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IN PURSUIT OF COMPETITIVE BALANCE OR PAYROLL RELIEF?

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INTRODUCTION

The term "competitive balance" may be one of the most commonly used—and emphatically stressed—phrases in sports. Indeed, professional sports league commissioners invoke it with great regularity to underscore the importance they place on its underlying value: that for the health, longevity, and growth of the league, teams must have a realistic chance—season-to-season or over another period of time—to be a winning team and ultimately compete in the playoffs and for a championship.[1] As former Major League Baseball Commissioner Bud Selig stated, "every fan has to have hope and faith. If you remove hope and faith from the mind of a fan, you destroy the fabric of the sport."[2] Perhaps even more important than this, the argument goes, is the necessity for teams to be competitive so that fans stay engaged, the various revenues of the sport remain robust, and the interest in the league deepens and grows.[3] The fear is that large-market teams have substantially higher revenues than small and mid-market franchises that would otherwise allow them to have exponentially higher payrolls that

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[1] Matthew J. Parlow, *Hope and Faith: The Summer of Scott Boras's Discontent*, 10 HARV. J. SPORTS & ENT. 85, 100–04 (2019) (hereinafter "Parlow, *Hope and Faith*").

[2] 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.

[3] Dan Markel, Michael McCann & Howard M. Wasserman, *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1, 26 (2015).

would enable them to hoard the best players.[4] In turn, these big-market super teams would then dominate both the regular season and playoffs, leading to almost predetermined outcomes game-to-game and season-to-season.[5] Fans would thus lose interest in these lopsided contests—and thus the leagues—because only a few franchises had the real ability to win most games and, ultimately, the championship.[6]

Part of what makes sports so compelling to so many of us is the uncertainty of the outcome of a particular sporting event and the playoff and championship contests.[7] Consequently, many argue that a professional sports league that has the likelihood of winning being concentrated in a few larger-market teams significantly limits the sports' appeal to fans and the general public.[8] In fact, some commentators have contended that such competitive disparity could actually spell doom for a sports league over time.[9] To avoid either fate, professional sports leagues have placed a great emphasis on competitive balance over the past fifty years. In particular, leagues such as Major League Baseball (MLB), the National Basketball Association (NBA), and the National Football League (NFL)[10], have implemented a variety of reforms—most, though not all, through the process of collective bargaining with their respective players' unions—aimed at achieving greater parity within their leagues. These have come in the form of revenue sharing, salary caps, luxury taxes, changes to the amateur draft, limitations to rookie and veteran contracts, and free agency reforms.[11]

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[4] Richard A. Kaplan, *The NBA Luxury Tax: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1615 n.2 (2004).

[5] *See id.*

[6] Kevin E. Martens, *Fair or Foul? The Survival of Small-Market Teams in Major League Baseball*, 4 MARQ. SPORTS L.J. 323, 362 (1994).

[7] Ian A. McLin, *Going, Going, Public? Taking a United States Professional Sports League Public*, 8 WM. & MARY BUS. L. REV. 545, 561 (2017).

[8] *See* Martens, *supra* note 6, at 362.

[9] *See id.*

[10] While there are other professional sports leagues, this article limits its analysis to the three largest revenue-grossing—and most popular sports leagues—in the United States.

[11] *See* Parlow, *Hope and Faith*, *supra* note 1, at 105–11.

This value of competitive balance in sports has been deemed so important that courts have not only recognized it, they have created special legal protections for professional sports leagues to implement such reforms—in particular, exempting certain actions from antitrust scrutiny.[12] Courts have reasoned that competitive balance was so necessary to the economic health and long-term viability of professional sports leagues that certain parity-seeking reforms—despite otherwise violating antitrust laws—were permissible.[13] In this regard, not only have professional sports leagues identified—and proselytized regarding—the value of competitive balance, but they have received special legal recognition by the courts for pursuing it. Given this long-standing narrative and the judicial validity given to it, an observer could easily conclude that professional sports leagues are animated by the goal of competitive balance among its teams and pursue it doggedly and in earnest.

Yet a deeper look into this topic reveals some questions regarding professional sports leagues' motivations for implementing these competitive balance reforms. Have the results of these competitive balance reforms led to greater parity in the NFL, NBA, and MLB? Are team owners more interested in winning or profit maximization? Are the competitive balance reforms geared more towards winning or limiting team owners' payrolls (and thus costs)?

This article seeks to sort through the competitive balance landscape and analyze these questions through legal, business, and policy lenses. Part I explores the concept of competitive balance, the interest of professional sports leagues (in particular, the team owners) in minimizing their costs through payroll constraints, and how collective bargaining plays an integral role in the law and business of professional sports. Part II details the various competitive balance reforms that the NBA, NFL, and MLB have adopted in the past two decades. Part III will delve into the questions of how competitively balanced professional sports leagues are and analyzes market forces such as tanking and the rise of data analytics and their impact on the pursuit of parity. The conclusion provides some reflections on the tension between winning and profit maximization in light of these various

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[12] Michael H. LeRoy, *The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining*, 86 TUL. L. REV. 859, 873 (2012).

[13] *See, e.g.*, United States v. Nat'l Football League, 116 F.Supp. 319, 323 (E.D. Pa. 1953).

competitive balance reforms and their impact on league parity and players' share of growing league revenues.

I. COMPETITIVE BALANCE, COST MINIMIZATION, AND COLLECTIVE BARGAINING

A. COMPETITIVE BALANCE

While MLB's Blue Ribbon Panel brought competitive balance to the forefront of the professional sports conversation in 2000,[14] the concept dates back to at least the 1920s when the New York Yankees' dominance of MLB caused attendance problems that threatened the sport.[15] Despite its prevalence in sports parlance for nearly one hundred years, the definition of competitive balance is somewhat more elusive. One way to envision competitive balance is a state where there is not a significant talent and performance gap between the top and bottom teams in a professional sports league.[16] In other words, the best teams would not be substantially better than the worst teams in the league.[17] In a league with greater parity, the teams would be sufficiently well-matched to where the outcome of games was unpredictable on any given day or night.[18] This "uncertainty of

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[14] RICHARD C. LEVIN ET AL., THE REPORT OF THE INDEPENDENT MEMBERS OF THE COMMISSIONER'S BLUE RIBBON PANEL ON BASEBALL ECONOMICS 1, 1–5 (2000), *available at* http://mlb.mlb.com/mlb/news/mitchell/index.jsp.

[15] Daniel A. Rascher, *Competitive Balance: On the Field and In the Courts*, SPORTS ADVISORY GROUP, http://www.thesportsadvisorygroup.com/resource-library/business-of-sports/competitive-balance-on-the-field-and-in-the-courts/ (last visited April 21, 2020).

[16] Matt D. Pautler, *The Relationship Between Competitive Balance and Revenue in America's Two Largest Sports Leagues*, CMC SENIOR THESES, PAPER 86 (2010), *available at* http://scholarship.claremont.edu/cmc_theses/86/.

[17] Michael Lopez, *Exploring Consistency in Professional Sports: How the NFL's Parity is Somewhat of a Hoax*, SLOAN SPORTS CONFERENCE, http://www.sloansportsconference.com/mit_news/exploring-consistency-in-professional-sports-how-the-nfls-parity-is-somewhat-of-a-hoax/ (last visited April 21, 2020).

[18] *See* Paulter, *supra* note 16, at 4–5.

outcome" hypothesis[19] rests on the notion that fans' interest will be greater the more uncertain the outcome of the game (or season) is.[20] In short, fans do not want games to be fixed or anything close to it.[21] Moreover, a competitively-balanced league is one where no team or two would dominate the regular season and playoffs year after year.[22] Rather, as NFL Commissioner Roger Goodell noted, competitive balance exists "[w]hen you come into a season, [and] every fan thinks that their football team has a chance to win the Super Bowl."[23]

Indeed, many professional sports league commissioners view parity among teams in their respective leagues as one of their key responsibilities[24] because of the broadly-held perception that the more competitive balance there is in a league, the higher the attendance and the greater the interest will be in the sport.[25] Relatedly, many believe that improved competitive balance also leads to increased revenue and financial success of the sport.[26] It is unsurprising, then, that one scholar urged that "competitive balance should be viewed as a level of competitiveness and uncertainty of outcome sufficient to increase or optimize the fan appeal of a sports league."[27] Indeed, there are several studies that seem to confirm this conventional wisdom: that is, that competitive balance within a league led to an increase in attendance while less parity within a league resulted in lower

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[19] R. Alan Bowman, James Lambrimonos & Thomas Ashman, *Competitive Balance in the Eyes of the Sports Fan: Prospective Measures Using Point Spreads in the NFL and NBA*, 14 J. SPORTS ECON. 498, 517 (2012).

[20] Travis Lee, *Competitive Balance in the National Football League After the 1993 Collective Bargaining Agreement*, 11 J. SPORTS ECON. 77, 78 (2010).

[21] Aaron Gordon, *The Myth of Competitive Balance*, SPORTS ON EARTH (Aug. 8, 2013), http://www.sportsonearth.com/article/56193798.

[22] *See id.*

[23] *See* Lopez, *supra* note 17.

[24] John Urschel, *The Parity Ideal*, THE PLAYERS' TRIBUNE (Jan. 4, 2016), https://www.theplayerstribune.com/en-us/articles/john-urschel-ravens-parity-ideal.

[25] *See* Bowman et al., *supra* note 19, at 499.

[26] *See* Gordon, *supra* note 21.

[27] James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 525 (2011).

attendance.[28] Professional sports leagues thus seek to create greater parity to avoid periods of time like the Boston Celtics in the 1960s—when the team won ten NBA titles from 1959-1969—and the New York Yankees in the 1920s (when the team so dominated MLB that the league experienced serious attendance problems) that disrupted each sport.[29] The more competitively balanced the teams in a league, the greater fan interest, attendance, and revenues should be.[30]

Despite the importance placed on the concept, courts, industry professionals, scholars, and commentators alike all struggle to define competitive balance in order to gauge and assess a league's parity. For example, one court wrote the following definition: "[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."[31] In 2000, the MLB Blue Ribbon Commission similarly focused on the post-season by defining

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[28] *See* Martin B. Schmidt & David J. Berri, *Competitive Balance and Attendance: The Case of Major League Baseball*, 2 J. SPORTS ECON. 145, 146–57 (2001) (noting the correlation between greater competitive balance and higher attendance and less parity and lower attendance); Edwin Woodrow Eckard, *Baseball's Blue Ribbon Economic Report: Solutions in Search of a Problem*, 2 J. SPORTS ECON. 213 (2001) (explaining that while attendance increased as a team approached competing for a championship, attendance actually decreased for each additional year that the team contended for the title); JAMES QUIRK & RODNEY D. FORT, PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS 1 (1992) (finding that during the time that the Cleveland Browns consistently won conference championships and titles in the NFL, their attendance decreased due to lack of parity in the league).

[29] *See* Josh Weinstein, *Can the NBA's Competitive Balance Issue Be Fixed?*, LAST WORD ON SPORTS (April 11, 2017), https://lastwordonsports.com/2017/04/11/can-nbas-competitive-balance-issue-fixed/.

[30] P. Dorian Owen & Nicholas King, *Competitive Balance Measures in Sports Leagues: The Effects of Variation in Season Length*, 53 ECON. INQUIRY 731, 731 (2015).

[31] Smith v. Pro-Football, 420 F. Supp. 738, 745 (D.C. Cir. 1976).

competitive balance as a "regularly recurring hope of reaching postseason play."[32] One commentator defined competitive balance as either one team being able to beat another team at any given time or the possibility of any team winning the championship.[33] Another writer described just some of the ways in which one could view competitive balance: specifically, the number of different teams winning a championship; advancing deep in the playoffs; losing perpetually; or sustaining winning records for years.[34]

Economists and other scholars, on the other hand, have attempted to quantify competitive balance through various metrics in order to judge a league's success in achieving it. Many economists focus on the standard deviation of winning percentage for teams as an accurate measure of a league's competitive balance.[35] Economists seem to prefer a regular-season focus because playoffs—particularly in the case of the NFL where it is a one game contest where the losing team is eliminated—are not as statistically reliable.[36] While no single definition prevails, one scholar's description seems to capture the general sentiment: "The 'optimal' level of competitive balance probably does not require that each team be 'competitive' every year—provided that each team has a reasonable probability of winning in the foreseeable future."[37]

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[32] Olugbenga Ajilore & Joshua Hendrickson, The Impact of the Luxury Tax on Competitive Balance in Major League Baseball 1-3 (2011) (unpublished manuscript), *available at* https://works.bepress.com/gajilore/11/.

[33] *How Does Parity Compare Among the Major U.S. Sports Leagues?*, FORBES (Mar. 13, 2012), https://www.forbes.com/sites/quora/2012/03/13/how-does-parity-compare-among-the-major-u-s-sports-nfl-nba-mlb-nhl-college-football-college-basketball/#67800034cedd.

[34] *Competitive Balance in Pro Sports Leagues: how does the NBA look?*, 82 GAMES, http://www.82games.com/balance.htm (last visited April 21, 2020).

[35] *See* Evan S. Totty & Mark F. Owens, *Salary Caps and Competitive Balance in Professional Sports Leagues*, 11 J. FOR ECON. EDUC. 46, 49 (2011); *see also* Andrew Zimbalist, *Competitive Balance in Sports Leagues: An Introduction*, 3 J. SPORTS ECON. 111, 112 (2002).

[36] *See* David Berri, *Major League Baseball Is Less Competitive Than We Think*, TIME USA (Oct. 7, 2014), http://time.com/3479205/major-league-baseball-bud-selig-competitive-balance/.

[37] McKeown, *supra* note 27, at 526.

This push—perhaps even obsession—with competitive balance is rather unique to professional sports.[38] Traditionally, businesses seek to eliminate their competition from the marketplace and create a competitive imbalance so as to reap the rewards of their market dominance.[39] The structure of professional sports are such that individual teams need one another—indeed, need the competition—in order to be profitable and, in all likelihood, to exist.[40] To this end, teams must cooperate with one another—through the centralized league office—to facilitate the on-field product.[41] In this regard, professional sports leagues are joint ventures where teams have a duty to one another and the entire sport to work together to grow and sustain the sport.[42] While some of the collective, centralized work focuses on logistics like scheduling, more normative values such as competitive balance play a key role in the success and operation of a professional sports league.[43] Therefore, though teams compete on the field or court in the games, the business side of the sport necessitates a collaborative approach for its success.[44]

The importance of competitive balance has been recognized by courts in a variety of ways. For example, while rejecting the NFL's argument that it is a single entity, the United States Supreme Court in *American Needle v. National Football League* stated that competitive balance is "unquestionably an interest that may well justify a variety of collective decisions made by the teams."[45] In *Toolson v. New York Yankees*, the United

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[38] *See* Yong-zhen Cao, *Competitive Balance of Professional Sports Leagues—A Case Study on NBA*, IEEE XPLORE (2010), https://ieeexplore.ieee.org/document/5660323/.

[39] *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, 42 (2002).

[40] *See* Henry H. Perritt, Jr., *Competitive Entertainment: Implications of the NFL Lockout Litigation for Sports, Theatre, Music, and Video Entertainment*, 35 HASTINGS COMM. & ENT. L.J. 95, 108 (2012).

[41] *See* Rascher, *supra* note 15.

[42] *See id.*

[43] *See* McKeown, *supra* note 27, at 526–27.

[44] *See* Cao, *supra* note 38, at 1.

[45] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010); *see also* NCAA v. Board of Regents, 468 U.S. 85 (1985)

States Supreme Court upheld baseball's reserve clause, noting the importance of centralized league coordination and decision-making in order to field the sporting events that the public desired.[46] In *National Basketball Association v. Williams*, the court upheld various restraints on trade implemented by the NBA because while such actions may have other violated antitrust laws, the effectiveness of the salary cap in helping create competitive balance outweighed the anticompetitive effects of these restraints.[47] Perhaps it is unsurprising then that some scholars have advocated for an antitrust exemption for professional sports leagues because of their anomalous business model.[48] While courts have been unwilling to recognize such a blanket exemption, there is no doubt that courts have provided preferential treatment to teams working collectively in furtherance of competitive balance.

B. MINIMIZING PAYROLL COSTS

Professional sports teams are all private businesses, with the exception of the NFL's Green Bay Packers.[49] Accordingly, owners run their team businesses with a profit-maximizing motive that one would expect to find with any other business.[50] One side of the profit-maximization equation is increasing and optimizing revenues. Teams do this by fielding a competitive product on the field or court and strategically growing revenue in the various ways in which money flows into their sport, including ticket sales, concessions, merchandise, television and radio deals, and marketing and sponsorship agreements.[51] In addition, like other private businesses, professional sports teams seek to limit their

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(justifying various restraints on trade on the basis of the need for competitive balance).

[46] *See* Toolson v. N.Y. Yankees, 346 U.S. 356 (1953).

[47] *See* Nat'l Basketball Ass'n v. Williams, 857 F.Supp. 1069, 1079 (S.D.N.Y. 1994).

[48] *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).

[49] *See* Matthew J. Parlow & Anne-Louise Mittal, *Are the Green Bay Packers Socialists?*, 14 VA. SPORTS & ENT. L.J. 143, 144–46 (2015).

[50] *See* McKeown, *supra* note 27, at 521.

[51] *See* Jeremy M. Evans, *We Have Come Full Circle: Where Sports Franchises Derive Their Revenue*, 33 SUM ENT. & SPORTS L.J. 12, 14 (2017).

costs to help maximize their profits.[52] Indeed, particularly over the past few decades, businesses generally have sought to cut or cap labor costs to remain competitive in the marketplace and thus generate more robust profits.[53]

For most private-sector employers, there are a variety of tools and approaches that they can implement in order to cut or minimize labor costs. For example, employers can reduce the number of hours an employee works per week, cut employee pay rates, and reduce or eliminate various employee benefits in order to cut labor costs.[54] Moreover, employers can change the relationship with their employees to avoid various government-required costs, such as workers' compensation, social security, and unemployment insurance.[55] Employers effect this approach by hiring workers as independent contractors rather than as employees or by hiring employees as part-time workers to minimize or eliminate some of the regulatory costs that would otherwise apply to full-time employees.[56] In short, employers—whether they be professional sports teams or any other private business—seek to reduce their labor costs in order to help maximize profits.

As detailed below in Part II, professional sports leagues have implemented a variety of reforms—purportedly aimed at competitive balance—that have the effect of minimizing labor costs. These cost-control and competitive balance measures come in the form of revenue sharing, salary caps, luxury taxes, amateur drafts (and the rookie contracts that flow from them), limits and restrictions to player free agency, and other contractual limitations placed on player contracts. However, because the players in the NFL, NBA, and MLB are unionized, these types of policies that impact the employment relationship between the league and teams on one side and the players on the other must be collectively bargained.[57] In this regard, players' unions—like other private-sector unions—have a voice through collective bargaining in labor

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[52] *See* Perritt, Jr., *supra* note 40, at 159.

[53] *See* Stephen Plass, *Wage Compression as a Democratic Ideal*, 25 CORNELL J.L. & PUB. POL'Y 601, 611 (2016).

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *See* Parlow, *Hope and Faith*, *supra* note 1, at 98.

cost reductions through concession bargaining.[58] Such labor cost reductions are common even when a business has healthy and increasing profits and their position in the marketplace vis-à-vis competitors is relatively secure—as is the case with professional sports leagues and teams—because of the profit-maximizing focus that private businesses pursue.[59]

C. THE ROLE OF COLLECTIVE BARGAINING

Whether for competitive balance or labor cost control purposes (or both), league regulations related to issues like salary caps, free agency, luxury taxes, revenue sharing, and the like must be negotiated between the league and their respective players' union through the collective bargaining process.[60] A collective bargaining agreement ("CBA") provides professional sports leagues with an additional special legal status for running their business and sport. When this special status for these CBAs are combined with the unique legal protections provided by courts, professional sports leagues have an inimitable legal and business space within which to operate, so long as they reach agreement with the players' union on the terms and conditions of employment for players and the related policies governing the sport.

While extremely powerful once implemented,[61] CBAs must be negotiated between management (the commissioner's office working on behalf of the owners) and employees (the players who are represented by their players' union).[62] CBAs cover a variety of operational, employment, and business-related

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[58] *See* Plass, *supra* note 53, at 612–13.

[59] *Id.*

[60] *See* Brad R. Humphreys & Hyunwoong Pyun, *Monopsony in Professional Sport: Evidence from Major League Baseball Position Players, 2000-2011*, 38 MANAGE. DECIS. ECON. 676, 678 (2016).

[61] Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 192 (2008) (referring to CBAs as "the supreme governing authority" of labor matters between professional sports leagues, teams and their players).

[62] *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).

functions of a professional sports league.[63] These negotiations are done pursuant to the National Labor Relations Act.[64] Required topics for negotiation between the league and players' union are certain terms and conditions of employment, such as wages, salaries, hours, and other related working conditions.[65] In addition, the two sides often also negotiate on broader league economic policies that could impact player salaries: revenue sharing, luxury taxes, and the like.[66] Labor law requires that both sides negotiate these terms and conditions of employment in good faith and through arms-length negotiations.[67] This requirement is based on the underlying theory of the collective bargaining process: that both sides negotiated freely—and not under duress or false pretenses—and that the terms to which both sides agreed are acceptable to both.[68] Given the great judicial deference given to the terms and conditions of a CBA, this labor law requirement for good faith and arms-length negotiations makes even greater sense.[69]

It is hard to overstate the special and impactful legal protection that CBAs receive from the courts: namely an

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[63] *See* Brendan H. Ewing, Comment, *MLS Promotion! Can MLS's Single Entity Protect it from "Pro/Rel"?*, 25 JEFFREY S. MOORAD SPORTS L.J. 359, 381 (2018).

[64] 29 U.S.C. § 151–169. *See also* Am. League of Prof'l 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).

[65] *See* Cody McElroy, *Take a Knee: Speech Considerations in the NFL*, THE CIVILIAN (Oct. 5, 2016), https://sites.law.lsu.edu/civilian/2016/10/take-a-knee-speech-considerations-in-the-nfl/.

[66] *See* Marc J. Coghlan, *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).

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

[68] *See* Ryan Probasco, *Revisiting the Service Time Quandary: Does Service Time Manipulation of Minor League Baseball Players Violate MLB's Collective Bargaining Agreement?*, 15 DEPAUL J. SPORTS L. 1, 12 (2019).

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

exemption to most antitrust laws.[70] The various competitive balance rules and policies—described further below in Part II—would ordinarily violate antitrust laws as they are unreasonable restraints on trade.[71] In fact, the collective work of the team owners together would alone almost certainly violate antitrust laws without the CBA protection.[72] Yet because these otherwise violative terms and conditions of employment are negotiated and agreed to as part of the collective bargaining process, they are insulated from antitrust laws. Given the special status that labor law provides for CBAs, courts are often vigilant in ensuring that both sides—the league/owners and the players—adhere to the terms to which they agreed. In this regard, the collective bargaining process places a premium on the importance for both sides to know what issues matter most to them, negotiate them into the CBA as best they can, and be willing to live with the results of the CBA for the entire term of the agreement.

II. COMPETITIVE BALANCE REFORMS

Armed with the special legal protections provided by labor law, the NBA, NFL, and MLB have pursued various competitive balance reforms that have been adopted through the collective bargaining process. These include revenue sharing, salary caps, luxury taxes, amateur drafts, rookie contracts, various contract limitations, and restrictions to player free agency. While some of these reforms have shown some modest progress in terms of helping a league achieve greater parity among its teams, most of these policies have failed to achieve the stated goals of competitive balance. However, many of them have succeeded in creating greater revenue streams for team owners, reducing or limiting their payroll costs, and thus fulfilling their profit-maximizing motivation.

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[70] *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).

[71] *See* John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705–06 (1977).

[72] *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.

A. Revenue Sharing

Professional sports leagues have adopted revenue sharing policies to help address the competitive imbalance issues that each had historically faced.[73] The intent of revenue sharing is to redistribute some league revenues so there is not such a great gap in resources between larger- and smaller-market teams.[74] By redistributing such revenue, small- to mid-market franchises should, in theory, have more money to spend on payroll and thus field a more competitive team.[75] All three professional sports leagues share revenue by pooling—and then redistributing—money from similar areas of league activity: national broadcasting contracts,[76] intellectual property rights, and league-wide sponsorships.[77] These revenues are generally divided equally among teams, even though larger-market teams bring greater value to each category of these centralized revenue streams.[78] While most local revenue—such as ticket sales, concessions, local

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[73] *See* Nicholas A. Jolly, *Revenue Sharing and Within-Team Payroll Inequality in Major League Baseball*, 22 Applied Econ. Letters 80, 81 (2015).

[74] *See id.* at 81.

[75] *See* Derek Thompson, *Why American Sports Are Socialist*, The Atlantic (June 20, 2016), https://www.theatlantic.com/business/archive/2016/06/why-american-sports-are-socialist/487640/.

[76] *See* Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, Sporting News (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. National television deals are often incredibly lucrative for leagues and thus comprise a significant portion of revenue sharing in the NBA, NFL, and MLB. For example, the NBA's nine-year national broadcasting rights agreement with ESPN and Turner Sports is worth $24 billion. Brandon S. Ross, *The NBA's New Media Rights Deal: A Look Into the Multi-Billion Dollar Cause of What May Become the Next NBA Lockout*, 37 Hofstra Lab. & Emp. L.J. 291, 291 (2016). MLB's national television contract is worth $4 billion over eight years. *See* Evans, *supra* note 51, at 12.

[77] *See* Scott Bukstein, *Preparing for Another Round of Collective Bargaining in the National Basketball Association*, 22 Jeffrey S. Moorad Sports L.J. 373, 377–78 (2015).

[78] *See* Bloom, *supra* note 76.

television and radio contracts, team sponsorships, and the like—are usually retained by the team,[79] there are distinct differences in each league's revenue sharing system.[80] The NFL, for example, shares approximately 61% of its revenue among its teams.[81] MLB shares hundreds of millions of dollars with its teams through its revenue-sharing policy.[82] The NBA shares enough revenue among its teams that without it, fourteen of the league's thirty teams would have lost money in 2017.[83] While the unshared revenues in each league still create a gap between the "rich" and

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[79] *See id.*

[80] *See* John Urschel, *The Parity Ideal*, THE PLAYERS' TRIBUNE (Jan. 4, 2016), https://www.theplayerstribune.com/en-us/articles/john-urschel-ravens-parity-ideal.

[81] *See* Bloom, *supra* note 76. A decade ago, by contrast, MLB shared 40% of its revenue while the NBA shared 25%. *See* John Vrooman, *Theory of the Perfect Game: Competitive Balance in Monopoly Sports Leagues*, 34 REV. IND. ORGAN. 5, 7 (2009).

[82] *See* Andy Dolich, *MLB Revenue Sharing a Problem for A's, Raiders*, NBC SPORTS (Feb. 29, 2016), https://www.nbcsports.com/bayarea/athletics/mlb-revenue-sharing-problem-raiders (noting that for the 2015 season, MLB redistributed $34 million in revenue sharing to each of its teams). Some of this money came from national television broadcasting deals and centralized intellectual property licensing, while others came from a percentage of locally-sourced revenue from tickets sales and local television and radio deals. *See* Maury Brown, *Revenue Sharing is Making an Impact*, BASEBALL AMERICA (Mar. 2, 2010), https://www.baseballamerica.com/stories/revenue-sharing-is-making-an-impact/. In addition, MLB teams that spend above the competitive balance tax threshold—another name for a luxury tax—pay additional monies into a fund that is redistributed to lower-revenue teams. *See* Evans, *supra* note 51, at 15. At the same time, MLB does not share any local television contract revenues, which can be extraordinarily lucrative for teams such as the Los Angeles Dodgers and New York Yankees. *See* Evan Zepfel, *Have MLB's Efforts to Preserve Competitive Balance Done Enough?*, HARV. SPORTS ANALYSIS (Feb. 13, 2015), http://harvardsportsanalysis.org/2015/02/have-mlbs-efforts-to-preserve-competitive-balance-done-enough/.

[83] *See* Brian Windhorst and Zach Lowe, *A Confidential Report Shows Nearly Half the NBA Lost Money Last Season. Now What?*, ESPN (Sept. 19, 2017), https://www.espn.com/nba/story/_/id/20747413/a-confidential-report-shows-nearly-half-nba-lost-money-last-season-now-what.

"poor" teams, the revenue sharing systems for the NBA, NFL, and MLB seek to minimize that revenue disparity to some degree.[84]

While the animating theory behind revenue sharing is to enable smaller-market teams to better compete against large-market team payrolls, nothing in the three leagues' respective CBAs requires teams receiving revenue sharing money to use it to increase their payroll. For example, while MLB forbids the use of revenue sharing money to pay for tax obligations or debt service—under threat of fines from the MLB Commissioner—nothing in the league's governing documents requires teams to spend the money on their payroll.[85] Without a requirement to use such funding for payroll and on-field improvement, teams may well prioritize profit maximization over fielding a more competitive team. Indeed, some economists posit that by redistributing revenue, leagues create circumstances where teams will value non-elite players and thus keep more of the money rather than offer more competitive salaries and drive up their labor costs.[86] Put another way, revenue sharing devalues winning which by definition makes players less valuable.[87]

This economic theory may well explain why revenue sharing has not seemed to have spurred more competitive balance in professional sports leagues. This result seems antithetical as one would understandably believe that as more revenue was shared, payroll inequality would lessen and more competitive balance

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[84] *See* Kevin Clark, *The NFL's Parity Myth Has Become a Reality*, THE RINGER (Oct. 17, 2017), https://www.theringer.com/nfl/2017/10/17/16488320/parity-myth-dynasty-roger-goodell-collective-bargaining-agreement.

[85] *MLB players union files grievance against 4 teams for failing to spend revenue-sharing money*, DENVER POST (Feb. 27, 2018), https://www.denverpost.com/2018/02/27/mlb-players-union-grievance-revenue-sharing-money/ [hereinafter "MLB Players Union Grievance"]. The MLB CBA encourages using revenue sharing money for improving its payroll and on-field performance, but there is nevertheless no prescription to do so: "Each 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." *See id*. (quoting the 2017-21 MLB CBA).

[86] *See* RODNEY FORT, THE ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE 216–17 (Kevin G. Quinn, ed. 2012).

[87] *See id.*

would be achieved.[88] Strikingly, the opposite has been true: Since revenue sharing began in MLB, payroll inequality has grown and greater parity among teams in the league has failed.[89] In fact, several studies indicate that revenue sharing does not improve parity in these leagues.[90] In this regard, irrespective of the intended goal of revenue sharing, the results seem to suggest that greater parity has not been achieved in the NBA, NFL, and MLB because team owners have not spent enough of the revenue sharing money on increasing their payroll and improving their rosters.

B. SALARY CAP

The NBA and NFL have pursued a salary cap as another means for achieving competitive balances, while MLB has never had one.[91] The NFL has a "hard" salary cap, meaning that team payrolls may not exceed a certain designated threshold, with very limited exceptions.[92] The NBA, on the other hand, has a "soft" salary cap that allows teams to spend above the identified payroll target but under far more limiting circumstances than if their payroll was below the salary cap amount.[93] The underlying theory

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[88] *See* Zepfel, *supra* note 82, at 2.

[89] *See id.*

[90] *See* Fort, *supra* note 86, at 217; *see* Zimbalist, *supra* note 35, at 111. *See also* Craig Edwards, *The Battle Between Payroll and Parity*, FANGRAPHS (Aug. 23, 2018), https://blogs.fangraphs.com/the-battle-between-payroll-and-parity/ [hereinafter "Edwards, *Battle*"].

[91] *See* Derek Taylor, *Splitting the Uprights: How the Seventh Circuit's American Needle Holding Created a Circuit Split and Exempted the NFL from Antitrust Scrutiny, and Why the Supreme Court Should Overturn the Seventh Circuit*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 143, 148 (2010).

[92] *See* Glenn M. Wong & Chris Deubert, *National Basketball Association General Managers: An Analysis of the Responsibilities, Qualifications and Characteristics*, 18 VILL. SPORTS & ENT. L.J. 213, 219 (2011).

[93] *See* Deubert et al., *supra* note 62, at 158. The NBA's salary cap seeks to ensure that the players collectively receive approximately 50% of the league revenue—referred to as basketball-related income (BRI)—for that season. *See* Bukstein, *supra* note 77, at 383. While there are many exceptions that allow NBA teams to spend above the salary cap—such as the Larry Bird exception—most do not allow the team to offer contracts at robust or market-rate amounts. *See* Larry Coon, *Larry*

of a salary cap in both cases—for parity purposes—is that by precluding or limiting higher-revenue teams from outspending other teams, the league will experience better team competitive balance.[94] In both the NBA and NFL, the parameters of the salary cap are negotiated through collective bargaining with the yearly amount of the cap being determined as a percentage of the league's revenues from the previous year.[95] The types of penalties teams face for not adhering to the salary cap mandates—such as fines, loss of draft picks, and even player contract cancellation—are also negotiated through collective bargaining and well-known in each league.[96] The belief that salary caps will bring about greater parity within professional sports leagues is sufficiently strong that even courts have recognized their importance in holding that they do not violate antitrust laws despite their anticompetitive effect on player salaries and mobility.[97]

The success of salary caps to achieving competitive balance is a little less clear. Some studies have deemed them to

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Coon's NBA Salary Cap FAQ, http://www.cbafaq.com/salarycap.htm#Q2 (last visited April 21, 2020); Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Bias, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1488 n.157 (2006) (explaining the Larry Bird exception).

[94] *See* D'Bria Bradshaw, Comment, *Has the National Basketball Association Lost Its Competitive Touch? Increasing Competitive Balance and Parity and Avoiding Litigation Through the New NBA Collective Bargaining Agreement*, 4 ST. THOMAS J. COMPLEX LITIG. 54, 58 (2017). Interestingly, both the NFL and NBA have instituted salary "floors"—a minimum payroll threshold that all teams must meet—in order to present teams from minimizing their payroll spending and maximizing their profits. *See* Deubert et al., *supra* note 62, at 155.

[95] *See* Michael Schottey, *How the NFL Became the Most Competitive League in All Sports*, BLEACHER REP. (Mar. 20, 2013), https://bleacherreport.com/articles/1574285-how-the-nfl-became-the-most-competitive-league-in-all-of-sports.

[96] Kerry Miller, *How NBA Free Agency, Salary Cap Work*, BLEACHER REP. (Aug. 7, 2018), https://bleacherreport.com/articles/2787871-how-nba-free-agency-salary-cap-work#slide4.

[97] *See* Nat'l 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.

have achieved the goal of league parity.[98] Others have either found that salary caps had no impact on competitive balance or, even worse, created greater imbalance.[99] While the effects of a salary cap may be up for debate, one clear impact of its usage is its negative impact on player salaries. When an overall maximum payroll amount is imposed, team owners benefit financially through the capping of payroll expenses and the lessening of competition for player talent in the marketplace.[100] By limiting the amount that teams can spend on player salaries, team owners are able to better maximize profits.[101] Moreover, with a payroll cap, players' salaries are artificially depressed because of the decrease in how talent is valued within the salary cap model.[102] This economic reality helps explain one scholar's compelling finding about salary caps: Salary caps in isolation improve parity because they compress team payrolls so that higher-revenue teams do not have a marked advantage.[103] However, salary caps combined with revenue sharing created very different results. The infusion of revenue-sharing monies created a disincentive for teams to pursue winning—as owners more actively sought profit maximization—and thus offset the greater parity that the salary cap would otherwise achieve.[104] Consequently, a professional sports league would experience the same type of competitive imbalance it experienced before the implementation of a salary cap because of the offsetting features that the introduction of revenue sharing created.[105]

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[98] *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, 476 (2006).

[99] *See* Fort, *supra* note 86, at 216; Totty & Owens, *supra* note 35, at 47 (finding no evidence of parity derived from the implementation of salary caps). Totty and Owens worried that their research suggested that salary caps might create great competitive imbalance. *See id.* This concern echoed that of another scholar whose research indicated a greater disparity created among teams when a salary cap was used. *See* Vrooman, *supra* note 81, at 38.

[100] *See* Totty & Owens, *supra* note 35, at 48.

[101] *See id.*

[102] *See* Rascher, *supra* note 15.

[103] Vrooman, *supra* note 81, at 11.

[104] *See id.*

[105] *See id.*

C. LUXURY TAXES

Luxury taxes are similar to salary caps in that they attempt to limit teams' overall payroll expenses so that higher-revenue teams cannot substantially outspend other teams in the league.[106] While the NBA adopts a luxury tax in conjunction with its salary cap, MLB dispenses with the salary cap and solely implements a luxury tax—called the competitive balance tax—to achieve its parity goals.[107] In both cases, a luxury tax system creates a payroll threshold—in the NBA, it is above the salary cap amount—over which teams are fined a financial penalty for exceeding that amount.[108] Each team's payroll is determined by aggregating its players' salaries and signing bonuses—both of which are apportioned based on the player's contract length.[109] The league then assesses the penalty tax at set amounts for a team's payroll amount above the luxury tax threshold.[110] There are also progressive and additional taxes both for different levels above the luxury tax threshold, as well as for teams that exceed that amount for more than one year in a row.[111] In addition to financial penalties, teams that consistently pay the luxury tax can lose other competitive advantages such as a drop in draft pick order in MLB and the ability to use certain exceptions to the salary cap in the NBA.[112] The goal in such progressive tax penalties is to inhibit

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[106] Thompson, *supra* note 75.

[107] Brett Pollard, *Creating Economic Equality Among Major League Baseball Franchises: The Removal of Major League Baseball's Archaic Antitrust Exemption*, 18 TEX. REV. ENT. & SPORTS L. 49, 50–51 (2016).

[108] Kaplan, *supra* note 4, at 1615.

[109] Kristi Dosh, *Can Money Still Buy the Postseason in Major League Baseball?*, DEN. U. SPORTS & ENT. L.J. 1, 20 (2007).

[110] Ajilore & Hendrickson, *supra* note 32, at 3; *see also* Frank Urbina, *How does the NBA's luxury tax work?*, HOOPSHYPE (Oct. 11, 2018), https://hoopshype.com/2018/10/11/nba-luxury-tax/ (explaining the specifics of the NBA's luxury tax); *Competitive Balance Tax*, MLB, http://m.mlb.com/glossary/transactions/competitive-balance-tax (detailing MLB's competitive balance tax) (last visited April 21, 2020).

[111] *See id.*

[112] R.J. Anderson, *MLB Luxury Tax: Breaking down baseball's Competitive Balance Tax and how it affects hot stove season*, CBS SPORTS (Nov. 11, 2019), https://www.cbssports.com/mlb/news/mlb-luxury-tax-breaking-down-baseballs-competitive-balance-tax-and-how-

higher-revenue teams from being able to afford to retain multiple star players or otherwise outspend the rest of the league.[113] Of course, as one commentator pointed out, the salary cap and luxury tax provisions in the NBA did not stop the Golden State Warriors from outspending the rest of the NBA to keep its championship team of stars—including Stephen Curry, Kevin Durant, Klay Thomson, and Draymond Green—together for several years.[114]

While some commentators believe that luxury taxes are helping advance competitive balance by becoming quasi-hard salary caps given their increasing and harsh penalties,[115] some evidence—apart from the anecdotal Golden State Warriors example—suggests the opposite. The theory behind luxury taxes is to create a more compressed payroll bandwidth among teams. Couple that with revenue sharing—and thus, in theory, the ability for smaller-market teams to spend more on their players—and one might expect that league parity would increase. In the case of MLB, the opposite has been true: There is now greater payroll disparity in the league than there was more than thirty years ago.[116] In fact, many of the teams with the highest payrolls are large-market teams, and their higher payrolls have come with consistent

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it-affects-hot-stove-season/; Ross, *supra* note 76 at 308. Teams can reset their luxury tax penalty by dropping below the threshold for a season and thus avoid some of the cumulative penalties that the leagues impose. *See Competitive Balance Tax*, *supra* note 110.

[113] *See* Dan Messeloff, *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, 563, (2000); 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).

[114] *Fixing the NBA Competitive Balance Problem*, BASKETBALL INSIDERS (July 6, 2017), http://www.basketballinsiders.com/nba-am-fixing-the-nba-competitive-balance-problem/ (pointing out that the soft salary cap and luxury tax still did not deter the Golden State Warriors from spending more money than most of the NBA to retain a championship core of players such as Stephen Curry, Kevin Durant, Klay Thompson, Draymond Green, Andre Iguodala, and Shaun Livingston).

[115] *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-agency-hot-stove-slow-pace.

[116] Zepfel, *supra* note 82, at 2.

success with regard to both the regular season and playoffs.[117] As one commentator notes, while those teams that are able to absorb these penalties will, at times, exceed the luxury tax threshold, the combination of the harsh luxury tax penalties and revenue sharing has provided team owners with a powerful incentive to keep their payrolls manageable and maximize their profits.[118]

D. AMATEUR DRAFT AND ROOKIE CONTRACTS

Another way in which professional sports leagues attempt to achieve greater parity among teams is through the amateur player draft and the attendant rookie contracts that players receive through that process. When amateur or international athletes want to enter the NBA, NFL, or MLB, they cannot negotiate directly with any team they want. Instead, they must enter that league's amateur draft.[119] In doing so, the player agrees to be able only to negotiate a contract with—and play for—the team that drafts them.[120] Professional sports leagues attempt to structure their amateur player drafts to increase competitive balance. For example, the NFL and MLB hold reverse-order drafts where the team with the worst record from the previous year drafts first and other teams follow until the last pick is chosen by the team with the best record.[121] Similarly, the NBA holds a draft where teams that did not make the playoffs are entered into a lottery for the top

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[117] *See, e.g.*, Craig Edwards, *In 2019, Team Payroll and Wins are Closely Linked*, FANGRAPHS (Aug. 16, 2019), https://blogs.fangraphs.com/in-2019-team-payroll-and-wins-are-closely-linked/ [hereinafter "Edwards, *Team Payroll*"].

[118] Emma Baccellieri, *The MLBPA is Failing Its Players*, DEADSPIN (Jan. 22, 2018), https://deadspin.com/the-mlbpa-is-failing-its-players-1822305159.

[119] Michael Tannenbaum, *A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL*, 3 SPORTS L.J. 205–06 (1996); *see also* Russell Yavner, *Minor League Baseball and the Competitive Balance: Examining the Effects of Baseball's Antitrust Exemption*, 5 HARV. J. SPORTS & ENT. L. 265, 280–83 (2014) (describing MLB's first-year player draft in detail).

[120] Humphreys & Pyun, *supra* note 60, at 677.

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

thirteen picks of the draft, followed by a reverse-order draft thereafter by record for the playoff teams.[122] With both models, the leagues seek to reallocate talent so that the weakest teams in the league get the best new players entering the sport.[123] In this regard, teams with losing records one year have the opportunity to turn things around quickly if they secure an elite player in the draft.[124]

Relatedly, players entering the NFL, NBA, and MLB through the draft sign rookie contracts with the teams that selected them. These rookie contracts contain player restrictions and conditions that seek to further competitive balance within the league.[125] Players have "reserve clauses" in their rookie contracts that require them to play for the team that owns their contract—whether it be the team that drafted them or the one that acquired them through a trade—for a defined number of years.[126] For example, in the NFL, rookie contracts are designated for four years with a team option for a fifth year.[127] The NBA rookie contracts for first-round draft picks are guaranteed for two years with team options for a third and fourth year.[128] In MLB, players are under rookie contract conditions for the first six years of playing time at the big league level.[129] Given the contractual control and financial benefits to MLB's pre-free agency system,

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[122] Bukstein, *supra* note 77, at 376.

[123] Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and Antitrust Laws*, 1997 U. ILL. L. REV. 519, 574 (1997). MLB also adds "competitive balance draft picks" to smaller-market and lower-revenue teams to enable them to draft and develop additional players—after the first two rounds of the draft—that are on team-friendly rookie contracts. *See Competitive Balance Draft Picks*, MLB, http://m.mlb.com/glossary/transactions/competitive-balance-draft-picks (last visited April 21, 2020).

[124] Schottey, *supra* note 95.

[125] Humphreys & Pyun, *supra* note 60, at 677.

[126] *See id.*

[127] Andrew Brandt, *Teams Have All the Leverage On Rookie Contracts, Another Topic for Future CBA Negotiations*, SPORTS ILLUSTRATED (Aug. 6, 2018), https://sports.yahoo.com/teams-leverage-rookie-contracts-another-174522175.html.

[128] Derek J. Rowe, *It's Time to Retire the NBA's Rookie Salary Scale*, 24 SPORTS LAW. J. 123, 132 (2017).

[129] Connor J. Menneto, *Using the MLB's Final Offer Arbitration System to Revamp the NFL's Franchise Tag*, 17 VA. SPORTS & ENT. L.J. 101, 112 (2017).

many teams will purposefully engage in "service time manipulation"—the process by which a player is sent back and forth between the minor and major leagues or by delaying a player's being called up to the big leagues—in order to stretch such player control to a seventh year.[130] Accordingly, players cannot enter free agency—and thus negotiate for higher salaries—for between four to seven years depending on the league. Finally, the salaries under each league's rookie contracts are intentionally set at far below market value.[131] Rookie salaries are either predetermined based on a sliding scale negotiated as part of the collective bargaining process or have significant restrictions placed on the maximum salary and/or signing bonus that teams can pay their rookie players.[132] Therefore, losing teams the year before can change their fortunes by drafting a talented rookie player—and keep him under contract for years—without needing significant resources.[133]

While reverse-order drafts seem to incentivize losing—a recent phenomenon dubbed "tanking," as discussed further below in Part III—many believe that the amateur drafts (coupled with team-friendly rookie contract salaries and terms) help promote competitive balance.[134] Indeed, a team coming off a losing season can draft the next superstar player in the league to help make them

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[130] Probasco, *supra* note 68, at 5; *see also* Bill Shaikin, *Baseball's compensation system is broken. Owners and players will discuss building a new one this winter*, L.A. TIMES (Sept. 29, 2018), https://www.latimes.com/sports/mlb/la-sp-mlb-column-20180929-story.html (detailing the examples of Ronald Acuna with the Atlanta Braves and Vladimir Guerrero, Jr., with the Toronto Blue Jays as recent example of such service-time manipulation to extend each player for a seventh year).

[131] *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).

[132] *See id.* In MLB, players can receive closer to market value in their "arbitration years"—usually years four, five, and six under the aforementioned system. *See* Probasco, *supra* note 68, at 5.

[133] *See* McCann, *supra* note 131, at 119–20. This system has led to superstars, like the NFL's Dallas Cowboys quarterback, Dak Prescott, being paid $630,000 for a season on his rookie contract while comparable quarterbacks in the league made $25 to $30 million that same year. *See* Brandt, *supra* note 127.

[134] Gordon, *supra* note 21.

competitive again. These teams have an even greater likelihood of becoming more competitive because a rookie player will not cost the team that much money for several years because of the under-market salary scale for rookie contracts that each league employs. The amateur draft and rookie contract terms thus seem to help redistribute player talent in a cost-effective manner to teams most in need of a competitive advantage. This structure, in theory, should lead to greater parity within each league. However, some studies have cast doubt on that assumption.[135] One reason for this skepticism is that while drafts reallocate talent, the weaker teams have the choice to sell or trade their draft pick for other players, future draft picks, salary relief, or other considerations that a team owner may desire.[136] In this regard, a team owner motivated by profit maximization could well sell or trade a draft pick to increase profits but not necessarily improve their team.[137]

Moreover, these player and control measures seem geared towards enabling teams to control players during many of their prime playing years at depressed salary levels.[138] For example, in 2010, top draft picks in the NFL were paid upwards of $50 million in guaranteed money, while that figure dropped to approximately $30 million eight years later (without factoring in inflation).[139] So while these competitive balance reforms enable teams to retain talented players at an affordable level, there is also a significant cost savings in these depressed rookie salaries that helps maximize profits for owners.

E. FREE AGENCY AND OTHER CONTRACTUAL LIMITATIONS

If players make it through their rookie contracts, they can become free agents and negotiate to play for any team. However, the NBA, NFL, and MLB all have different policies related to free agency that, they claim, attempt to advance competitive balance. For example, in the NBA, there are two types of free agents: restricted and unrestricted.[140] As the name suggests, a restricted

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[135] Fort, *supra* note 86, at 217; Zimbalist, *supra* note 35, at 111.

[136] Gordon, *supra* note 21.

[137] *See id.*

[138] *See* Baccellieri, *supra* note 118.

[139] *See* Brandt, *supra* note 127.

[140] Matthew Epps, Comment, *Full Court Press: How Collective Bargaining Weakened the NBA's Competitive Edge in a Globalized Sport*, 16 VILL. SPORTS & ENT. L.J. 343, 356 (2009).

free agent has more limited options in their choices. After a player's fourth year of their rookie contract, that player may negotiate and agree to a contract with any team in the league within the parameters of the salary cap and other CBA conditions.[141] However, the player's current team can invoke its right of first refusal and match any such contract offer made by another team and thus keep the player on their team at those negotiated terms.[142] Unsurprisingly, restricted free agents are far less likely to command the same—that is, higher—salaries than if they were an unrestricted free agent. A restricted free agent can choose to take their team's one-year qualifying offer for their fifth season and then become an unrestricted free agent after that season.[143] An unrestricted free agent in the NBA is one whose current team can does not have a right of refusal; rather, the player can sign with any team under contractual terms consistent with the salary cap and the CBA.[144] In this regard, an unrestricted free agent has a greater chance of achieving their fair market value. However, with both types of NBA free agency, the NBA CBA places various limitations on player contracts that restrains a free market for player services. These include a cap on the maximum number of years for a contract; a maximum salary per year; and other such limitations.[145] In these regards, players may not get their actual market worth for the number of years they would otherwise be able to negotiate in a true free market.[146]

The NFL has a similar type of unrestricted versus restricted form of free agency that can limit a player's options after their rookie contract.[147] In addition, the NFL has the "franchise tag," which allows a team to designate a player as its "Exclusive

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[141] *Free Agency Explained*, NBA, https://www.nba.com/free-agency-explained#restricted (last visited April 21, 2020).

[142] *See id.*

[143] *See id.*

[144] *See* Epps, *supra* note 140, at 356.

[145] *See Free Agency Explained*, *supra* note 141.

[146] *See* Jared Wade, *Doing the Math on LeBron James' Would Be Worth on the Open Market*, BLEACHER REP. (Feb. 5, 2013), https://bleacherreport.com/articles/1513402-doing-the-math-on-lebron-james-would-be-worth-on-the-open-market.

[147] *See 2019 NFL Free Agency FAQ*, NFL (Mar. 11, 2019), https://operations.nfl.com/updates/football-ops/2019-nfl-free-agency-faq/.

Franchise Player."[148] If the player wants to play in the league that year, they must accept the team's one-year, fully-guaranteed contract, which will be the greater of 120% of the player's previous year's salary; the average of the five highest-paid players at the same position; or a certain percentage of the salary cap as determined by looking at the five highest-paid players at the same position over the previous five years.[149] The franchise tag thus accomplishes two competing goals in line with league parity: It ensures that the player is highly paid while allowing smaller-market teams to keep one of their better players without needing to compete on the free agent market for their services.[150] However, the franchise tag option does not allow for long-term contract protections that many players seek in additional to their annual salary amount.[151]

As described above, MLB players do not reach free agency until after six full years of playing on the major-league level.[152] Oftentimes, due to "service-time" manipulation, players do not reach free agency until after seven years at that level.[153] Even once a player is a free agent, MLB places an additional restriction of player movement within the league by requiring a team that signs an elite free agent to send a comparable high draft pick to the team which lost that player's services.[154] If a team offers one of its free agents a qualifying offer, then a team that signs that player in free agency will lose a high draft pick in the next draft—depending on what classification the free agent had—to compensate the original team for the loss of its player.[155] While the stated purpose of this system to help with league parity—by

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[148] Menneto, *supra* note 129, at 102.

[149] *See id.* at 102–03.

[150] *See id.* at 101.

[151] *See id.*

[152] *See* Probasco, *supra* note 68, at 5.

[153] *See id.*

[154] *See* Noah J. Goodman, *The Evolution and Decline of Free Agency in Major League Baseball: How the 2012-2016 Collective Bargaining Agreement is Restraining Trade*, 23 SPORTS L.J. 19, 46 (2016); *see also* Totty & Owens, *supra* note 35, at 47.

[155] *See Qualifying Offer*, MLB, http://m.mlb.com/glossary/transactions/qualifying-offer (last visited April 21, 2020). The NFL has a similar compensatory draft pick system for teams that lose players in free agency. *See 2019 Compensatory Draft Picks*, NFL (Feb. 22, 2019), https://operations.nfl.com/updates/football-ops/2019-nfl-compensatory-draft-picks/.

compensating a team with a draft pick when they lose a top player to free agency—it also has a chilling effect on player salaries and their ability to garner long-term contracts because of this penalty that the signing team must pay. While the player can accept their current team's one-year qualifying offer and then enter free agency with no compensatory draft pick attached to them, that additional year delays the player entering the free-agent market. This can be risky with regard to how teams have increased their awareness of, and calculations regarding, the player aging curve and projected future performance.[156]

Traditionally, commentators worried that free agency would have a negative effect on league parity because the large-market teams with plentiful resources could better afford and amass rosters with a disproportionate amount of elite talent in the league.[157] However, in 1956, economist Simon Rottenberg theorized through his invariance proposition that free agency would yield the same talent distribution as the reserve system that professional sports leagues had in place at the time (which allowed a team to keep a player under contract as long as it wanted).[158] More recently, several economists have argued that free agency has not had a negative impact on the competitive balance of professional sports leagues, due, in part, to the payroll constraints imposed by each league's CBA.[159] Other economists have found that free agency actually promotes competitive balance.[160] Whether free agency achieves greater league parity or not, it is clear that the systems in the NFL, NBA, and MLB do restrict player movement and salaries. For example, in MLB, in 2018, of the league's seventy best players, only eight of them had ever been

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[156] *See* Probasco, *supra* note 68, at 10–11.

[157] *See* Lee, *supra* note 20, at 78.

[158] *See* Vrooman, *supra* note 81, at 6. Interestingly, the only difference that Rottenberg identified between the two approaches would be the lessening of team control and manipulation of players that would enable players to better achieve the fair market value of their services. *Id*.

[159] *See* Lee, *supra* note 20, at 78.

[160] Michael R. Butler, *Competitive Balance in Major League Baseball*, 39 AMER. ECON. 46, 47–49 (1995).

free agents.[161] This may be due, in part, to the length of time players need to play under the rookie contract system before reaching free agency. It could also be related to players realizing that with the rise of data analytics, the old system and tradition of playing through a long rookie contract and striking it rich with a free agent contract is becoming increasingly rare.[162] The contrast between the evidence that free agency may well lead to more competitive balance and the lengths through which leagues go in order to stifle player movement through free agency—and depress player salaries—raises the question again about whether owners truly seek parity or payroll relief.

III. TRENDS IN PROFESSIONAL SPORTS IMPACTING PARITY: HOW Competitively BALANCED ARE THE LEAGUES?

There are two trends in professional sports that have both enhanced and hurt the efforts toward achieving competitive balance: the phenomenon of tanking and the rise of data analytics in sports. "Tanking" is a term used in sports that describes when a team purposely acts in ways—such as trading expensive star players or minimizing payroll—to not be competitive and thus garner benefits like top, cost-effective draft picks to build toward a strong, more competitive future.[163] At the same time, there has been a growth in the use of statistics in professional sports that has helped teams better evaluate and value players, project future performance, and more efficiently structure their rosters for success in the short- and long-term. Whether these trends were fueled by—or merely exacerbated the problems with—the various competitive balance reforms detailed above is hard to say. But they are important topics to analyze in trying to determine whether these various rules and policies aimed at parity have been successful or not.

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[161] Sam Miller, *Why aren't the Dodgers even better?*, ESPN (Sept. 19, 2018), https://www.espn.com/mlb/story/_/id/24710787/why-los-angeles-dodgers-even-better.

[162] *See* Shaikin, *supra* note 130; *see also* Humphreys & Pyun, *supra* note 60, at 686.

[163] Allen T. Paxton, *Trust the Process: How the NBA Can Combat Its "Tanking" Problem in Court*, 104 IOWA L. REV. 1551, 1552 (2019).

A. TANKING

The tanking phenomenon has seemed to rise in prominence the past decade or so. Teams in each league assess whether they will be able to compete for a championship or not. If they can, the teams spend as strategically and aggressively as it can in order to pursue a title. They might give up long-term assets—like draft picks—for short-term infusions of talent: for example, trading for high-priced players or signing an expensive free agent. On the other hand, if teams are not competitive for the championship, then they will oftentimes begin a rebuilding process to reconstruct a title-contending roster in the future.[164] In that circumstance, teams will oftentimes trade away expensive players, forgo the free agent market, and attempt to stockpile as many future draft picks as possible.[165] By stripping its roster down, these non-competitive teams minimize their payroll and ensure profitability because of league revenue sharing. These teams also usually end with one of the worst records in the league, which gives them a higher draft pick (and likely more talented player).[166] As the team wallows during the regular season for a few years, they compile highly-talented players through the draft that are cost-controlled through their rookie contracts.[167] Once the

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[164] *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*, BUS. INSIDER (Mar. 3, 2018), http://www.businessinsider.com/mlb-free-agency-drama-rift-2018-3.

[165] *See* Rachel Schaefer, *What exactly is "tanking?"*, THE DAILY CAMPUS (Feb. 7, 2018), http://dailycampus.com/stories/2018/2/7/mlb-column-what-exactly-is-tanking.

[166] *See* Dave Sheinin, *No longer sports' dirty little secret, tanking is on full display and impossible to contain*, WASH. POST (Mar. 2, 2018), 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. That is not to say that teams purposely lose individual games. Rather, teams that are rebuilding construct their rosters in a manner that makes the likelihood of a winning season quite low. *See* Davis, *supra*, note 164; *see also MLB Players Union Grievance*, *supra* note 85 (quoting MLB Commissioner Rob Manfred as saying, "[i]n Baseball, it has always been true that Clubs go through cyclical, multi-year strategies directed at winning").

[167] *See MLB Players Union Grievance*, *supra* note 85.

team sufficiently improves, the financial flexibility of having top-quality talent on rookie contract salaries allows the team to then trade for higher-priced players or sign expensive free agents and then compete effectively for the league championship for a window of time. Once that window closes, the team starts the rebuilding process all over by "tanking" again.

The intricate system of competitive balance reforms seems to almost encourage this all-or-nothing approach to running a professional sports team. If a team can compete for a championship, the structure is in place to do so within a salary- or luxury-capped environment that limits spending on payroll. If a team is not competitive, it has an incentive to minimize payroll—especially with revenue sharing all but ensuring profitability—and wind up with one of the worst records in the league so that they can obtain top players in the next draft at fixed, far-below-market costs. As several commentators have noted, especially in the NBA, being in middle—that is, not competing for a championship but not being one of the worst teams in the league—is fraught with peril.[168] To be middling, teams usually have healthy payrolls, yet they do not get the benefit of being able to draft an elite talent given that they choose in the middle of the draft—creating an untenable yet self-fulfilling situation.[169] Perhaps it is unsurprising then that in a given season, six teams might be competing for an NBA championship while the others are either actively trying to rebuild or stuck in middle-ground purgatory.[170] Given the parity systems in place in these leagues, well-run teams thus try and alternate between the highest levels of winning and the lowest levels of losing—attempting to avoid the middle along the way.[171]

This approach has proven successful in professional sports. For example, the Philadelphia 76ers in the NBA have built a title-contending roster after years of abysmal records.[172] Four of the last five MLB World Series champions all rebuilt their teams

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[168] *See* Verducci, *supra* note 115.

[169] *See id.*

[170] *See* Weinstein, *supra* note 29.

[171] *See* J.P.F., *Continental Divide*, THE ECONOMIST (Dec. 16, 2013), https://www.economist.com/game-theory/2013/12/16/continental-divide.

[172] *See Fixing the NBA Competitive Balance Problem*, *supra* note 114.

in a similar "tanking" fashion.[173] These examples may help explain why fan bases have not revolted against teams that tank and rebuild. Studies validate that fans view winning over a three- to five-year horizon rather than on an every-year basis.[174] If a potential championship looms in the near-term, fans have shown their willingness to be patient through losing seasons.[175] At the same time, this all-or-nothing trend leads to fewer teams spending on their rosters to be competitive and, instead, minimizing costs in the short run to garner greater cost effective rookie talent for the long term. Whether this phenomenon was created by the competitive balance reforms or more starkly accentuates some of its particular features, it has changed the marketplace for players and thus disrupted long-standing assumptions about players' salaries and contracts.[176]

B. DATA ANALYTICS

The rise of data analytics in professional sports over the last decade has similarly intersected with the competitive balance reforms. Almost every team in the NFL, NBA, and MLB have analytics departments that track and analyze data—offensive and defensive statistics—that help inform player usage and roster decision-making.[177] Teams research aging curves, project future

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[173] The Kansas City Royals in 2015; the Chicago Cubs in 2016; the Houston Astros in 2017; and the Boston Red Sox in 2018. *See MLB Players Union Grievance*, *supra* note 85; Sam Miller, *In 2018, What is a Win? A Shift in Philosophy Has Changed MLB Forever*, ESPN (Mar. 23, 2018), http://www.espn.com/mlb/story/_/id/22815820/houston-astros-chicago-cubs-set-path-winning-losing [hereinafter "Miller, *What is a Win?*"]. The latter two championships, of course, are now called into question given the sign-stealing scandal that broke in late 2019 and early 2020. *See* Molly Knight, *How can MLB put an end to illegal sign stealing? Do away with instant replay*, THE ATHLETIC (Jan. 10, 2020), https://theathletic.com/1524044/2020/01/10/knight-how-can-mlb-put-an-end-to-illegal-sign-stealing-do-away-with-instant-replay/.

[174] *See* Gordon, *supra* note 21.

[175] *See* Miller, *supra* note 173.

[176] *See* Parlow, *Hope and Faith*, *supra* note 1, at 113–16.

[177] *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.

productivity, estimate cost per win, and adjust for salary inflation in preparation for free agent contract negotiations.[178] This use of data has led teams away from past practices of paying players for past performance under the assumption that for at least the early years of a free agent's contract, they will perform similarly.[179] Teams use statistics and data projections to determine how much a player is worth going forward and usually do not stray from this cost efficiency modeling.[180]

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.[181] 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.[182] Since many players are reaching free agency well into their 20s—if not early 30s—this change in valuing players creates challenges for free agents seeking to achieve the big payoff of a free agent contract after under-market salaries on their rookie contracts.[183] Given the ages in which players reach free agency, teams are usually unwilling to offer long contracts or higher salaries—at least compared to the past—because of their recognition of aging curves and projected future performance as the players age.[184]

While data analytics started famously with the Oakland A's and Moneyball, large- and small-market teams alike use data

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[178] *Id.*

[179] *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.

[180] *See* Davis, *supra* note 164.

[181] *See* Baccellieri, *supra* note 118.

[182] *Id.*

[183] *See* Probasco, *supra* note 68, at 10–11.

[184] *See* Neil Weinberg, *The Beginner's Guide to Aging Curves*, FANGRAPHS (Dec. 10, 2015), https://library.fangraphs.com/the-beginners-guide-to-aging-curves/; Sam Miller, *What Happens as Baseball Players Age?*, ESPN (June 27, 2018), https://www.espn.com/mlb/story/_/id/23916211/major-league-baseball-aging-cycle-how-mike-trout-becomes-albert-pujols.

analytics.[185] In this regard, statistics have indisputably impacted nearly every aspect of player compensation.[186] They have changed the length and amounts of free agent contracts.[187] Data analytics have led teams to value less expensive rookie players over veteran players, even if the less-experienced player will lead to fewer wins.[188] Teams may not deem the cost differential worth the additional wins, particularly if they are in a tanking/rebuilding mode.[189] Indeed, the data analytics movement was driven by a desire for teams to be able to better evaluate and value players and pay them accordingly.[190] This goal, however, is not related to benefitting smaller-market or lower-revenue teams to create greater parity in the league. Instead, data analytics has enabled all teams to become more cost efficient in constructing their rosters—with the aid of the various competitive balance reforms detailed above—and thus minimize their payroll costs.[191]

C. HAVE THE COMPETITIVE BALANCE REFORMS CREATED GREATER PARITY?

With all of the effort leagues have put into designing and implementing the various competitive balance reforms, and in light of tanking and data analytics, the question arises as to whether professional sports leagues have achieved greater parity or not. The record is mixed. Some economists argue that competitive balance improved "despite team relocation, expansion, and growing local revenue disparities beginning in the early 1980s."[192] Different data points seem to support this contention to varying degrees.[193] For example, from 2011-2017, there was not a strong correlation between payroll and wins in

[185] *See* Edwards, *Team Payroll*, *supra* note 117.
[186] *See* Shaikin, *supra* note 130.
[187] *See* Probasco, *supra* note 68, at 10–11.
[188] *See* Jaffe, *supra* note 177.
[189] *See* Davis, *supra* note 164.
[190] *See* Gordon, *supra* note 21.
[191] *Id.*
[192] Rodney Fort & Young Hoon Lee, *Structural Change in MLB Competitive Balance: The Depression, Team Location, and Integration*, 43 ECON. INQ. 158, 167 (2005).
[193] *See* Bowman et al., *supra* note 19, at 512.

MLB for six of the seven seasons during that time period.[194] Moreover, in 2013, the MLB teams above the median payroll experienced no greater success than those below the median.[195] Such relative balance may help explain why from 2010-2019, all but four MLB teams made the playoffs.[196] Indeed, during a fifteen year period from 2000-2015, sixteen different MLB teams competed for the World Series with ten different teams emerging victorious.[197] In the NFL, there has been a pretty consistent turnover in the teams that compete for the conference championships each year—also suggesting greater parity.[198] During that same fifteen-year period—2000-2015—seventeen different NFL teams competed in the Super Bowl with nine different teams winning over that span of time.[199] These various data points seem to suggest that professional sports leagues experienced greater competitive balance after implementing some of the aforementioned reforms aimed at parity within the leagues.

On the other hand, there exists contrary evidence that leagues have remained imbalanced or, worse yet, move further away from parity than before the institution of these reforms. For example, certain NFL teams dominate the number of conference championship appearances: the Denver Broncos, New England Patriots, and Pittsburgh Steelers—with the Patriots winning five of the twenty Super Bowls since 2000.[200] Perhaps most strikingly, only eight of the NFL's thirty-two teams account for almost 70% of Super Bowl victories in league history.[201] In fact, half of all conference championship berths from 2000-2017 were concentrated among five teams.[202] The NBA similarly has a dearth of teams that have made the conference championships in the past

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[194] *See* Edwards, *Battle*, *supra* note 90.

[195] *See* Yavner, *supra* note 119, at 310–11.

[196] *See* Matt Snyder, *The NFL is a league of parity, but so is Major League Baseball*, CBS SPORTS (Jan. 23, 2016), https://www.cbssports.com/mlb/news/the-nfl-is-a-league-of-parity-but-so-is-major-league-baseball/. The four MLB teams that did not make the playoffs during that period of time were the Chicago White Sox, Seattle Mariners, Miami Marlins, and the San Diego Padres. *See id.*

[197] *Id.*

[198] *See* Fort, *supra* note 86, at 211–12.

[199] *See* Snyder, *supra* note 196.

[200] *See* Fort, *supra* note 86, at 213–14.

[201] *See* Badenhausen, *supra* note 72.

[202] *See* Clark, *supra* note 84.

ten years.[203] This phenomenon is due, in part, to a few teams having more NBA superstars on their roster than other teams and thus having greater success in the regular season and the early rounds of the playoffs on their way to the conference championships.[204] In MLB, the size of a team's payroll has been correlated with more success in the regular season.[205] In fact, from 2014-2017, only one of the eight winningest teams during that period did not have a payroll amount among the top eleven teams in the league.[206] In these regards, professional sports leagues do not seem to have improved parity among their teams despite the various competitive balance reforms they implemented over the past couple of decades.

Interestingly, whether leagues are more competitively balanced or not, two things remain true: revenues have been surging for the leagues and the players' share of revenue has declined from historical levels. For example, MLB just surpassed more than $10 billion in annual revenues.[207] Yet the players in these professional sports leagues are receiving a smaller percentage of the league's revenues than in the past. For example, NBA players receive between 49% and 51% of the basketball-related income in the NBA.[208] The NFL also shares approximately 50% of its revenue with its players.[209] While MLB Commissioner Rob Manfred claims that players' share of league revenue is close

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[203] *Competitive Balance in Pro Sports Leagues*, *supra* note 34. However, this trend should not be particularly surprising as the NBA has been historically less competitively balanced than the NFL and MLB. *See* Andrew Puopolo, *Which Sports League Has the Most Parity*, HARV. SPORTS ANALYSIS (Dec. 1, 2016), http://harvardsportsanalysis.org/2016/12/which-sports-league-has-the-most-parity/.

[204] *See* Weinstein, *supra* note 29.

[205] Edwards, *Team Payroll*, *supra* note 117.

[206] *Id.*

[207] Jeff Passan, *Here's why baseball's economic system might be broken*, YAHOO (Jan. 16, 2018), https://sports.yahoo.com/heres-baseballs-economic-system-might-broken-224638354.html. This figure is even more impressive when considering that several MLB teams have been struggling with declining attendance. *See id.*

[208] Baccellieri, *supra* note 118.

[209] Ben Lindbergh, *Baseball's Economics Aren't As Skewed As They Seem*, THE RINGER (Feb. 21, 2018), https://www.theringer.com/mlb/2018/2/21/17035624/mlb-revenue-sharing-owners-players-free-agency-rob-manfred.

to 50%, some estimates have it closer to 40%.[210] However, these figures are lower than historical percentages and may reveal the unspoken goal of many of these competitive balance reforms: minimizing payroll costs.[211]

CONCLUSION

The analysis above leads to the inevitable question: Are team owners more interested in winning or profit maximization? The long-standing argument for the various competitive balance reforms has been to create greater league parity. These reforms were needed, leagues argued, so that teams were competitive, which would keep fans interested—thus increasing revenue for the league.[212] However, this foundational argument does not seem to hold up upon closer scrutiny. For example, several economists have studied competitive balance and attendance and found that there was no statistically-significant relationship between parity and greater fan attendance.[213] In fact, some studies suggested that more competitive balance would actually hurt attendance for professional sports leagues.[214] Rather, attendance increased when a few teams consistently dominated the league over a sustained period of time.[215] In addition, star players have also tended to drive fan interest and attendance.[216] Others have noted that league parity does not always equate to greater interest and respect. For example, the NBA had its greatest parity among teams in the 1970s, but that decade is widely viewed as one of the least interesting and respected in the league's history.[217]

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[210] *Id.*

[211] *Id.* (providing a chart of MLB revenue and the percentage of league revenue allocated to players and noting that MLB players had previously received between 56%-60% of league revenue); Vrooman, *supra* note 81, at 24 (detailing league revenues and the percentage attributable to players for the NFL and MLB).

[212] Gordon, *supra* note 21.

[213] Mehra & Zuercher, *supra* note 48, at 1533–34.

[214] *Id.* at 1535.

[215] Badenhausen, *supra* note 72.

[216] *Id.*

[217] Jerry Brewer, *Cavaliers' and Warriors' complete dominance actually illustrates NBA's competitive balance*, CHI. TRIBUNE (May 30, 2017), https://www.chicagotribune.com/sports/ct-nba-finals-cavaliers-warriors-dominance-20170530-story.html.

One might think that with the competitive imbalance prevalent in professional sports leagues—despite the adoption of competitive balance reforms—the business of these sports should be struggling. But nothing could be further from the truth.[218] As detailed above, the NFL, NBA, and MLB are highly successful—oftentimes reaching record revenue marks in recent years. The incredibly-lucrative broadcasting deals for each league also demonstrate that significant and growing fan interest in these sports, despite the lack of parity in the leagues. Competitive imbalance, then, does not seem to have a negative impact on fan interest, attendance, or league revenue. This phenomenon seems to suggest that as long as a game is not fixed—and thus either team has a chance to win, even if they are unevenly matched—fans will maintain interest in the sport.[219] Moreover, some studies have shown that fans view team competitiveness over a three- to five-year period.[220] This finding helps explain why fans have tolerated—indeed, embraced—the tanking trend in sports. Fans seem to be willing to embrace several losing seasons if they believe the chance of a championship will follow thereafter.[221] In this regard, fans do not look at the year-to-year competitiveness of their teams but rather take a longer-term view of success with the hopes that several down years lead to the euphoria of a title.[222]

Another prominent narrative that may also be suspect is that with the rise of data analytics in professional sports, teams are being "smarter."[223] The "Moneyball" revolution in MLB was heralded as a way in which smaller-market—and lower-revenue—teams could compete with larger-market, higher-revenue teams.[224] However, all teams now fully embrace data. All teams seek to use data to no longer overpay for players: to use data to predict player value and pay accordingly.[225] This analysis, of course, renders the size of a team's market and the amount of team revenue largely irrelevant.[226] At its core, then, the data analytic

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[218] Badenhausen, *supra* note 72.
[219] Gordon, *supra* note 21.
[220] *Id.*
[221] Verducci, *supra* note 115.
[222] Miller, *What is a Win?*, *supra* note 173.
[223] Baccellieri, *supra* note 118.
[224] Gordon, *supra* note 21.
[225] *Id.*
[226] *Id.*

movement in professional sports served simply to find a way for all teams to win more cost efficiently—achieving the same competitive goals while spending less.[227]

If leagues were striving for competitive balance, they would require teams receiving revenue-sharing monies to use it on their payroll rather than keep it as profits. MLB would have a salary floor—a minimum payroll amount for each team. Leagues would embrace a far more free-market free agency, which has been shown by economists to be the most effective method for achieving competitive balance.[228] If leagues chose to continue revenue sharing, they would cease with a salary cap or luxury taxes, as economists have found that the latter two competitive balance reforms have offset the parity gains that revenue sharing alone would accomplish.[229] But leagues have not chosen to do so. Instead, they have adopted a variety of reforms aimed at competitive balance that have largely failed in their goals. Leagues have implemented salary caps and luxury taxes, which—when combined with revenue sharing—create artificially-depressed markets that drive down player salaries and do not lead to improved competitive balance.[230] They continue to redistribute league revenue, despite findings that revenue sharing hurt competitive balance because it makes winning less valuable.[231] Revenue sharing does, however, reduce the amount team owners pay for talent—one MLB study suggested a 22% average reduction in value[232]—while increasing the exploitation of players.[233]

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[227] Baccellieri, *supra* note 118.

[228] *See supra* text accompanying notes 158–160.

[229] *See* Vrooman, *supra* note 81, at 11; *see also* Rascher, *supra* note 15.

[230] *See* Vrooman, *supra* note 81, at 11; *see also* Totty & Owens, *supra* note 35, at 48–49.

[231] Gordon, *supra* note 21; *see also* Zimbalist, *supra* note 35, at 111. As one commentator noted: "There has never been a time in baseball history when a team—a team's owner—got more money just for existing than it does today." Jaffe, *supra* note 177 (quoting Joe Sheehan). Revenue sharing has thus exacerbated competitive balance—rather than achieving greater parity—because it all but guarantees profitability for owners, thus reducing the incentive to win. Gordon, *supra* note 21.

[232] Gordon, *supra* note 21.

[233] Vrooman, *supra* note 81, at 13.

As one scholar noted, professional sports leagues are either terrible at figuring out ways to achieve parity among their teams or they are not really trying to achieve competitive balance.[234] Indeed, the various competitive balance reforms have been unsuccessful at achieving league parity. However, they have been successful at minimizing team payrolls and increasing league and owner profitability.[235] While the popular narratives in the industry and among fans are those regarding competitive balance, the analysis above tells a different story of player exploitation in creating restrained labor markets that depress player salaries and keep team payrolls lower than they would be in a free(er) market. Accordingly, as the NFL, NBA, and MLB inch closer to their next round of collective bargaining negotiations with their respective players' unions, the issue of player pay may become even more prominent than it has in past CBAs.

[234] Fort, *supra* note 86, at 218.
[235] Gordon, *supra* note 21.