to, or at least in addition to, for purposes of competitive balance—but the reality remains the same: these free-agent-market-depressing terms of the MLB CBA will be in place through 2021. If the 2019 free agent market mirrors this past off-season, the MLBPA may face a lot of discontent from its player members. Indeed, players may well be so unhappy with baseball’s seemingly changed economic structure that they might strike when the 2021 MLB CBA expires. Such a labor disruption would end what will then be a more than twenty-five-year period of labor peace, which many point to as the reason for the unprecedented economic growth that MLB has experienced during that time. The next few free agent markets will be telling in terms of whether 2018 was an anomaly or it represents a new normal for baseball.

growth CBT threshold coupled with punitive luxury tax penalties—even if they were made with competitive balance in mind. The MLBPA may have mistakenly assumed team free agent spending would continue based on the historical—but outdated—model that seems to no longer reflect how the league functions.