

1-1-1998

## Title VII and the Reserve Clause: A Statistical Analysis of Salary Discrimination in Major League Baseball

Jack F. Williams

Jack A. Chambliss

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Civil Rights and Discrimination Commons](#)

---

### Recommended Citation

Jack F. Williams and Jack A. Chambliss, *Title VII and the Reserve Clause: A Statistical Analysis of Salary Discrimination in Major League Baseball*, 52 U. Miami L. Rev. 461 (1998)

Available at: <https://repository.law.miami.edu/umlr/vol52/iss2/3>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# Title VII and the Reserve Clause: A Statistical Analysis of Salary Discrimination in Major League Baseball

JACK F. WILLIAMS\* & JACK A. CHAMBLESS\*\*

I. THE TRICHOTOMIZED MARKET IN MAJOR LEAGUE BASEBALL .....	470
A. <i>The Draft</i> .....	470
B. <i>The Reserve System</i> .....	472
C. <i>Arbitration</i> .....	477
D. <i>Free Agency</i> .....	485
II. DISCRIMINATION IN MAJOR LEAGUE BASEBALL .....	486
A. <i>Statutory Framework—Title VII</i> .....	486
B. <i>Previous Discrimination Studies</i> .....	495
C. <i>Methodology</i> .....	504
D. <i>Results</i> .....	507
1. <i>HITTERS</i> .....	507
2. <i>PITCHERS</i> .....	508
E. <i>Positive Profits and Discrimination</i> .....	509
III. PROPOSAL .....	514
A. <i>Abolish the Amateur Draft and Modify the Reserve System</i> .....	514
B. <i>Eliminate Arbitration</i> .....	515
C. <i>Expand Free Agency</i> .....	518
D. <i>Rejection of a Salary Cap</i> .....	519
E. <i>Reject Revenue Sharing Among Clubs</i> .....	521
IV. CONCLUSION .....	521

*"I don't believe there is any room in baseball for discrimination. It's our true national pastime and a game for all."*

Lou Gehrig, New York Yankees First Baseman 1923-39.<sup>1</sup>

## ABSTRACT

This statistical study explores whether certain components of the labor market in Major League Baseball foster racial discrimination in setting player salaries. Based on the regression results in the study, the

---

\* Associate Professor of Law, Georgia State University College of Law. The author thanks his colleague Steve Kaminshine, and research assistants Sheri Donaldson and Susan Seabury for their invaluable assistance.

\*\* Professor of Economics, Valencia Community College. The author would like to acknowledge the excellent research assistance of Joanna Boylan, John Greenwood, and Patrick Truhlar. He would also like to express his sincerest thanks to Paul While who selflessly provided invaluable insight into this endeavor, and Robert Clark, Steven Margolis, David Dickey, and Ron Brandolini, each of whom offered timely analysis and productive suggestions during the development of this article.

1. RAY ROBINSON, *IRON HORSE: LOU GEHRIG IN HIS TIME* 151 (1990) (quoting Lou Gehrig, New York Yankees First Baseman 1923-39).

anecdotal evidence of racially insensitive remarks and discriminatory practices, and the history of discrimination against minority players, coaches, and executives, there is strong evidence that Major League Baseball's reserve system, as a term and condition of employment, perpetuates discrimination based on race in violation of Title VII of the Civil Rights Act.

This study first considers all players on the Major League roster for the years 1987-88. It then considers the performance statistics of these players in 1987, national and local television revenues and appearances in 1987, and the race of players as explanatory factors of players' 1988 salaries.

Departing from previous empirical studies on salary discrimination in Major League Baseball, this study separates the labor market in Major League Baseball into three submarkets to accurately reflect the relationship of power between owners and players. In the first submarket, known as the reserve market, owners unilaterally set the salary of players with zero to three years of Major League experience, so long as the salary does not fall below the league minimum of \$109,000. In the second submarket, known as the arbitration market, owners and players with three to six years of Major League experience submit proposed salary offers to an arbitrator who chooses one of the proposals. In the third submarket, known as the free agency market, owners bid competitively for players with six years of Major League experience whose contracts have ended.

The results from the regression model show that, among other things, a minority pitcher with zero to three years of experience operating in the reserve market, where owners may unilaterally set salaries, is paid \$67,942.86 less than his white counterpart at a significance level of 0.01. However, there is no statistical evidence of discrimination against minority pitchers operating in the free agency market where owners must bid competitively to obtain the pitcher.

The results of the study strongly indicate a need for owners and players, through the Major League Baseball Players Association ("Players Association"), to reevaluate the terms of the 1996 collective bargaining agreement in light of the potential that certain terms in the agreement may perpetuate racial discrimination in players' salaries. Major League Baseball does not enter the discrimination debate with clean hands. When Al Campanis, the former general manager of the Los Angeles Dodgers, insisted that the lack of representation by African-Americans in the front offices of Major League Baseball teams was due to inferior mental faculties, the nation expressed shock. Similarly, when the media exposed the repeated use of racial and ethnic slurs by Cincinnati Reds

owner Marge Schott, many shook their heads in disbelief. However, people close to the inner circles of baseball were not surprised. After all, professional baseball has historically and systematically discriminated against African-Americans for most of its existence. Although it was believed that sordid past was relegated to the dark recesses of history, it still exists.

The 1994 baseball season presented an event unparalleled in its history as labor strife prematurely ended the season. With the end of the season went the hearts of die-hard fans, who had "clung to that hope which springs eternal in the human breast,"<sup>2</sup> that the owners and the players would settle their disagreements for the good of the game. It did not happen, and as a result, August 12, 1994 is a date that will live in infamy as long as baseball is played. That evening, fans at the Oakland Coliseum witnessed the final pitch of the 1994 Major League Baseball season, as the Athletics' pinch hitter, Ernie Young, whiffed on a fastball from the Mariners' ace pitcher, Randy Johnson.<sup>3</sup> As one sports journalist explained:

With that final, futile swing, the national pastime went down for the count as the more than 750 members of the Major League Players Association began their long-dreaded strike, baseball's eighth work stoppage since 1972. Never before have the games been halted this late in the season. Never before have the October play-offs and the World Series been in such dire jeopardy. Never before has the naked power struggle between the players and owners seemed so heedless and self-destructive.<sup>4</sup>

Both sides of the labor dispute immediately staked out their positions. Initially, it seemed that their proposals, comments, criticisms, and counterproposals were aimed more at the fans than at each other, creating a nasty form of dysfunctional bargaining conducted through a willing media. The owners, through their representative Richard Ravitch, made several demands. They pushed for a salary cap to limit the amounts teams may spend on free agents, for the elimination of salary arbitration, for the retention of the \$109,000 minimum salary for Major League Baseball players, for fifty-fifty revenue sharing with the players, and for revenue sharing among the clubs.<sup>5</sup> The owners proposed reducing the free agency threshold from six to four years of service, while retaining a right of first refusal to match any offer made to a player with

---

2. THE ANNOTATED CASEY AT THE BAT: A COLLECTION OF BALLADS ABOUT THE MIGHTY CASEY 21 (University of Chicago Press, 2d ed. 1984).

3. See Walter Shapiro, *Bummer of '94*, TIME, Aug. 22, 1994, at 69.

4. *Id.*

5. See *Baseball '94: The Shortest Season Q & A*, ATLANTA CONST., Sept. 15, 1994, at D3.

less than six years of service.<sup>6</sup> When asked to share revenues with the players, the owners proposed a guarantee totaling \$1 billion to players over seven years if revenues did not increase.<sup>7</sup> Finally, after a four-year phase-in period, club payrolls would have to fall between 84% and 110% of the Major League average.<sup>8</sup>

The players, through their representative Donald Fehr, completely rejected the owners' proposal. Fehr initially proposed to eliminate the restriction on repeat free agency within a five-year span if a player's club offers salary arbitration at the end of the contract.<sup>9</sup> The players also sought to reduce the threshold for salary arbitration to two years.<sup>10</sup> Finally, the players sought to increase the pensions for those players playing before 1970 and to increase the minimum salary from \$109,000 to between \$175,000 and \$200,000.<sup>11</sup>

After more posturing by both sides, the players announced their second proposal—a tax of 1.5% of revenue on the sixteen teams generating the most revenue and the sixteen teams with the highest payrolls.<sup>12</sup> The tax revenue would be distributed among the bottom twelve clubs in revenue and in payroll.<sup>13</sup> Coupled with the proposed tax, the players suggested that home teams share 25% of gate receipts with the visiting team.<sup>14</sup>

Following the second proposal, weeks turned into months with no end to the strike. Consequently, baseball began to suffer. The league championships and the World Series were cancelled for the first time in ninety years!<sup>15</sup> Moreover, during the winter, the players successfully sued the owners for bad faith negotiations.<sup>16</sup> Barely into the 1995 spring training season, the owners and players finally announced that they would play the 1995 regular season without a new collective bargaining

---

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.* The two-year threshold to arbitration was the practice from 1974 through 1986. Presently, salary arbitration is available to those players with three years of service and to the top 17% (measured in years, and fractions thereof, of Major League Baseball) of those with between two and three years of service. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.* Currently, American League home teams share 20% and National League home teams share about \$0.43 per ticket over \$1. *See id.*

15. It is estimated that the 232-day strike cost players \$350 million in lost salaries and cost owners \$800 million in operating losses for the twenty-eight teams during a three-year period. *See Baseball Gets Peace Until 2000*, FLA. TODAY, Dec. 6, 1996, at 01C.

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

agreement. They agreed to operate under the terms of the previous, expired collective bargaining agreement, and extended this agreement for the 1996 season.

In August 1996, the owners and Players Association reconvened to hammer out a new collective bargaining agreement. Although the parties agreed on several key terms, significant issues remained unresolved.<sup>17</sup> The central feature of the proposal was a "luxury tax" that would be imposed on clubs that exceeded certain payroll limits.<sup>18</sup> For example, clubs with payrolls exceeding \$51 million in 1997, \$55 million in 1998, and \$58 million in 1999, would have to pay a tax of approximately 35% of the excess; under the plan, there would be no tax in the year 2000.<sup>19</sup>

Revenue-sharing appeared to be part of the proposal as well. Although specific numbers were not publicized, the proposal requiring high-revenue clubs to subsidize low-revenue clubs had been labeled "modest."<sup>20</sup> Additionally, the new proposal retained salary arbitration. The new format, however, required a three person panel;<sup>21</sup> presently, only a single arbitrator decides salary disputes.

As of October 1996, several points of contention remained. First, the Players Association insisted that players receive credit for the seventy-five lost days of service time.<sup>22</sup> Several owners strongly opposed this measure.<sup>23</sup> Second, the Players Association balked on releasing the owners from damages resulting from the 1994-95 strike, at least until the owners relent on the issue of lost service time credit.<sup>24</sup> Finally, the Players Association sought to extend the agreement through the year 2001, with no payroll tax in the final year.<sup>25</sup>

After initially rejecting the tentative agreement hammered out by Randy Levine, the owners' negotiator, and Donald Fehr, executive director of the Players Association, the owners approved the new proposal on November 26, 1996.<sup>26</sup> Many observers found the event that led to the owners abrupt about-face was the enlistment by Chicago White Sox owner Jerry Reinsdorf of Albert Belle to a five-year, \$55 million con-

---

17. *See Next Move Uncertain as Talks Stall*, ATLANTA CONST., Aug. 14, 1996, at C3.

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.* Service time dictates when a player becomes eligible for arbitration and free agency.

23. Because of pre-strike changes in league governance, twenty-one of twenty-eight clubs must approve an agreement. *See id.*

24. *See id.*

25. *See id.*

26. *See Baseball Gets Peace Until 2000*, *supra* note 15, at 01C.

tract.<sup>27</sup> A commentator opined:

What makes the act [Belle's contract] so hypocritical is that Reinsdorf was the ringleader of the opposition to a labor agreement which, among other things, mandates that lucrative clubs pay a luxury tax to help support smaller franchises. The agreement was hammered out by owners' own committee.

As for his own opposition, Reinsdorf charged that the new agreement didn't do enough to curtail players' salaries.

The signing of Belle, for more money than the slugger was publicly seeking, forced other owners to recognize that the enemy was one of them, not necessarily the Player's Association.<sup>28</sup>

On December 5, 1996, the players unanimously approved the labor agreement.<sup>29</sup> Pursuant to the agreement, fourteen players, including Alex Fernandez, Moises Alou, and Jimmy Key became free agents as of December 7, 1996.<sup>30</sup> Additionally, the collective bargaining agreement imposed a 35% luxury tax on portions of payrolls above \$51 million for the 1997 season for the five highest team payrolls.<sup>31</sup> The tax will remain in effect for the 1997-99 seasons, but not for the 2000 season or the 2001 option year.<sup>32</sup> The tax was designed to curb increases in team payrolls;<sup>33</sup> however, the tax must be put in perspective. The average salary in the Major League for 1996 was \$1,119,981,<sup>34</sup> an increase of only 0.8% and 4.1% below the level of salaries before the 1994-95 strike,<sup>35</sup> while team salaries totaled \$929.6 million.<sup>36</sup> The New York Yankees, the 1996 World Champions, had the highest average salary at \$1,882,417, and the top payroll at \$64 million.<sup>37</sup> Milwaukee owned the lowest payroll average at \$420,320,<sup>38</sup> and Montreal had the lowest total payroll at \$15.4 million.<sup>39</sup> The eight 1996 post-season teams all had average payrolls among the top eleven teams.<sup>40</sup>

---

27. See Editorial, *In Our View*, INTELLIGENCE J., Dec. 3, 1996, at A10.

28. *Id.*

29. See *Baseball Gets Peace Until 2000*, *supra* note 15, at 01C.

30. See *id.* As part of the agreement, players receive credit for service time during the seventy-five regular season days wiped out by the strike.

31. See *Baseball Players Vote for the Labor Agreement*, ORLANDO SENTINEL, Dec. 6, 1996, available in 1996 WL 12431209.

32. See *id.*

33. See *id.*

34. See *Salaries in Baseball Average \$1,119,981*, FORT WORTH STAR-TELEGRAM, Dec. 4, 1996, at 1, available in 1996 WL 11355600.

35. See *id.* The average salary in 1994 was a record \$1,168,263, and the salary in 1995 was the first substantial decline in thirty years.

36. See *id.*

37. See *id.*

38. See *id.*

39. See Stephen Baker, *Baseball's Losers Still Lose*, BUS. WK., Dec. 16, 1996, at 42.

40. See *id.*

Along with the luxury tax, the new agreement provides for a limited form of revenue sharing. High-revenue teams are forced to give up a higher percentage of their locally-generated broadcast and ticket money.<sup>41</sup> One account states that the thirteen richest clubs will transfer some \$70 million in 1997 to the thirteen poorest clubs.<sup>42</sup> Players will also transfer 2.5% of their own salaries for revenue sharing.<sup>43</sup>

While the clubs and the players alternately engaged in posturing and serious frank discussions about the future of the labor market in baseball, this Article argues that the parties should have considered the effect on minorities of traditional components of the historic labor market in baseball. Traditionally, baseball is perceived as a meritocracy. Conventional wisdom suggests that discrimination, so much a part of this country's labor market, does not infect modern Major League Baseball. Our statistical study suggests that it may, or that at least there may be evidence of discrimination which should be directly confronted. This Article constructs a statistical model based on several assumptions disclosed below.<sup>44</sup>

The regression model suggests that the differences in salary between minority and white Major League Baseball players may be driven by, among other things, the race of the player. It does not necessarily follow from the results of the regression model, however, that invidious discrimination in fact exists in baseball.<sup>45</sup> It is not this Article's primary purpose to establish a *prima facie* case of employment discrimination against the owners. Rather, it seeks to expose certain components of the present labor market and conditions of employment that may harbor or mask discrimination against minority baseball players.

This Article will also explore the present labor market in Major League Baseball as framed by the present collective bargaining agreement under the lens of Title VII of the Civil Rights Act.<sup>46</sup> We analyze evidence, both anecdotal and statistical, suggesting the existence of salary discrimination, using a legal theory known as systemic disparate treatment. After carefully explaining the statistical model and the results and inferences therefrom, it suggests a fresh look at certain components of the Major League Baseball labor market.

---

41. See *Baseball Gets Peace Until 2000*, *supra* note 15, at 01C.

42. See Baker, *supra* note 39, at 42.

43. See *id.*

44. See *infra* text accompanying notes 238-44.

45. Statistical and legal significance are two different concepts. The results of a model may be statistically significant but lacking in legal significance. See Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, in REFERENCE MANUAL ON SCI. METHODS 429 (1994).

46. 42 U.S.C. § 2000e-e4 (1994).



Part I of this Article describes the trichotomized labor market in Major League Baseball. Although a number of studies have considered the labor market in Major League Baseball as one market, it is misleading to view the baseball labor market in that manner—Major League Baseball is actually composed of three submarkets. Players with up to three years of Major League experience comprise the first submarket. These players remain governed by the reserve clause.<sup>47</sup> This labor submarket is the least competitive. Aside from the minimum salary set in the collective bargaining agreement between the owners and the players,<sup>48</sup> players laboring under the reserve clause have no negotiating power with regard to their salaries. Owners have the power unilaterally to establish player salaries. Thus, first submarket players must either take it or leave it. The second submarket consists of players with three to six years of experience. These players operate under the reserve clause, but may seek salary arbitration if there is no agreement on salary. Although far from a competitive market, the second submarket's anti-competitive effect on salary are tempered by the driving forces of a third submarket—the free agency submarket. Players with over six years of Major League experience are free from the reserve clause and may file for free agency upon the completion of their contract. This third submarket closely reflects a free, competitive market economy, in which owners bid on a player's services, with the player usually accepting the highest offer.<sup>49</sup>

Part II investigates the question of whether salary discrimination exists in Major League Baseball. The section begins by providing a concise review of the statutory framework applicable to discrimination in employment, focusing on salary discrimination and the use of statistical models to infer discrimination and intent. Although Major League Baseball is exempt from the application of antitrust laws,<sup>50</sup> it is not exempt from the application of anti-discrimination laws, such as those

---

47. The reserve clause is a provision in the Uniform Player's Contract that forbids a player under contract from playing baseball for any other professional baseball club. See Basic Agreement, Schedule A, at 86 (on file with the authors); see also MARTIN J. GREENBERG, 1 SPORTS LAW PRACTICE § 5.08(1), at 405 (1993); GERALD W. SCULLY, THE BUSINESS OF MAJOR LEAGUE BASEBALL 23-24 (1989). Member clubs agreed not to contract, negotiate, or sign players reserved to another club without club permission.

48. In 1996, the minimum salary was \$109,000. See *Baseball '94: The Shortest Season Q & A*, *supra* note 5, at D3.

49. This is not always the case. Both Greg Maddux of the Atlanta Braves and Kirby Puckett of the Minnesota Twins (who recently retired) accepted offers less than the highest offer made to them for other reasons. See JOHN HELYAR, LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL 460 (1994); Ross Newhan, *Baseball Winter Meetings: Crisis? What Crisis?*, L.A. TIMES, Dec. 10, 1992, at C1.

50. See Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1994); see also *Flood v. Kuhn*, 407 U.S. 258 (1972) (holding Major League Baseball as judicially exempt from Sherman Antitrust Act).

found in Title VII.<sup>51</sup>

Part II also announces the results of our statistical study of salary discrimination. This Article is the first to consider the salaries of all Major League Baseball players and to control for revenues generated by and exposure on national and local television. The study shows that there is statistically significant evidence of salary discrimination against pitchers based on race and ethnicity in the reserve clause and arbitration submarkets. This occurs when owners unilaterally set players' salaries in the case of the reserve system or where, in the case of arbitration, a neutral third-party determines a salary based on numbers submitted by the player and the owner. In short, in reserve clause and arbitration submarkets, white pitchers earn \$67,942.86 more than minority pitchers at a 0.01 level of significance—a very significant result. Our study, however, shows no statistically significant evidence of discrimination against minority pitchers in the free agency submarket.

The study also shows a correlation between race and salary for hitters in the combined arbitration and free agency submarkets, with white hitters earning \$26,781.56 more than minority hitters at a 0.18 level of significance. It does not show statistically significant evidence of discrimination, however, in the reserve system submarkets.

Permeating the analysis is the question of whether a free market stops discrimination. Because of the strong evidence of salary discrimination against hitters in the combined arbitration/free agency submarket, the study suggests that a free market may not end discrimination, particularly when the owners of competing teams are not attempting to maximize profits, or when a positive profit stream short of maximization is acceptable.

Part III of this Article sets out a proposal to substantially modify the labor market in Major League Baseball. In particular, it provides a comprehensive market plan accommodating both the interests of the players and the owners, and ameliorating what appears to be systematic discrimination against minority pitchers in the reserve system submarket. This plan rejects the paradigmatic labor market model for modern Major League Baseball as potentially discriminatory, anti-competitive, incoherent, and unjustifiable, and proposes instead a global model for the labor market that abolishes the amateur draft, modifies the present reserve system, eliminates salary arbitration and salary cap proposals, and rejects revenue sharing among clubs.

---

51. See 42 U.S.C. § 2000e-e4 (1994).

## I. THE TRICHOTOMIZED MARKET IN MAJOR LEAGUE BASEBALL

To begin the analysis, it is beneficial to construct the contours of the present labor market in Major League Baseball with an eye toward mapping the shifts in power from the owners to the players. Thus, the following discussion about the trichotomized market in Major League Baseball is more than an historical overview; it is designated to provide context to what the negotiations between owners and players in Major League Baseball are all about: power!

### A. *The Draft*

Every June, Major League Baseball teams select high school and college players as part of the amateur draft. The draft continues until either the clubs run out of players they wish to select, or they reach fifty rounds.<sup>52</sup> Teams select players in inverse order of standings and alternate between leagues.<sup>53</sup> Players do not have the option to declare themselves eligible for the draft; the clubs do that for them. Of course, a player may refuse to sign with a club and re-enter the draft the following year;<sup>54</sup> however, he may not play Major League Baseball in the interim.

If a player signs with a club, he typically executes a Uniform Minor League contract and receives about \$700 a month to play minor league baseball.<sup>55</sup> Typically, the player may also receive a signing bonus from over \$2 million for a first-round choice to \$12,000 for a twenty-second-round choice.<sup>56</sup> The minor league contract is renewable solely by the drafting team for six consecutive years after the first year of play.<sup>57</sup>

Additionally, each year during late October, the clubs, in reverse order of standing, may select minor league players for major league status.<sup>58</sup> "All players on the reserve lists of National Association clubs are eligible for the draft. Clubs may continue to select players until their player limit is reached."<sup>59</sup> A selecting club is required to compensate a selected player's former club with the compensation amounts tied to the

---

52. See GREENBERG, *supra* note 47, § 5.24, at 440. Before 1992, the draft had no cap on its rounds. By comparison, basketball has two rounds and football has seven. See *id.* See also Thomas George, *Pro Football: Free Agency Put Aside, It's Draft Day*, N.Y. TIMES, Apr. 25, 1993, § 8, at 1.

53. See GREENBERG, *supra* note 47, § 5.24, at 440. In even years, the National League has first pick, and in odd years, the American League has first pick.

54. See *id.* at 441.

55. See *id.* at 436.

56. Major League Baseball has been criticized for not immediately releasing the names of those drafted and their place in the draft, presumably to keep agents from identifying potential clients and using the list as a tool in negotiation. See *id.* at 442.

57. See *id.* at 436.

58. See SCULLY, *supra* note 47, at 25.

59. *Id.*

competition level of the club. For instance, a Major League team pays more than an AAA team.<sup>60</sup> Professor Gerald Scully continues:

Once the player has been upgraded to major league status he may not be freely returned to the minors. No assignment of a player contract to a National Association club may occur without the granting of waivers by other major league clubs. If all of the major league clubs waive claims on the player contract, he may be assigned, and the assigned club pays 50% of the original price paid for the selection. The major league club is responsible for any difference between the player's contracted major league salary and the monthly salary rate in the player's National Association Uniform Player Contract.<sup>61</sup>

The Major League Baseball draft operates as a group boycott. Through various agreements, the clubs have agreed that any club that selects the rights to a player through the draft has the exclusive rights to that player's services. All other teams agree not to contact, negotiate, or contract with that player.

Recently, Major League Baseball witnessed life, albeit with just one player, without the downward pressure on salaries caused by the draft. In October 1996, the expansion team Arizona Diamondbacks signed free-agent first baseman Travis Lee to a four-year, \$10 million contract.<sup>62</sup> Included in the package was a \$5 million signing bonus. Lee was originally drafted by the Minnesota Twins in the June 1996 draft as the team's second pick. The Twins failed to tender a formally executed contract within fifteen days of the draft in accordance with Major League Rule Number 4(e).<sup>63</sup> The Twins' failure to comply with Rule Number 4(e) forced the Commissioner's Office to declare Lee a free agent.<sup>64</sup>

Lee's agent/attorney, Jeff Moorad, stated the exceptional salary is "indicative of what teams are willing to pay if forced to compete for top amateur talent."<sup>65</sup> To put the Lee signing in perspective, the number one pick in the June 1996 draft, Kris Benson, signed for \$2 million with the Pittsburgh Pirates.<sup>66</sup> These circumstances provide strong proof of the downward pressure on salaries exerted by the draft in Major League Baseball.

---

60. *See id.*

61. *Id.*

62. *See Scorecard: A Bomb Drops on Baseball*, SPORTS ILLUSTRATED, Oct. 21, 1996, at 19-20.

63. *See* PROFESSIONAL BASEBALL RULES BOOK, Major League Rule Number 4(e). The rule was passed by the Player Relations Committee after the 1990 season. *See Scorecard: A Bomb Drops on Baseball*, *supra* note 62, at 20.

64. *See Scorecard: A Bomb Drops on Baseball*, *supra* note 62, at 20.

65. *Id.*

66. *See id.* at 22.

### B. *The Reserve System*

In 1876, a group of baseball clubs seeking greater financial stability formed the National League. Among a number of pressing financial concerns was the owners' belief that unrestrained competition for players among the clubs would bode serious financial consequences.<sup>67</sup> In 1879, Jim O'Rourke became upset when his team, the Boston Beaneaters, would not buy him a uniform.<sup>68</sup> He quit the team and signed on with another professional baseball team. The teams owners, distressed by this turn of events, agreed to exchange lists of players from each team who would be "off-limits" to the rest of the league. These players were deemed "reserved" to one team only.

Furthermore, in response to the belief that free agency could ruin baseball, the National League owners secretly agreed to introduce a player reservation rule. Under the secret rule, a club possessed exclusive property rights to five players.<sup>69</sup> Other clubs were forbidden to compete for the contracts of the five reserve players. Any reserve player who jumped to another club would be blacklisted, and clubs that employed such players would be boycotted. Thus, reserve players had the severely limited choices of either playing baseball with the club that held their reservation rights, or not playing professional baseball at all. The reserve system became an effective mechanism in reducing club roster costs and increasing the fiscal stability of the National League. By the 1883 season, a National League club could protect its entire player roster through the use of the reserve rule.<sup>70</sup> Eventually, the owners incorporated this agreement into all major and minor league baseball contracts as the "reserve clause."<sup>71</sup> By 1903, when the National League and American League formed Major League Baseball, the reserve system had become an integral part of the warp and woof of the baseball players' market.

During the first one hundred years of Major League Baseball, the owners exerted almost complete control over the players and the game, especially regarding players' salaries. For example, Ralph Kiner, now a member of baseball's Hall of Fame, hit thirty-seven home runs for the last place Pirates in 1952. This was the seventh consecutive year Kiner led the league in home runs. Branch Rickey, then owner of the Pirates, announced he was cutting Kiner's salary by 25%, reasoning that the

---

67. See SCULLY, *supra* note 47, at 2.

68. O'Rourke is now a member of the Hall of Fame. See Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORTS L. 301, 303 (1992).

69. See SCULLY, *supra* note 47, at 2.

70. See *id.* at 3.

71. See *id.* at 3-4.

Pirates would have finished last with or without Kiner.<sup>72</sup> Likewise, Mickey Mantle won the Most Valuable Player Award in 1956 and 1957. Yet, when Mantle signed his new contract, the Yankees offered a \$10,000 pay cut. This heavy-handed treatment was not unusual.

The reserve system gave a team the exclusive rights to a player while he was under contract with the team and for the next contract year, effectively binding the player to a team for life.<sup>73</sup> From the owners' perspective, this protected the team from interference by richer teams and enabled the team to recoup its investment in the player.<sup>74</sup> The reserve system enabled teams to artificially limit players' salaries by assigning each player a contract, essentially making players indentured servants,<sup>75</sup> and in turn, providing more money to baseball owners. Therefore, the player had two options: (1) he could accept the team's contract offer, or (2) he could retire from professional baseball.

Moreover, if a player sat out a year, he would lose a year's salary and the league's other teams would blacklist him.<sup>76</sup> Alternatively, a team could release a player at any time with only ten days' notice.<sup>77</sup> These circumstances led to the players' unequal bargaining position in the early years of Major League Baseball.

Every professional baseball player must sign a Uniform Players' Contract. The contract may not contain a bonus clause for playing, pitching, or batting skills, or contain a bonus contingent upon club standing. The use of the Uniform Players' Contract is intended to "preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form. No club should make a contract different from the uniform contract or a contract containing a non-reserve clause . . . ."<sup>78</sup> Pursuant to the contract, a player "agrees to render skilled services as a baseball player during the year . . . including the clubs' training season, the clubs' exhibition games, the clubs' playing season, and the World Series . . . or any other official series in which the club may participate."<sup>79</sup> Additionally, the player is free to terminate his contract with the club and seek a contract with another club only if "the Club shall default in the payments to the Player" or "fail to perform

---

72. See HELYAR, *supra* note 49, at 10.

73. See Hopkins, *supra* note 68, at 304.

74. See Robert A. McCormick, *Labor Relations in Professional Sports: Lessons in Collective Bargaining*, 14 EMPLOYEE REL. L.J. 501, 502 (1989).

75. See SCULLY, *supra* note 47, at 29.

76. See Kevin A. Rings, *Baseball, Free Agency and Salary Arbitration*, 3 OHIO ST. J. ON DISP. RESOL. 243, 245 (1987).

77. See *id.* at 245 n.19; see also *Philadelphia Ball Club v. Lajoie*, 51 A. 973 (Pa. 1902).

78. SCULLY, *supra* note 47, at 23.

79. *Id.*

... [its] ... other obligation[s] ... and if the club shall fail to remedy such ... within ten (10) days after the receipt by the Club of written notice of such default.”<sup>80</sup> The club may terminate the contract if the player fails to demonstrate good citizenship and sportsmanship, fails to keep himself in peak physical condition, fails to obey the clubs’ training rules, fails to exhibit sufficient skill, or fails to render other services stipulated in the contract.

The reserve clause was a matter of bitter dispute between management and the players in the 1975 labor negotiations. Prior to 1976, players were bound indefinitely to their clubs. As a result of the now famous *Messersmith* arbitration decision, players were declared eligible for free agency after playing one year without a contract.<sup>81</sup> The Basic Agreement between the owners and players stipulates conditions and procedures for free agency, binding salary arbitration, and player trading.

There have been numerous legal challenges to Major League Baseball’s reserve clause. In theory, the reserve clause appears to violate section one of the Sherman Antitrust Act.<sup>82</sup> The effect of the reserve clause is to prevent a player’s ability to sell his services to the highest bidder. The clause operates in a manner similar to a group boycott; teams that do not own the rights to a player cannot and will not contact, negotiate, or contract with a player without the consent of the club that has such rights.

In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,<sup>83</sup> the Supreme Court strengthened owners’ control over players. In that case, the Federal League, a rival professional baseball league, attempted to lure away star players of the National League, but were frustrated by the reserve clause.<sup>84</sup> The Federal League claimed the defendants destroyed their league by buying several of the Federal League teams, and by blacklisting the Federal League players.<sup>85</sup> The Federal League asserted that the reserve system violated federal antitrust laws, but the Supreme Court disagreed. Justice Holmes ruled that Major League Baseball was a business “giving exhibitions of baseball, which are purely state affairs.”<sup>86</sup> Moreover, although the league “must induce free persons to cross state lines,” this transpor-

---

80. Uniform Player’s Contract ¶ 7(a), in LIONEL S. SOBEL, *PROFESSIONAL SPORTS & THE LAW* 669-70 (1977).

81. See JAMES B. DWORKIN, *OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING* 78 (1981).

82. 15 U.S.C. § 1 (1994).

83. 259 U.S. 200 (1922).

84. See *id.* at 206.

85. See H. Ward Classen, *Three Strikes and You’re Out: An Investigation of Professional Baseball’s Antitrust Exemption*, 21 AKRON L. REV. 369, 377 (1988).

86. *Federal Baseball*, 259 U.S. at 208.

tation was incidental and not essential to the game.<sup>87</sup> Accordingly, Justice Holmes concluded that baseball was not a business engaged in interstate commerce, and thus, was not subject to antitrust laws.<sup>88</sup> Affording Major League Baseball this court-crafted antitrust exemption enables it to govern itself without any real threat of government intervention.

Many criticize the *Federal Baseball* case as an anomaly, which is illogical and unfair to the players, noting that other sports are not exempt from the ambit of antitrust laws.<sup>89</sup> Nevertheless, *Federal Baseball* has continued to serve as precedent for further challenges to the business of professional baseball on antitrust grounds.<sup>90</sup>

In 1953, the Supreme Court reaffirmed its holding in *Federal Baseball* in *Toolson v. New York Yankees, Inc.*<sup>91</sup> In that case, Toolson, a pitcher for the New York Yankees, refused to report to the team's farm club. In response, the team blacklisted him and prevented him from playing for any other team. Toolson argued that Major League Baseball's monopoly deprived him of his livelihood.<sup>92</sup> The Court relied on the fact that baseball "has . . . been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation."<sup>93</sup> The Court refused to address the merits of the case and held that "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."<sup>94</sup> Thus, the Supreme Court announced that "any change in the nonapplicability of the antitrust laws to baseball would henceforth have to be made by Congress and not the judiciary."<sup>95</sup>

Despite indications that the Court was willing to remove baseball's antitrust exemption, in 1972 the Supreme Court, citing the doctrine of *stare decisis*, again upheld the reserve clause's validity in *Flood v. Kuhn*.<sup>96</sup> In that case, pursuant to the reserve system, the St. Louis Cardinals traded Curt Flood to another team without consultation. Flood

---

87. *Id.* at 209.

88. *See id.*

89. *See, e.g.,* Radovich v. National Football League, 352 U.S. 445 (1957) (holding that professional football is not exempt from antitrust laws); United States v. International Boxing Club, Inc., 348 U.S. 236 (1955) (finding that not all professional sports were outside the scope of the antitrust laws, including the International Boxing Club); *see also* Flood v. Kuhn, 407 U.S. 258, 282-83 (1972) (noting that "other professional sports operating interstate-football, boxing, basketball, and, presumably, hockey and golf—are not so exempt").

90. *But see* Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Penn. 1993).

91. 346 U.S. 356 (1953).

92. *See id.* at 366.

93. *Id.* at 357.

94. *Id.*

95. *Id.*

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



claimed this trade violated antitrust laws.<sup>97</sup> The Court admitted baseball was a business engaged in interstate commerce,<sup>98</sup> and that *Federal Baseball's* reasoning was no longer sound, yet decided to uphold the cases stemming from it. The Court explained that the antitrust exemption set forth in *Federal Baseball* and reaffirmed in *Toolson* is an "aberration confined to baseball."<sup>99</sup> The Court reasoned that this aberration reflected Major League Baseball's special relationship with the United States and constituted a "recognition and an acceptance of baseball's unique characteristics and needs."<sup>100</sup> The Court concluded by stating, "[i]f there is any inconsistency or illogic in all of this, it is an inconsistency and illogic long standing that is to be remedied by the Congress and not by this Court."<sup>101</sup> No congressional remedy ever came. Therefore, the players needed to seek some other avenue of relief from the oppressiveness of the owners and the reserve system. This relief came in the form of arbitration and the collective bargaining process.

Under the Basic Agreement between management and the players, the effect of the reserve system has been tempered. Both final-offer salary arbitration and free agency ameliorate the harsh anti-competitive effect of the reserve clause on player salaries. Nevertheless, the reserve system remains a significant component of the players' labor market for those players with less than three years experience in the major leagues.

At this point, it is beneficial to review the impact the amateur draft and the reserve system have on the labor market. Up until the advent of salary arbitration in the 1970's, all the power in contract negotiations rested with the owners, who consistently abused it for their own benefit. Though the power of the draft and the reserve system permitted the owners to set artificially low salaries, allowing the owners to exploit their players, a player's only power was to leave the game of baseball. He could forego baseball and enter another profession. Nevertheless, as long as the owners set salaries equal to or above salaries in competing

---

97. Flood complained to Commissioner Kuhn that he was not a "piece of property to be bought and sold irrespective of [his] wishes." *Id.* at 288-89.

98. *See id.* at 282.

99. *Id.*

100. *Id.* The Court justified treating baseball differently than football, boxing, hockey, and non-sports entertainment based on Major League Baseball's uniqueness, in that it developed around the antitrust exemption. *See also* Stephen F. Ross, AN ANTITRUST ANALYSIS OF SPORTS LEAGUE CONTRACTS WITH CABLE NETWORKS, 39 EMORY L.J. 463, 474 (1990).

101. *Flood*, 407 U.S. at 284. The Court elaborated:

We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disprove them legislatively.

*Id.* at 283-84.

markets, usually markets for unskilled labor, the owners had little worry of a talent drain.

With the introduction of arbitration and free agency, however, the owners' tendency to exploit their players was severely blunted. For the first time in over one hundred years, players could look to systems of compensation that more closely approximated a free market. With this increased power, players uncovered what they suspected all along: owners were paying all players salaries well below their market values. What this study shows, however, is that owners may be paying their minority players less than white players, in part, on the basis of race.

### C. Arbitration

As an industry, Major League Baseball has seen many changes. The most dramatic structural changes have come in the players' market in the form of arbitration and free agency. Since 1974, baseball has had binding final-offer salary arbitration,<sup>102</sup> and since 1976, free agency for eligible veteran players.<sup>103</sup>

Contrary to popular opinion, owners, and not players, first proposed salary arbitration. After the Supreme Court decided *Flood v. Kuhn*, the owners concluded that the players should have an opportunity to have salary grievances heard by a neutral party, largely as a mechanism to stave off any player attempts to impose free agency.

Arbitration is the "submission of a dispute to an impartial person or persons on the basis of evidence and arguments presented by the parties."<sup>104</sup> Arbitration in the United States became popular during World War II as a means to expeditiously resolve labor disputes and prevent work stoppages that would cripple the war effort.<sup>105</sup> Today, almost all collective bargaining agreements contain provisions for settling disputes through arbitration.<sup>106</sup> In the 1970 collective bargaining agreement, the players and owners agreed to employ the arbitration system to settle internal disputes.<sup>107</sup> After the *Flood* case, Marvin Miller, the Executive Director of the Players Association, realized that the courts would be of no use to players. Miller also knew that the players would not gain meaningful concessions from owners through the collective bargaining

---

102. For an excellent discussion of baseball arbitration, see GREENBERG, *supra* note 47, § 5.17, at 423-29.

103. For an excellent discussion of free agency in baseball, see *id.* § 5.18, at 429-32.

104. Marvin F. Hill & Anthony V. Sinicropi, *Improving the Arbitration Process: A Primer for Advocates*, 27 WILLAMETTE L. REV. 463, 468 (1991).

105. See *id.* at 466.

106. See *id.*

107. See MARVIN MILLER, *A WHOLE DIFFERENT BALLGAME: THE SPORT AND BUSINESS OF BASEBALL* 214 (1991).

process,<sup>108</sup> recognizing that players had no effective leverage in negotiations. Arbitration was the last avenue of relief, and it ultimately provided players with the bargaining power to end the owners' complete and total control over the labor market.

In 1975, two players, Andy Messersmith and Dave McNally, refused to sign contracts to play for their teams that season. Both players rejected the efficacy of the reserve clause and claimed the freedom to sign with any team.<sup>109</sup> The Los Angeles Dodgers, Messersmith's team, invoked the reserve clause to force him to play the 1975 season, and assigned Messersmith a new contract. This new contract also contained a new reserve clause.<sup>110</sup> Though he played that season with the Dodgers, Messersmith never signed the new contract. Messersmith claimed the Dodgers no longer had contractual control over him.<sup>111</sup> The owners claimed that the reserve clause continued to bind players, like Messersmith, to their respective teams forever, even if they did not sign the new contracts. Under this argument, if the owners prevailed, the players would be bound to a team for as long as the team desired.

Pursuant to the collective bargaining agreement, the case came before a panel of arbitrators headed by Peter Seitz. The panel ruled in favor of the players and declared the players "free agents."<sup>112</sup> The owners challenged the panel's decision, but the reviewing court rejected the owners' argument.<sup>113</sup> This decision enabled the players to establish their value on the open market for the first time as free agents, and ended total owner control over players' salaries.

While Major League Baseball is currently exempt from federal antitrust laws, owners and players are obligated to negotiate under the National Labor Relations Act.<sup>114</sup> Since the reserve system could no longer be used to settle salary disputes in a number of situations, the owners and players adopted binding "final offer" arbitration.<sup>115</sup>

---

108. See Michael J. Cozzillio, *From the Land of Bondage: The Greening of Major League Baseball Players and the Major League Baseball Players Association*, 41 CATH. U. L. REV. 117, 131-32 (1991) (reviewing MARVIN MILLER, *A WHOLE DIFFERENT BALLGAME: THE SPORT AND BUSINESS OF BASEBALL* (1991)).

109. See Rings, *supra* note 76, at 250.

110. See *id.*

111. See *id.* McNally essentially took the same actions with his team.

112. See *id.* Major League Baseball Commissioner, Bowie Kuhn, fired Seitz immediately after the ruling.

113. See *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F. Supp. 233, 250 (W.D. Mo. 1976), *aff'd*, 532 F.2d 615 (8th Cir. 1976).

114. See *American League of Prof'l Baseball Clubs*, 180 N.L.R.B. 190 (1969); see also DWORKIN, *supra* note 81, at 38.

115. See Paul Gordon, *Submitting "Fair Value" to Final Offer Arbitration*, 63 U. COLO. L. REV. 751, 756-57 (1992). Final Offer Arbitration was devised by economist Carl Stevens. See also James Warren, *College Prof Spawns Baseball Arbitration, Author Proud of Intellectual*

To a certain extent, salary arbitration in baseball was never intended to be used. The structure of Final Offer Arbitration promotes settlement by encouraging both sides to submit reasonable offers.<sup>116</sup> If an arbitrator deems a party's offer unreasonable, the arbitrator chooses the other offer by default. "The intended effect is that, in the process of making compromises to enhance the attractiveness of their final offers to the arbitrator, the parties will reach common ground and come so close to a settlement that they will resolve their differences voluntarily."<sup>117</sup> More than 90% of players eligible for salary arbitration reach a settlement before the hearing occurs, which shows that pressures to force agreement are working.<sup>118</sup>

In Major League Baseball, salary arbitration goes into effect when the parties reach an impasse in negotiating an eligible player's salary.<sup>119</sup> Currently, all players in Major League Baseball with three to six years of service, as well as 17% of the second year players (also known as "senior two's"), are eligible for salary arbitration.<sup>120</sup> Once the negotiation reaches an impasse, the team and the player each submit a one year salary figure to the arbitrator. Next, the arbitrator (recently changed into a three-member panel) conducts a hearing where each side presents evidence to support why its proposed salary figure best reflects the player's worth. The arbitrator must choose one of the figures presented by the parties,<sup>121</sup> then must issue a decision within one day. While the decision is binding, the arbitrator is not required to render a written opinion. Moreover, arbitrators must limit their decision to criteria agreed upon in the current collective bargaining agreement. Presently, arbitrators consider the following:

- (1) the quality of the player's contribution to the team during the

---

"Baby," CHI. TRIB., Mar. 4, 1990, at 9C. Stevens was concerned that parties involved in conventional arbitration might take extreme positions, believing the arbitrator would split the difference. Stevens sought a system that encouraged both sides to put their best offer on the table and truly bargain. Stevens explained, "[m]y hypothesis was that this would encourage parties to bargain. One side would offer what it felt an arbitrator would see as more reasonable, thus providing a moderate influence." *Id.*

116. See Roger I. Abrams, *Sports Labor Relations: The Arbitrator's Turn at Bat*, 5 ENT. & SPORTS L.J. 1, 7 (1988).

117. Gordon, *supra* note 115, at 757 (quoting 1 LABOR AND EMPLOYMENT ARBITRATION § 63.02 (T. Bornstein & A. Gosline eds., 1991)).

118. Parties often settle after they present the two salary numbers to the arbitrator. Both sides continue to evaluate their position and may reach a compromise fearing their position is further from the "correct" salary than the other side's position. See Rings, *supra* note 76, at 255.

119. See *id.* at 254.

120. The eligibility of second year players is determined based on time spent in the major leagues. See Craig Neff, *The 17% Solution*, SPORTS ILLUSTRATED, Apr. 2, 1990, at 13.

121. The current rules do not allow arbitrators to choose a compromise figure between the two proposed by the parties.

past season (in terms of performance, leadership, and popularity with the public);

(2) the length and consistency of the player's career performance;

(3) the player's past compensation;

(4) comparable salaries of other baseball players;

(5) the existence of any physical or mental problems which may affect the player; and

(6) the club's performance.<sup>122</sup>

The parties present evidence relevant to the above criteria and arbitrators have the discretion to weigh the evidence as they deem appropriate.<sup>123</sup>

Presently, the collective bargaining agreement specifically excludes several topics from an arbitrator's consideration, including:

(1) the financial situation of the team;

(2) comments made by the press that may bear on the performance of the player or team, except for any awards the player received for his performance;

(3) any offers made by the player or the team before the hearing;

(4) the cost to either party for legal representation; and

(5) salaries in other sports or occupations.<sup>124</sup>

Since the inception of salary arbitration in 1974, a noticeable trend has emerged. Players that are eligible for salary arbitration, even those who lose at the hearing, receive a significant increase in salary. In 1991, for example, 157 players filed for arbitration. There were only seventeen hearings and the average salary increase for all eligible players participating in arbitration was 103%—nearly double the increase of non-eligible players.<sup>125</sup> In 1993, the average increase of the 118 Major League Baseball players who filed for arbitration was \$829,421, even though the owners were successful in twelve of the eighteen actual hearings.<sup>126</sup> Although the owners have held a slight advantage since 1974,<sup>127</sup> the players' salaries have continued to spiral upward.

Originally, arbitration agreements between management and players provided that any club or player with two to six years of service in the major leagues, and who had not reached a salary agreement, could

---

122. See Hopkins, *supra* note 68, at 311.

123. See *id.* Arbitrators often look at the midpoint between the two figures and then decide if the player is worth one dollar more or less than that.

124. See *id.*

125. Chicago White Sox pitcher Jack McDowell earned an 814% increase in salary despite losing his arbitration case. See Hopkins, *supra* note 68, at 328; see also Jerome Holtzman, *Player Salaries Uphold Wrigley Arbitration View*, CHI. TRIB., Jan. 23, 1994, at C13.

126. See Ronald Blum, *Players in Arbitration Were Big Winners*, ST. LOUIS POST-DISPATCH, Feb. 22, 1993, at 6C.

127. See *id.*

submit the dispute to arbitration. In 1987, the minimum service requirement was raised to three years by an agreement between management and the players.

Generally, about one hundred players file for arbitration each year. Most of these players end up settling with their club before the actual arbitration. Historically, players have won about 44% of the arbitration hearings.<sup>128</sup> One possible explanation for this may be that arbitrators, lacking the authority to exercise discretion to "split the difference" in a particular arbitration hearing, often do so, in effect, by deciding how often a player or management prevails overall.

Economists have speculated that the availability of an arbitration alternative puts upward pressure on salaries. Because the probability of winning in arbitration is historically close to 50%, club owners are generally willing to grant salary increases, at least up to the expected salary increase the player might attain through arbitration. It is also possible that much of the upward pressure on salaries attributed to arbitration may be caused by the high salaries obtained by players who file as free agents. The interaction between salary arbitration and free agency has fueled an increase in players' salaries. When salary arbitration began in 1974, the average players' salary was \$44,676.<sup>129</sup> The current average salary is more than \$1.2 million.<sup>130</sup> Theoretically, owners base free agent offers on their perception of a player's *future* value to a new team, whereas salary arbitration is designed to reflect the player's past contributions to a team.<sup>131</sup> However, arbitrators must base their decision on comparable baseball salaries; therefore, a player engaged in arbitration bases his figure, in part, on comparable players' salaries, including salaries offered to lure free agents.<sup>132</sup> This interplay of salary arbitration and free agency has sent players' salaries soaring. Because of these rising salaries, owners now seek to do away with salary arbitration,<sup>133</sup> believing that it damages Major League Baseball's financial structure.<sup>134</sup>

Owners typically parade their profit and loss statements to prove that salary arbitration is ruining Major League Baseball. Although Major League Baseball revenues have increased yearly between 1976 to 1994, television networks have experienced huge losses broadcasting

---

128. See SCULLY, *supra* note 47, at 162.

129. See Rings, *supra* note 76, at 243.

130. See Bill Brashler, *Booooooooooooooooooo!; Let's Hear It for Pampered, Preening, Overpaid Whiners: The Jocks*, CHI. TRIB., July, 28, 1996, at C12 (stating that the average Major League salary for the 1996 season was \$1,176,967).

131. See Rings, *supra* note 76, at 259.

132. See *id.*

133. See Tom Verducci, *In the Strike Zone*, SPORTS ILLUSTRATED, Aug. 1, 1994, at 26.

134. See Steven V. Roberts & Jim Impoco, *A Bronx Cheer for Baseball*, U.S. NEWS & WORLD REP., Aug. 22, 1994, at 24.

baseball over the past several years.<sup>135</sup> In fact, ESPN exercised its option to buy out its contract with Major League Baseball to cut its losses.<sup>136</sup> The end of these lucrative television contracts is expected to decrease Major League Baseball's revenues by at least \$200 million.<sup>137</sup> Owners contend this revenue decrease will be a substantial financial strain on Major League Baseball, and will ultimately force smaller market teams out of Major League Baseball. Smaller franchises complain that, because arbitrators cannot consider a team's economic situation or geographic location,<sup>138</sup> they are forced to match salaries offered by larger market clubs.<sup>139</sup>

Owners argue that the current system of salary arbitration, coupled with free agency, leads to domination by larger market teams. They contend that a pure reserve system maintains the game's competitive balance. Their contention, however, is erroneous for several reasons. First, the owners' argument implies that prior to salary arbitration, fierce competition existed and larger market teams did not dominate. Yet, between the years 1921 through 1964, under a pure reserve system, the New York Yankees won the American League pennant twenty-nine times, and the World Series twenty times.<sup>140</sup> In contrast, since 1976, twenty different teams have won the American League or National League pennant, with fourteen different teams going on to win the World Series. Therefore, one could argue that salary arbitration and free agency have, in fact, produced the most competitive period in Major League Baseball's history.<sup>141</sup>

Owners also complain that arbitration and free agency lead to raiding by larger market teams, and ultimately lead to fan disinterest. Yet,

---

135. See GREENBERG, *supra* note 47, § 5.01(2), at 374-75.

136. See *id.* § 5.01(2), at 222 n.55 (Cum. Supp. 1995).

137. See Mike Fish, *Fehr: TV Contract Likely to Undermine Commissioner's Role*, ATLANTA J./ATLANTA CONST., May 29, 1993, at D7.

138. See *supra* notes 122-124 and accompanying text. Former Major League Baseball Commissioner Fay Vincent believes the current system must change due to severe pressure placed on smaller clubs. "How do you deal with a system where, if you're in Seattle, you have to pay New York prices for talent [due to arbitration awards]? No other business in Seattle pays New York prices—except baseball. It's absurd." Bill Brubaker, *The Head of the Game, Faced With Trouble*, WASH. POST, Aug. 16, 1992, at D1 (alteration in original).

139. See Joe Strauss, *Baseball Study: Owners, Players Must Cooperate*, ATLANTA J./ATLANTA CONST., Dec. 15, 1992, at C5. See generally Kevin E. Martens, *Fair or Foul? The Survival of Small-Market Teams in Major League Baseball*, 4 MARQ. SPORTS L.J. 323 (1994).

140. See Michael Isikoff, *Bowie at the Bat*, NEW REPUBLIC, Apr. 27, 1987, at 32, 35 (reviewing BOWIE K. KUHN, *HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER* (1987)). Looking back further, between the years 1901-1919, only four teams won the American League championship. Similarly, between 1901-1914, only three teams won the National League championship. See CHARLES C. ALEXANDER, *OUR GAME: AN AMERICAN BASEBALL HISTORY* 93 (1991).

141. See MILLER, *supra* note 107, at 294-95.

this incorrectly presupposes that big market team raiding of smaller teams is a modern development in Major League Baseball. During their period of domination, the New York Yankees bought the contracts of many star players from other teams, particularly the Boston Red Sox.<sup>142</sup> Although this decreased baseball's level of competitiveness, the owners did not seem concerned that this domination would lead to fan disinterest, at least as long as the trading owner reaped the market value of its stars. The main difference is that under the original reserve system, the money representing the true value of the player went to the "selling" team. Under the current system, however, the money goes directly to the player as free agent.

Another complaint voiced by owners is that arbitration leads to large salary increases for many players whose productivity in the season preceding the arbitration did not merit any increase at all.<sup>143</sup> The owners argue that salary arbitration places players in a "no-lose" situation, and point to 1992 arbitration results to prove their case. In 1992, twenty salary disputes reached arbitration.<sup>144</sup> The owners won eleven of these hearings.<sup>145</sup> The nine winning players received an average salary increase of 135%, and the "losing" players received an average increase of 81%.<sup>146</sup> It is no surprise, then, that owners want to eliminate the salary arbitration system, even though they have won 56% of arbitration hearings since the system was implemented in 1974.<sup>147</sup>

One way for owners to confront the arbitration system and the harshness often associated with haggling over a player's value, is to avoid it altogether. Players use the threat of arbitration to gain huge salary increases.<sup>148</sup> Fearing exorbitant arbitration results, owners feel compelled to offer significantly increased salaries in an effort to settle the dispute before it reaches arbitration. In 1993, the Cleveland Indians adopted a different approach. To confront uncertain economic times and avoid salary arbitration disputes, the Indians signed fourteen young baseball players to long-term contracts during the 1992 and 1993 seasons.<sup>149</sup> The risky approach seems to have paid off. The Cleveland

---

142. See ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* 11 (1992).

143. See I.J. Rosenberg, *The Money Game*, ATLANTA J./ATLANTA CONST., Jan. 14, 1993, at E1.

144. See Joe Strauss, *Players Really Can't Lose in Baseball's Arbitration Game*, ATLANTA J./ATLANTA CONST., Feb. 25, 1992, at C1.

145. See *id.*

146. See *id.*

147. See SCULLY, *supra* note 47, at 162.

148. See Mark Maske, *Anderson: 438 Percent Pay Raise*, WASH. POST, Jan. 19, 1993, at E8. In 1993, Brady Anderson and the Baltimore Orioles avoided arbitration and agreed to a one-year contract resulting in a 438% pay increase for Anderson. See *id.*

149. See Mark Maske, *Orioles Seek to Sign Young Players*, WASH. POST, Mar. 3, 1993, at D1.



Indians were the 1995 American League Champions, advanced to post-season play again in 1996, and in 1997, came within one run of winning the World Series. Normally, teams offer unproven players one-year contracts. The Indians, however, hoped that by signing young players to multi-year contracts, they would avoid the escalating payroll and "bruised egos" inherent in salary arbitration.<sup>150</sup>

While owners believe the players' salaries are out of control, the players think that the owners collusively depressed their salaries before free agency through the reserve system. Therefore, in the players' view, today's increased salaries better represent a player's true market value and allow players to recoup previous lost rents appropriated by owners in a restrictive market.

The players also contend that the owners' cries of financial woes lack credibility and that the numbers disclosed by the owners forecasting financial doom were misrepresented.<sup>151</sup> A Toronto Blue Jays executive remarked, "I can turn a \$4 million profit into a \$2 million loss, and I can get every national accounting firm to agree with me."<sup>152</sup> Turning profits into book losses has only exacerbated an already stormy relationship between the owners and players, and has increased the players' mistrust of management's claims of impending financial ruin.<sup>153</sup>

Understandably, the players are determined not to return to a pure reserve system. Salary arbitration and free agency provide players with a bargaining position—the reserve system does not. Players also see arbitration as a way to hold on to their "professional liberty."<sup>154</sup> Players reject the owners' contention that salary arbitration placed them in a completely "no-lose" situation. According to the players, this one-sided characterization by the owners does not consider the hard feelings salary arbitration often leaves on both sides. The adversarial nature of salary

---

150. See Mark Maske, *Yanks, Like Boss, to Be Reckoned With*, WASH. POST, Feb. 28, 1993, at D13. This is a risk on both sides. The team is guaranteeing money to unproven players. By signing, the players miss a potential opportunity to cash in on bigger salaries.

151. See Richard Hoffer, *The Bucks Stop Here: Spiraling Salaries and a Potential Loss of TV Loot Imperil Baseball's Prosperity*, SPORTS ILLUSTRATED, July 29, 1991, at 46. In response to owners' claims of financial doom, Donald Fehr, the players' representative, responded, "[y]ou will go through the Sporting News of the last 100 years, and you will find two things are always true. You never have enough pitchers, and nobody ever made money." *Id.* at 47.

152. ZIMBALIST, *supra* note 142, at 62.

153. This skepticism about the owners' financial position escalated in 1992 when teams signed free agents to contracts worth more than \$230 million, including a contract to Barry Bonds worth \$43.75 million. See Tim Kurkjian, *Dark Days of Baseball*, SPORTS ILLUSTRATED, Dec. 21, 1992, at 44. Things were no better in 1996, where the owner of the Chicago White Sox signed Albert Belle to a five-year, \$55 million contract, while at the same time lamenting about the increase in players' salaries. See *In Our View*, *supra* note 27, at 410.

154. Isikoff, *supra* note 140, at 32.

arbitration often alienates players from management.<sup>155</sup> The process can leave players with the belief that their teams do not value their services, and naturally, no player wants to play for a team that does not want him.<sup>156</sup>

#### D. Free Agency

Jim "Catfish" Hunter's 1974 contract<sup>157</sup> with the Oakland Athletics called for \$50,000 in cash and \$50,000 in a tax-free annuity. Oakland's owner, the flamboyant Charles Finley, breached the agreement, paying Hunter \$100,000 in cash. Pursuant to paragraph 7(a) of the Uniform Players' Contract, Hunter terminated the agreement and announced his intention to play for whomever made the best offer. In December 1974, arbitrator Peter Seitz ruled in favor of Hunter, who then signed with the Yankees for \$3.75 million over five years.<sup>158</sup>

The baseball labor market did not change dramatically until 1975, when Andy Messersmith challenged the reserve clause. In that year, Messersmith demanded a no-trade guarantee from the Los Angeles Dodgers, who refused his request.<sup>159</sup> Messersmith played the 1975 season without a contract. At the end of the season, he declared himself a free agent. The Players Association filed a grievance on behalf of Messersmith and Dave McNally of the Montreal Expos, alleging that the interpretation of the renewal period and paragraph 10(a) of the Uniform Players' Contract was a legitimate contract dispute subject to arbitration. The players interpreted the clause as a one-year contract with a one-year club option. Not surprisingly, the clubs interpreted the clause as a perpetual renewal. On December 23, 1975, arbitrator Peter Seitz ruled in favor of the players.<sup>160</sup> The decision effectively granted free agency to

---

155. See I.J. Rosenberg, *Baseball: The Braves*, ATLANTA J./ATLANTA CONST., Feb. 1, 1993, at D7. One player agent explained "[e]ven the most thick skinned player can be [a]ffected . . . . Self confidence is usually the most integral part of a winning performance. This process can destroy it." *Id.*

156. See *id.* After the arbitration hearing between Terry Pendleton and the St. Louis Cardinals, both sides left with bitterness. Pendleton recalled that everybody said he was through with the Cardinals when he beat them; that was his last year there. I.J. Rosenberg, *Memory of Cards Hearing Is Still Sour for Pendleton*, ATLANTA J./ATLANTA CONST., Feb. 1, 1993, at D7.

157. Contrary to popular belief, it was Jim "Catfish" Hunter, not Andy Messersmith, that became baseball's first free agent. See Jack O'Connell, *Born to Be Free*, HARTFORD COURANT, April 3, 1992, at F1.

158. See DWORKIN, *supra* note 81, at 72; Al Stump, *A Money Player: Ty Cobb Was a Peach When It Came to Investments, Too*, L.A. TIMES, July 12, 1991, at C1.

159. See DWORKIN, *supra* note 81, at 72; Jim Murray, *Jim Murray: His Clout Hit Where It Counts*, L.A. TIMES, July 14, 1991, at C1.

160. See James R. Hill & William Spellman, *Professional Baseball: The Reserve Clause and Salary Structure*, 22 INDUS. REL. 1, 3 (1983).

any player who played one year without signing a contract.<sup>161</sup>

The arbitrator's decision made club owners fear the emergence of a bidding war of monumental proportions. Therefore, the clubs negotiated a free agency provision in the Basic Agreement with the Players Association. Consequently, any player with six or more years of service is free to negotiate with any team he chooses once his contract expires.<sup>162</sup> Thus, the free agency submarket of the players' labor market is the most competitive of the three submarkets. One should expect, then, that free agent salaries most closely approximate the market value of the players signed.

## II. DISCRIMINATION IN MAJOR LEAGUE BASEBALL

Title VII of the Civil Rights Act of 1964<sup>163</sup> constrains the powers of owners in setting player salaries. Under a theory of Title VII known as systemic disparate treatment, the statistical model developed in this Article, along with substantial anecdotal evidence, show that racial discrimination may exist in Major League Baseball. More importantly, this Article shows that anti-competitive labor submarkets, like the reserve system, perpetuate and possibly mask discrimination.

### A. Statutory Framework—Title VII

The primary purpose of this Article is to report statistical findings, carefully identify their assumptions, and discuss what the findings mean to the construction of the labor market and on-going collective bargaining negotiations. Although the primary purpose is not to establish a *prima facie* case of employment discrimination, several legal issues posed by the findings are considered. These issues, however, are quite complex and deserve further analysis, which is beyond the scope of this Article.

Title VII of the Civil Rights Act of 1964<sup>164</sup> prohibits discrimination in employment based on sex, color, race, religion, and national origin. Title VII represents the federal government's first attempt to "establish a national standard of fair employment practices,"<sup>165</sup> making it unlawful "to fail or refuse to hire or to discharge, or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment because of such individuals' race,

---

161. *See id.*

162. *See* GREENBERG, *supra* note 47, § 5.18(1), at 429. For the actual procedures involved, see *id.* § 5.18, at 429-32.

163. 42 U.S.C. § 2000e-e4 (1994).

164. *Id.*

165. CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 2.1, at 33 (2d ed. 1988).

color, religion, sex, or national origin.”<sup>166</sup> The promise of Title VII is to provide equal employment opportunities for all individuals. “The statute’s focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class . . . . Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII.”<sup>167</sup> This is true even where the generalization about the class is accurate, but the generalization is not applicable to a specific individual.<sup>168</sup>

Several different categories of employers are amenable to suit under Title VII. The Act defines an employer as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .”<sup>169</sup> The requisite number of employees is a mandatory jurisdictional requirement for commencing a suit under Title VII against an employer;<sup>170</sup> Major League Baseball clubs employ the requisite number of employees to meet this jurisdictional requirement. Moreover, Major League Baseball is engaged in interstate commerce as defined under Title VII.<sup>171</sup> *Flood v. Kuhn*<sup>172</sup> stands on the thin slice of precedent regarding Major League Baseball in the context of the application of antitrust laws to the labor market. *Flood* is strictly limited to the application of antitrust law to Major League Baseball and has no precedential effect on matters such as collective bargaining rights<sup>173</sup> and the application of Title VII.<sup>174</sup> Thus, Major League Baseball clubs are employers for Title VII purposes and thus are amenable to suit.

An employee may bring a Title VII action against eligible private

---

166. 42 U.S.C. §§ 2000e-e2(a) (1994); see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

167. *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708, 710 (1978).

168. Title VII of the Civil Rights Act, as originally enacted in 1964, afforded a remedy for employment discrimination only to private sector employees. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.). The Equal Employment Opportunity Act of 1972 amended Title VII to include federal, state, and local government employees. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 42 U.S.C.). Title VII also provides protection from discrimination by employment agencies and labor unions. See 42 U.S.C. § 2000e-2(b), (c).

169. 42 U.S.C. § 2000e(b); see *Bonomo v. National Duckpin Bowling Congress, Inc.*, 469 F. Supp. 467, 470 (D. Md. 1979) (finding interstate commerce present); *American League of Prof’l Baseball Clubs*, 180 N.L.R.B. 190 (1969). See also *Walters v. Metropolitan Educ. Enter.*, 117 S. Ct. 660 (1997) (discussing what constitutes an “employee” for Title VII discrimination purposes).

170. See *Bonomo*, 469 F. Supp. at 470.

171. See *American League*, 180 N.L.R.B. 190.

172. 407 U.S. 258 (1972).

173. See generally *American League*, 180 N.L.R.B. 190.

174. See *Flood*, 407 U.S. 258.

employers, unions, and employment agencies.<sup>175</sup> Moreover, submission of an employee's claim to arbitration under a nondiscrimination clause of a collective bargaining agreement does not foreclose the employee's right to a new trial.<sup>176</sup>

An interesting problem arises when a previous employer is accused of discrimination, which may be the case with some of the Major League clubs that have changed ownership. Courts have generally addressed this problem by embracing a balancing test, weighing the interest of the employee and the national policy against discrimination.<sup>177</sup> Courts generally hold previous employers liable for Title VII violations when there is a continuity of operations.<sup>178</sup> This would always appear to be the case in Major League Baseball.

There are several categories of employees who may bring a suit under Title VII. After complying with the presuit administrative requirements,<sup>179</sup> a nonfederal employee may bring suit on his or her own behalf, or as a class representative pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, unless the initial administrative charge was filed by a member of the Equal Employment Opportunity Commission ("EEOC").<sup>180</sup> The EEOC may bring suit, but not against a government, a governmental agency, or a political subdivision.<sup>181</sup> However, the Attorney General may bring suit against these parties.<sup>182</sup> A federal employee may also bring suit, but only on his or her own behalf, or as a class representative. A federal employee, however, cannot turn to either the EEOC or the Attorney General for aid in the prosecution of the suit.

Title VII cases may be brought under two general theories: disparate treatment and disparate impact. This Article's primary focus is on

---

175. See 42 U.S.C. § 2000e-2(b), (c). See generally *Northwest Airlines v. Transportation Workers Union*, 606 F.2d 1350 (D.C. Cir. 1979), *aff'd in part*, 451 U.S. 77, 88 (1981).

176. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that age discrimination claim is subject to compulsory arbitration pursuant to arbitration agreement in securities registration application).

177. See *Brown v. Evening News Ass'n*, 473 F. Supp. 1242, 1245 (E.D. Mich. 1979).

178. See *Trujillo v. Longhorn Mfg. Co.*, 694 F.2d 221, 224-25 (10th Cir. 1982).

179. For a helpful discussion and outline of pre-litigation procedures for federal and non-federal employees, see C. RICHEY, *MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS* A-19 to A-26 (rev. ed. 1984).

180. See 42 U.S.C. § 2000(e)(5)(f)(1) (1994).

181. See *id.* § 2000(e)(5)(f); *EEOC v. General Tel. Co.*, 599 F.2d 322, 326 (9th Cir. 1979), *aff'd on other grounds*, 446 U.S. 318 (1980).

182. See 42 U.S.C. § 2000e-6 (1982). The circuits have split on the question of whether the Attorney General has the independent authority to institute a pattern or practice suit against a public employer without the case being referred by the EEOC. Compare *United States v. Board of Educ.*, 581 F.2d 791, 791-2 (6th Cir. 1978) (holding that the Attorney General has no independent authority) with *United States v. Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1094-95 (9th Cir. 1979) (holding that the Attorney General does have independent authority).

disparate treatment, although it will discuss some aspects of disparate impact theory, particularly in the area of the use of statistical inference as evidence. In a typical disparate treatment suit, employees allege that they have been treated less favorably than their peers on the basis of their race, sex, or membership in some other statutorily protected category. The plaintiff is required to prove an intent to discriminate.<sup>183</sup> In contrast, in a typical disparate impact case, the plaintiff alleges that a facially neutral employment criterion disproportionately disqualifies a protected class from employment, promotion, or benefit. Claims brought under the impact theory do not require proof of discriminatory intent.<sup>184</sup> Both disparate treatment and disparate impact cases can be further grouped into systemic (involving adverse impact on members of the protected class as a whole) and individual discrimination theories.<sup>185</sup>

Under a disparate treatment theory, Title VII proscribes salary differentials that result from an intent to discriminate. Intent in the law, however, is a slippery eel, difficult to define, let alone prove.<sup>186</sup> In fact, "unemployment decisions are frequently influenced by the stereotypical attitudes of which even the decisionmaker may be unconscious."<sup>187</sup> Disparate treatment is the intentional use, subtle or otherwise, of race or color to make employment decisions. "Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical although it can . . . be inferred from the mere fact of differences in treatment."<sup>188</sup>

Under disparate treatment, intent is the focus. Actual direct evidence<sup>189</sup> of a discriminatory intent is becoming harder to discover as employers become more sophisticated. Rather, it is increasingly common to use circumstantial evidence to prove discriminatory intent. Typically, one claiming discrimination can make out a *prima facie* case by showing a pattern of decisionmaking that reveals a racial bias or discrep-

---

183. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Technically, animus is unnecessary. For example, an employer, despite his belief that he is acting to "protect" women from hard physical labor, may still run afoul of Title VII.

184. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Dothard v. Rawlinson*, 433 U.S. 321, 328 (1977).

185. See SULLIVAN, *supra* note 165, § 2.2, at 38.

186. See *id.* § 2.1, at 35.

187. *Id.*

188. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

189. An obvious example of direct evidence was the formal segregation policy in many regions of the South. See SULLIVAN, *supra* note 165, § 2.3, at 40. Likewise, Major League Baseball's formal ban on blacks would fall into this category.

ancy.<sup>190</sup> In the past, parties have used either statistical evidence, such as regression analysis, or several individual incidents to construct a case based on a disparate treatment theory.<sup>191</sup>

Such evidence will typically show a gross and long lasting disparity between the racial composition of the employer's workforce (the "observed") and what the composition should be had the employer not discriminated (the "expected"). The expected composition is frequently proven by looking to the racial composition of the labor market from which the defendant could be expected to pick its workers. Statistical evidence of systemic disparate treatment can be buttressed by anecdotal evidence supporting the inference that the employer had a policy of discriminating.<sup>192</sup>

After the employee establishes discrimination in the typical case that relies, in part, on statistical methods, the employer generally attempts to undermine the statistical evidence. It attempts to do so by attacking the model itself, the database used by the plaintiff (both the data collected and the variables used and unused), and the inferences drawn from the statistical model. The employer will also generally seek to fashion an explanation other than the unlawful criterion (e.g., race) to explain any statistical discrepancy. If these attempts fail, the employer will seek to justify the use of the otherwise unlawful criterion based on the evidence that the criterion is a bona fide occupational qualification. The employer shoulders the burden of justifying the challenged activity or requirement by demonstrating its relation to bona fide occupational qualifications ("BFOQ"s)<sup>193</sup> in disparate treatment cases, or business necessity in disparate impact cases.<sup>194</sup> Such defenses embody the fundamental principle that Title VII does not forbid all types of discrimination. There are unavoidable standards for employment in certain jobs. For example, only women may be wet nurses. Such standards are BFOQs and have a relation to legitimate job requirements.

In disparate treatment cases, the BFOQ defense was intended as a narrow exception to the general rule against discrimination. The criteria for judging a BFOQ defense were developed in *United Auto Workers v. Johnson Controls, Inc.*<sup>195</sup> and *Western Air Lines, Inc. v. Criswell*.<sup>196</sup>

---

190. See *id.* at 41.

191. See *id.*

192. See *id.*

193. See 42 U.S.C. § 2000e(h) (1994). The bona fide occupational qualification ("BFOQ") defense is similar to the business necessity defense in disparate impact cases, but is harder to prove. See *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991). Race, however, is not an acceptable BFOQ. See *id.*

194. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32.

195. 499 U.S. 187 (1991).

196. 472 U.S. 400 (1985) (involving age discrimination).

The BFOQ defense is written narrowly, and this Court has read it narrowly. We have read the BFOQ language of § 4(f) of the Age Discrimination in Employment Act of 1967 (ADEA), which tracks the BFOQ provision in Title VII, just as narrowly. Our emphasis on the restrictive scope of the BFOQ defense is grounded on both the language and the legislative history of § 703.

The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. The statute thus limits the situations in which discrimination is permissible to "certain instances" where sex discrimination is "reasonably necessary" to the "normal operation" of the "particular" business. Each one of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is "occupational"; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.<sup>197</sup>

Under Title VII, the disparate treatment case is usually made out by anecdotal and statistical evidence. Once the *prima facie* case is proved, the burden of production shifts to the employer.<sup>198</sup> As a practical matter, in this type of case, the employer usually attacks the *prima facie* case itself, eschewing the BFOQ defense.<sup>199</sup>

Based on the regression results in this study, anecdotal evidence, and past history of discrimination, Major League Baseball's reserve system, as a term and condition of employment, may operate to perpetuate and possibly mask discrimination based on race in violation of Title VII. Statistical evidence, as well as anecdotal and historical accounts, indicate the need to consider carefully the role and future of the reserve system in Major League Baseball, if all parties are serious about eradicating all forms of racial discrimination, "subtle or otherwise."<sup>200</sup>

This Article explores the statistical evidence of salary discrimination developed from our study of professional baseball salaries. Before turning to statistical study, however, some issues posed by the use of statistical techniques in employment discrimination cases should be considered.

The use of statistical evidence to prove discrimination under Title VII has an interesting lineage. In *Griggs v. Duke Power Co.*,<sup>201</sup> the Supreme Court formulated what is now referred to as the disparate impact theory of Title VII. Disparate impact cases typically analyze the

---

197. *Johnson Controls*, 499 U.S. at 201 (citations omitted).

198. See SULLIVAN, *supra* note 165, §2.3, at 41-42.

199. See *id.* at 42.

200. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

201. 401 U.S. 424 (1971).



use of facially neutral employment standards that have an adverse impact on a protected group and cannot be justified by business necessity.<sup>202</sup> In *Griggs*, the Court reviewed the requirement of a high school diploma for employment as a power line repair worker. Plaintiffs challenged the degree requirement as discriminatory against African-Americans and offered a model comparing the percentage of the adult white male and African-American populations who were high school graduates.<sup>203</sup> The comparison showed that the degree requirement was not related to job performance,<sup>204</sup> and in effect, had a disparate impact on African-Americans.<sup>205</sup>

After *Griggs*, those challenging employment discrimination used several different statistical models. Among those courts have accepted is a model identifying salary discrimination through regression analysis.<sup>206</sup> In fact, multiple regression models are routinely used to prove discrimination.<sup>207</sup>

The landscape changed dramatically, however, with the Supreme Court's opinion in *Ward's Cove Packing Co. v. Atonio*.<sup>208</sup> Although the opinion is confusing, it is relatively clear that the Court sought to limit the use of statistical evidence in Title VII disparate impact cases. Throttling the use of statistical models, the Court required the plaintiff to make a focused comparison of similarly qualified individuals to support a disparate impact case.<sup>209</sup> The Court also made it easier for employers to justify an employment practice having a disparate impact. The Court did this by watering down the business necessity defense and accepting a "legitimate explanation" as a complete defense.<sup>210</sup> Consequently, plaintiffs noticeably lost more disparate impact cases.<sup>211</sup> In fact, it appears that in *Ward's Cove*, the Supreme Court came close to uniting disparate impact and disparate treatment cases.

In response to *Ward's Cove*, Congress enacted the Civil Rights Act

---

202. See *Dotharad v. Rawlinson*, 433 U.S. 321, 328-29 (1977).

203. See *Griggs*, 411 U.S. at 431-32 n.7.

204. See *id.*

205. See *id.* at 431.

206. See *Bazemore v. Friday*, 478 U.S. 385 (1986); see also SULLIVAN, *supra* note 165, § 3.4.3, at 91-103. Multiple regression analysis is a technique that studies the relative weight of two or more factors and can predict the value of a specific factor. See WEBSTER'S NEW INTERNATIONAL DICTIONARY 1913 (3d ed. 1986).

207. See SULLIVAN, *supra* note 165, § 3.4.3, at 91-103 (and authorities cited therein).

208. 490 U.S. 642 (1989).

209. See *id.* at 650-51.

210. See *id.* at 659.

211. See Joseph L. Gastwirth, Comment, STAT. SCI. 165, 166 (1993) (citing J. Cecil, Federal Judicial Center (unpublished data)).

of 1991.<sup>212</sup> The 1991 Act preserved the *Ward's Cove* requirement—of making a well-focused comparison—to establish disparate impact, but resurrected the business necessity defense announced in *Griggs*.<sup>213</sup>

Statistical models, like multiple regression techniques, can help develop a case of discrimination against an employer; however, courts, and now possibly juries, may be reluctant to rely solely on statistical evidence.<sup>214</sup> Consequently, in disparate treatment cases, plaintiffs often attempt to couple strong statistical evidence with anecdotal testimony. Both types of evidence are present in this study.

Some of the interesting issues posed by the application of Title VII to Major League Baseball include the treatment of the owners as a single entity for Title VII purposes, and the extent to which fan preference for a player's race may be taken into account in setting salaries. Both of these issues are addressed below.

A difficult legal issue posed by the use of the data in this study is the extent to which owners may be lumped together for purposes of increasing the sample of players' salaries in order to make valid statistical inferences related to a single owner. A non-sports example highlights the concern. Assume that an investigator is interested in whether General Motors discriminates against its mid-level managers as to terms and conditions of employment based on race. It does not seem fair to draw inferences from a sample that includes not only General Motors employees, but also employees at Ford and Chrysler. But what if General Motors, Ford, and Chrysler have entered into a multi-employer bargaining arrangement,<sup>215</sup> and the precise terms and conditions of employment scrutinized under Title VII are part of the collective bargaining agreement? Although still present, General Motors' fairness argument against the use of all three employee bases to make statistical inferences is not as compelling.

Moreover, on numerous occasions, Major League Baseball and other professional sports have argued that they should be characterized as a single owner for, among other things, antitrust purposes.<sup>216</sup> Authorities have painstakingly detailed the cogent reasons in support of and

---

212. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

213. 42 U.S.C. § 2000e-2(k)(1)(A) (1994).

214. As previously noted, statistical significance does not equate with legal significance. See *supra* note 45. Additionally, problems with sampling, clustering of data, and stratification pose difficult statistical and philosophical issues for significance tests. See Paul Meier et al., *What Happened in Hazelwood*, in *STATISTICS AND THE LAW* 1, 15-34 (M.H. DeGroot et al. eds., 1986).

215. See National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994).

216. See, e.g., *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir. 1984); *NASL v. NFL*, 670 F.2d 1249 (7th Cir. 1982); *USFLPA v. USFL*, 650 F. Supp. 12 (D. Or. 1986).

against this characterization of a professional sports league.<sup>217</sup> For example, although General Motors does not need Ford or Chrysler to bring its products to market, the Atlanta Braves do need other Major League clubs to do the same. Those arguments are even more compelling where the owners have acted in concert to impose a term and condition of employment on the labor market that is an integral part of the collective bargaining agreement.<sup>218</sup> Additionally, unlike with General Motors and Ford, Major League teams pool profits and share revenues. Therefore, in these limited and exceptional circumstances, the grouping of all players on the Major League roster for a given year is a valid method of analysis. The conclusions reached in this Article, however, were made with some caution and discomfort. For example, it seems troubling that the employment decisions of John Schuerholz and Dean Taylor of the Atlanta Braves are essentially lumped together with less scrupulous owners and executives.

Those acquainted with the interface between antitrust and labor law may well believe that the nonstatutory labor law exemption to the application of antitrust law defeats any attack against the reserve system in sports.<sup>219</sup> More specifically, Major League Baseball is exempt from antitrust challenges to the reserve system.<sup>220</sup> These observations miss the mark. The reserve clause in Major League Baseball constructs a labor submarket that may perpetuate salary discrimination based on race.

---

217. See Myron C. Grauer, *The Use and Misuse of the Term "Consumer Welfare": Once More to the Mat on the Issue of Single Entity Status for Sports Leagues Under Section 1 of the Sherman Act*, 64 TUL. L. REV. 71 (1989); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117 (1989); Gary R. Roberts, *The Single Entity Status of Sports Leagues under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562 (1986); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219 (1984). But see Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751 (1989); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 (1991); Daniel E. Lazaroff, *Antitrust Analysis and Sports Leagues: Re-Examining the Threshold Questions*, 20 ARIZ. ST. L.J. 953 (1988); Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157 (1984).

218. See *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984) (holding that a parent corporation and a subsidiary engaged in coordinated activity were a single entity and thus, could not conspire to violate section 1 of the Sherman Act).

219. See *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116 (1996) (holding that an agreement among several employers bargaining together after impasse to implement the terms of their last best good-faith wage offer is shielded from antitrust attack by federal labor laws); *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) (holding that a multi-employer, multi-union collective bargaining agreement involving restrictions on operating hours of food store meat departments is protected from antitrust attack).

220. See *Flood v. Kuhn*, 407 U.S. 258 (1972).

The reserve system is a term and condition of employment. Under the theoretical construct developed here, a player does not attack the reserve system because it is anti-competitive; he attacks the system because it is racist. In other words, Major League Baseball may well be exempt from the Sherman Antitrust Act, but it is not exempt from Title VII discrimination claims.<sup>221</sup> Moreover, the owners cannot defend their reserve system against a Title VII action launched by the players on the grounds that the condition of employment was agreed to by the Players Association in a collective bargaining agreement. In fact, the players may challenge union activities that further racial discrimination.<sup>222</sup>

Additionally, some owners may attempt to justify any discrimination in salaries based on fan preference and appeal. The argument is that the owner is not discriminating against a player, but merely responding to consumer demand. To the extent that an owner attempts to construct a defense against a discrimination suit based on this theory, it will be resoundingly defeated in the courts. Race is never an acceptable BFOQ.<sup>223</sup>

### B. Previous Discrimination Studies

Several empirical studies have been conducted to determine whether racial discrimination regarding salaries exists in Major League Baseball. The conclusions are mixed with several of the studies subject to serious challenge. A critical analysis of several pertinent studies follows in an effort to show limitations and discrepancies in the studies. As the reader will observe, this Article's statistical study goes a long way in addressing these limitations and discrepancies.

Using salary data from 1968 and 1969, years which predate the arbitration and free agency submarkets, Anthony Pascal and Leonard Rapping concluded that there was no salary discrimination against African-Americans in any fielding position under the reserve system submarket.<sup>224</sup> Using the same data set, Gerald Scully employed several multiple regression equations that were desegregated by position and race, and compared the resulting coefficients on African-American and

---

221. *See id.*

222. *See* 42 U.S.C. § 2000e-2 (1994).

223. *See* SULLIVAN, *supra* note 165, § 3.6.1, at 107. Race is specifically omitted from the BFOQ defense in the statute. Courts have also rejected customer preference as a pretext to considering race as a BFOQ. *See* Diaz v. Pan Am Airways, 442 F.2d 385 (5th Cir. 1971).

224. *See* Anthony H. Pascal & Leonard H. Rapping, *The Economics of Racial Discrimination in Organized Baseball*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 119 (Anthony H. Pascal ed., 1972).

white salary equations.<sup>225</sup> Scully found that, when focusing on "more experienced players," African-Americans earned less than whites. Scully reported that, "to earn \$30,000, black outfielders must outperform whites by about 0.020 in slugging average" (ratio of total extra base hits to total hits that Scully found to be a significant determinant of a player's marginal revenue product).<sup>226</sup> Significantly, Scully concluded that for the average level of outfielder performance—where slugging average equalled 0.450—whites earned 25% more than African-Americans. He also noted that as performance improved, the wage gap between African-American and white players widened.<sup>227</sup> Scully concluded that there were discriminatory salary practices by race for hitters.

Using a sample made up of approximately 21% of all baseball players and 17% of African-American players, Robert Mogull concluded that African-American hitters earned higher salaries than whites despite showing no clear domination in overall performance.<sup>228</sup> From a sample drawn from players in their reserve years in 1970-71, the results indicated that the "most important factor explaining the variation in salaries among Black nonpitchers is the number of years they played on a major league team."<sup>229</sup> Among pitchers, Mogull's sample found that African-Americans were superior to whites in terms of performance and salaries.<sup>230</sup> Mogull also observed that "those factors which individually explain much of the variation in salaries of white pitchers and nonpitchers also largely explain the salaries of Blacks"—evidence that African-Americans were not the victims of discrimination.<sup>231</sup>

Hill and Spellman examined salary data from the 1970's and determined that African-American hitters were compensated 20.5% more than whites, but for efficient reasons—"black hitters outperformed whites by a wide margin and also had more years of experience on average."<sup>232</sup> The sample was drawn from players during their reserve years in 1976 and did not include rookies. African-American pitchers were found to be paid just over \$1,000 less, on average, than whites, but their white counterparts had lower earned run averages, more innings pitched,

---

225. See Gerald W. Scully, *Discrimination: The Case of Baseball*, in GOVERNMENT AND THE SPORTS BUSINESS 221, 260 (Roger G. Noll ed., 1974).

226. *Id.* at 261.

227. Inferences could not be drawn for pitchers because the selected productivity variables were not significant.

228. See Robert G. Mogull, *Salary Discrimination in Major League Baseball*, 5 REV. BLACK POL. ECON. 269, 270-72 (1975).

229. *Id.* at 275-76.

230. See *id.* at 273.

231. *Id.* at 278.

232. See James R. Hill & William Spellman, *Pay Discrimination in Baseball: Data from the Seventies*, 23 INDUS. REL. 103, 107 (1984).

and more experience. The authors concluded that “[t]he portion of the wage differential attributable to discrimination is less than five percentage points and indicates discrimination against whites.”<sup>233</sup>

Without disaggregating the population by submarket, Kevin Christiano analyzed reported salaries of 86% of hitters from 1977 rosters to determine which variables influence salaries between African-Americans and whites.<sup>234</sup> Christiano discovered that experience and performance (specifically the number of home runs and batting average) were significant in explaining salary disparities, yet the race variable was insignificant at the 10% level.<sup>235</sup>

In 1988, Christiano analyzed 1987 compensation patterns using a log transformation of salaries derived from 357 veteran Major League hitters, with race as a dummy variable.<sup>236</sup> Christiano found that African-American hitters “are paid more than white hitters—even after the superior performances are taken into account”—giving little support to claims of racial discrimination against African-American players.<sup>237</sup> Even when separate salary functions for blacks and whites were estimated to eliminate dummy variable biases, Christiano concluded that “there is no consistent evidence of discrimination in the salaries awarded to black ballplayers.”<sup>238</sup>

More recently, Slottje, Hirschberg, Hayes, and Scully explored the possibility of salary discrimination in baseball using a technique new to labor market discrimination studies, known as frontier estimation.<sup>239</sup> This technique allows for the disaggregation of information concerning

---

233. *Id.* at 110.

234. See Kevin J. Christiano, *Salary Discrimination in Major League Baseball: The Effect of Race*, 3 SOC. SPORT J. 144, 145 (1986).

235. See *id.* at 149. Moreover, since whites were coded as one (1) and the race coefficient was negative, the author speculated that whites were at a financial disadvantage if in fact discrimination did exist.

236. See Kevin J. Christiano, *Salaries and Race in Professional Baseball: Discrimination 10 Years Later*, 5 SOC. SPORT J. 136, 139-40 (1988).

237. *Id.* at 142.

238. *Id.* at 145. See Wilbert M. Leonard, III, *Salaries and Race/Ethnicity in Major League Baseball: The Pitching Component*, 6 SOC. SPORT J. 152 (1989). Leonard divided the labor market into whites, African-Americans, and Hispanics to determine whether pitchers in the major leagues were rewarded with salaries commensurate with performance, or if race played a role in 1987. Leonard noted that experience, innings pitched, and earned run average determined salaries in large part. Additionally, he noted that recent data indicating that racial- or ethnicity-based salary discrimination did not exist among hitters appeared to be consistent for pitchers as well, although the very small number of minority pitchers precluded direct inferences that discrimination did not exist among pitchers.

239. See Daniel J. Slottje et al., *A New Method for Detecting Individual and Group Labor Market Discrimination*, 61 J. ECONOMETRICS 43-64 (1994). For a discussion on the topic of frontier estimation, see Dennis Aigner et al., *Formulation and Estimation of Stochastic Frontier Production Models*, 6 J. ECONOMETRICS 21 (1977).

wage deviations for specific labor market participants so that inferences can be made as to the extent to which an individual baseball player might be discriminated against, as opposed to how an entire cohort might be impacted, on average, by an owner's propensity to discriminate.<sup>240</sup>

Using data from the "collusion years" of 1985-86,<sup>241</sup> the authors found that, while many players were paid a salary that was less than the additional revenue the player contributed to his club, race was not a "significant factor in explaining this wage inefficiency."<sup>242</sup>

While frontier estimation provides an alternative to standard multiple regression analysis, the authors relied on distorted data such as that from the period in baseball history when a *de facto* reserve clause permeated the industry (that is, data in salaries from the collusion years). Reliance on data from this time period and the lack of a media variable casts some doubt on the significance of the authors' results.

Further, the non-frontier studies failed to recognize that there are three distinct submarkets in the baseball labor market that vary in their degrees of owner control over player salaries. Combining these distinct submarkets may mask the existence of discrimination in one, but not all of the submarkets. Also, with the exception of Leonard and Raimondo,<sup>243</sup> the previous studies failed to include Hispanics in salary data. Given that Hispanic representation in Major League Baseball has grown steadily over the years, this oversight is disturbing. For example, in 1987, the year selected for the study in this Article, approximately 35% of minority hitters and 76% of minority pitchers in the Major Leagues were Hispanic.<sup>244</sup> Although Leonard included Hispanics in his study, his exclusive analysis of pitchers does not take into account the large sample of Hispanic hitters.

---

240. See Slottje, *supra* note 239, at 43-64.

241. In 1985, sixty-two players filed for free agency, but no club pursued these players unless their current clubs did not express interest in them. The Players Association filed a grievance on February 3, 1986, alleging that the owners colluded to boycott the free agents. On September 21, 1987, arbitrator Thomas Roberts ruled that the clubs had colluded in violation of art. XVIII(H) of baseball's Basic Agreement. As a result, seven players were given the opportunity to negotiate with a new team without losing their existing contracts. The Players Association also filed grievances on behalf of the 1986 and 1987 free agents. In August 1988, arbitrator George Nicolau ruled in favor of seventy-nine players who were free agents in 1986, finding collusion in the 1986 free agency market. In July 1990, the owners were once again found guilty of collusion. A total settlement for damages was reached in the amount of \$280 million. See SCULLY, *supra* note 47, at 39-41; ZIMBALIST, *supra* note 142, at 25; see also HELYAR, *supra* note 49, at 332-63.

242. See Slottje, *supra* note 239, at 61.

243. See Leonard, *supra* note 238; Henry J. Raimondo, *Free Agents' Impact on the Labor Market for Baseball Players*, 4 J. LAB. RES. 183 (1983).

244. See THE BASEBALL GUIDE (1988); \$256,296,950: *Baseball Salaries '87*, SPORTS ILLUSTRATED, Apr. 20, 1987, at 54.

Another problem with the most recent studies<sup>245</sup> that find no discrimination based on race or ethnicity is that they rely on data sets derived from the years in which owners colluded to artificially limit the movement of free agent players. This *de facto* reservation of players by their clubs would reduce the predictive power of the models used in the prior studies because of the tainted free agency submarket. It is likely that the previous studies' use of 1985 through 1987 salaries prevents accurate measurement of the impact of performance and other variables on salaries, in light of findings by arbitrators Roberts and Nicolau that owners colluded to prevent free movement of free agents after the 1985 and 1986 seasons.

With virtually no bidding on free agents during the 1985-86 years, players' salaries actually fell for the first time in more than twenty seasons.<sup>246</sup> Therefore, research that focused on the effects of the "competitive market" on salary discrepancies by race and ethnic group for free agents in 1985 through 1987 fails to accurately measure this effect when the actual labor market reflected a reversion back to monopsonistic barriers to free movement of players. By 1988, a state of normalcy was restored, as free agents were signed and average salaries rose above 1987 levels.<sup>247</sup>

Yet another deficiency in other studies stems more from statistical procedure than from data specification. With the exception of Slottje,<sup>248</sup> none of the discrimination studies allow for the possibility that the effect of experience on salaries could take on a convex or concave shape. Squaring the experience term allows for the possibility that the lifetime earnings profile of Major League players is convex or concave. This is a common technique in labor market studies, where diminishing remunerations over time are most often observed. As experience increases, financial returns for workers eventually begins to decrease. This demonstrates that some workers become less productive over time. Because baseball is a rather atypical industry, it might be that for baseball players, as experience increases compensation, experience profiles actually become convex, which indicates the payment of a premium for marquee names. These intuitively appealing quadratic relationships are most likely a common feature of the baseball players' labor market.

In many instances, older players sign free agent contracts late in their careers for less money than they earned the previous year, while

---

245. See Christiano, *supra* note 236; Leonard, *supra* note 238; Slottje, *supra* note 239.

246. See DON N. MACDONALD & MORGAN O. REYNOLDS, ARE BASEBALL PLAYERS PAID THEIR MARGINAL REVENUE PRODUCTS? 5 (May 1990) (on file with the CARDOZO ARTS AND ENTERTAINMENT LAW JOURNAL).

247. See *id.*

248. See Slottje, *supra* note 239.



other players seem to receive generous compensation packages based more on lifetime performance than on more recent production levels.<sup>249</sup> The former case reflects the likelihood that the opportunity or reservation wage for players in the twilight of their careers is still less than what can be garnered in Major League Baseball. By focusing on experience alone, any regression results miss these potentially significant and possibly racially disparate relationships.

It is also somewhat surprising that past discrimination studies fail to acknowledge television's rapidly increasing role in Major League Baseball due both to coverage and to broadcast rights.<sup>250</sup> At first glance, it appears that while the magnitude of television revenues would help determine salaries among all players, there would be little reason to suspect differential coverage or willingness to pay for broadcast rights based on the racial composition of various teams.<sup>251</sup> After all, profit-maximizing theory dictates that potential carriers of national or local telecasts pay for rights in accordance with the perceived likelihood that outlays can at least be recouped from advertising revenues; factors such as race or ethnicity would not be considered under this theory. Moreover, owners of national television rights decide which contests to broadcast based on the anticipated level of viewer interest.<sup>252</sup> Theoretically, if two teams are vying for playoff positions or are traditionally popular nationwide, viewer demand for such a game would be higher than for games between teams of poorer quality, regardless of the racial makeup of the teams.

At least one study has purported to refute the notion that customer

---

249. For example, designated hitters as a class—often comprised of senior veteran players—had the second highest average salaries among starters (\$2,731,460) in 1996. See *Salaries in Baseball Average \$1,119,981*, *supra* note 34, at 2.

250. In 1971, total revenues from local and national television broadcasts were approximately \$40.7 million. By 1987, the total had grown to nearly \$350 million. CBS agreed to pay \$1.1 billion for the rights to telecast games from 1990 to 1993, while some teams have obtained lucrative cable television contracts in recent years. See Ira Horowitz, *Sports Broadcasting, in GOVERNMENT AND THE SPORTS BUSINESS* 275 (Roger G. Noll ed., 1974); Meg Cox & John Helyar, *CBS Wins Network TV Rights to Baseball*, WALL ST. J., Dec. 15, 1988, at B1; Peter Waldman, *Will Major League Baseball Go Cable?*, WALL ST. J., Dec. 14, 1988, at B1; Laura Landro, *Yankees' Owner Weighs Cable Bids for Games Rights*, WALL ST. J., Nov. 15, 1988, at B8; *It's a Whole New Ball Game*, BROADCASTING, Mar. 7, 1988, at 27; *Special Report; Baseball 1987: Baseball Rights Approach \$350 Million*, BROADCASTING, Mar. 2, 1987, at 47.

251. This assumes that potential carriers of such games are profit-maximizers and receive no "psychic benefit" from covering teams who employ fewer minorities.

252. As one local network research director pointed out, there is "an obvious co-relation with the team's performance on the field" and ratings. See Robert Sobel, *Network Picture Split: ABC Says It's Losing Money While NBC Is Upbeat; Flagship Stations Predicting Hot TV Sales Season*, TELEVISION/RADIO AGE, Mar. 2, 1987, at 37, 39.

discrimination exists in Major League Baseball.<sup>253</sup> The end result should be that among local and national television stations,<sup>254</sup> television coverage and revenues equally affect salaries for both white and minority players. Because each team can negotiate and retain local broadcast rights,<sup>255</sup> high-quality teams (measured by past win-loss percentages, playoff appearances, and/or future prospects) traditionally attractive to large numbers of viewers (such as the New York Yankees, Chicago Cubs, and Los Angeles Dodgers) earn higher rates broadcast rights than lower-quality teams or teams that reside in smaller media markets (such as Seattle, Kansas City, and Milwaukee).<sup>256</sup> Based solely on differences in broadcast revenues and the related abilities to pay players,<sup>257</sup> some disparities in annual salary could be expected, but these should not depend on race or ethnicity if minority and white players are of equal quality.

The study presented here accounts for more than fifty Hispanic hitters in the Major Leagues in 1987, and is the first to focus on both African-American and Hispanic hitters and pitchers. Justification for the inclusion of both groups stems from the conjecture that each group experiences similar socio-economic difficulties outside of baseball.<sup>258</sup> Thus, any salary discrepancy survey must take into account the possibility that both classes of minorities might be victims of discrimination. Working from the qualifying assumption that any salary discrimination practices by management would be meted out roughly proportionately against each group, the forthcoming multiple regression equations are estimated with African-American and Hispanic players grouped into one category called "minorities." Very little in the way of accuracy of measurement should be sacrificed by this grouping.<sup>259</sup> In fact, the results will likely provide superior estimates of possible discriminatory prac-

---

253. See Paul A. Sommers & Noel Quinton, *Pay and Performance in Major League Baseball: The Case of the First Family of Free Agents*, J. HUM. RESOURCES, Summer 1982, at 426.

254. For insight into what constitutes "local rights," see generally Horowitz, *supra* note 250, at 277.

255. See JESSE W. MARKHAM & PAUL V. TEPLITZ, *BASEBALL ECONOMICS AND PUBLIC POLICY* 66 (1981).

256. In some instances, the effect of team quality and population may be positively correlated with local broadcast revenues. See Horowitz, *supra* note 250, at 295-97.

257. This notion that greater ability to pay, particularly among large firms and in highly concentrated industries, is prevalent in many studies. See generally Wesley Mellow, *Employer Size and Earnings*, 3 REV. ECON. & STAT. 495 (1982).

258. See generally James P. Smith & Finis R. Welch, *Black-White Male Wage Ratios: 1960-1970*, 67 AM. ECON. REV. 323 (1977); SAR A. LEVITAN ET AL., *HUMAN RESOURCES AND LABOR MARKETS: EMPLOYMENT AND TRAINING IN THE AMERICAN ECONOMY* (1981); Glen Cain, *Economic Analysis of Labor Market Discrimination*, in 1 HANDBOOK OF LABOR ECONOMICS 693 (1986); Cordelia W. Reimers, *Labor Market Discrimination Against Hispanic and Black Men*, 65 REV. ECON. & STAT. 570 (1983).

259. In fact, the grouping of African-Americans and Hispanics should aid owners in arguments

tices, because more observations can be examined and more degrees of freedom for error exist.

Many of the previous studies have concentrated solely on possible discrimination facing hitters. The implied rationale for this concentration on hitters has been that African-Americans constituted a small proportion of pitchers, and that accurate comparisons between African-American and white pitchers could, therefore, not be made. Including Hispanics with African-Americans in this study attenuates this dilemma to some degree by increasing the sample size. This increased sample size warrants direct comparisons with white pitchers. The expectations facing hitters and pitchers are so divergent that failure to include both occupations in any study of salary determination could mask any possible market failures associated with discrimination. Simply put, because an individual hitter is but one of several hitters to perform during the game, it might be easier to discriminate against pitchers over the course of an entire season, where the individual can control the outcome of the game much more easily than the former group. Furthermore, measuring the quality of performances of hitters is much easier. Consequently, discriminatory practices become much more difficult to conceal. To account for these occupational differences, this study includes samples for hitters and pitchers who were on Major League rosters in 1987 and 1988.

Some previous studies, including those by Mogull and Christiano, failed to include all Major League players. As noted, Mogull used only 21% of all hitters and 17% of African-Americans in his study, while Christiano accounted for 86% of hitters in his analysis of the 1977 season. Combined with other research that leaves out either hitters or pitchers, few recent efforts exist that examine all players from any given year.

This Article fills this void with the following data set. For both hitters and pitchers (hitters who pitched and pitchers who hit are excluded), every white, African-American, and Hispanic player who received a salary in 1988<sup>260</sup> and was on a Major League roster in 1987 is included in the sample. Those who received salaries in 1988, but were in the minor leagues in 1987, are not included because the two leagues are not comparable. Table 1 represents the total number of white and minority players who were active in 1987 by selected position classification, with the accompanying proportional makeup of each group within

---

that discrimination does not exist because of the lack of a ban on Hispanic players in professional baseball.

260. See Murray Chass, *Baseball's \$2 Million Club No Longer So Exclusive/1988 Baseball Player Salaries*, S.F. CHRON., Dec. 14, 1988, at D2.

each position in parentheses.<sup>261</sup>

A positive relationship exists between telecasts and attendance at baseball games, and since a large percentage of annual revenues is derived from attendance,<sup>262</sup> this positive relationship would result in increased revenues and ability to pay players. This assumption is supported by the research of Horowitz, who concluded that "[a] statistical analysis of the relationship between the number of telecasts and baseball attendance confirms the absence of any deleterious effects of television on the gate."<sup>263</sup> Thus, if local broadcasts do have an effect on white and minority salaries, holding constant broadcast revenues, it will be reflected in the analysis.

Table 2 provides data on local broadcast rights and games telecast for each team in 1987. These figures are used in subsequent salary multiple regressions to determine if local revenues and/or coverage contribute to differences in salaries among whites and minorities.<sup>264</sup> Christiano and Leonard used local television and radio revenues in their study, but did not include local broadcasts.<sup>265</sup> This could be a significant omission. For example, both the Chicago Cubs and the Atlanta Braves are owned by the companies that broadcast their games. By concentrating only on revenues, which for each of these teams is much lower than proceeds from average broadcast rights (due in large part to common ownership), Christiano and Leonard cannot capture possible significant effects that the total number of games telecast could have on salaries among whites and minorities.<sup>266</sup> Certainly, inequality in local television revenues could lead to variations in salaries among players with equal abilities, but the effect of the number of games telecast is less obvious.

Perhaps of even greater consequence is the potential effect national television broadcasts have on players' salaries. In 1987, the National Broadcasting Company, Inc. ("NBC") owned the rights to telecast all non-playoff, nationally televised contests except for eight regular season telecasts carried by the American Broadcasting Company, Inc. ("ABC") (which were excluded from this study). As had been the practice for several years, all broadcast rights from nationally televised games were divided equally among the twenty-six teams.<sup>267</sup> Nevertheless, actual

---

261. See *infra* Table 1.

262. See MARKHAM & TEPLITZ, *supra* note 255, at 93.

263. See Horowitz, *supra* note 250, at 285.

264. See *infra* Table 2.

265. See Christiano, *supra* note 236; Leonard, *supra* note 238.

266. Scully contends that television could play a role in relegating blacks to outfield positions where they are seen infrequently by viewers and, thus, paid a lower wage commensurate with this "crowding effect." See Scully, *supra* note 225, at 244. Despite this contention, the effect of coverage and revenues should not hinge on race if performances between races are equal.

267. This has been the practice since 1966. See Horowitz, *supra* note 250, at 302. Since the

coverage by NBC varied greatly among the teams. Table 3 lists the number of times each team was part of a nationally televised non-playoff or exhibition game, as well as the total number of victories each team accumulated and the total number of games each team finished out of first place in 1987.<sup>268</sup> Arguments could be made on economic grounds that, if all revenues derived from national television rights are divided equally among the teams, there should be no disparate effects on any players' salaries.<sup>269</sup> This logic is put to the test by including the total number of national television telecasts for each team in all salary regressions for each player on a 1987 roster. Players who retired after the 1987 season are not included;<sup>270</sup> therefore, the test is to determine the extent to which the 1987 telecasts affected 1988 salaries for white and minority players.

### C. Methodology

This Article examines the possibility of discrimination using more recent and complete data than past studies, in order to more accurately measure the impact of race and ethnicity on salaries. In particular, the data analyzed is comprised of all players who were on the Major League roster in both 1987 and 1988. We employed multiple regression analysis to analyze the 1987 salaries of those players—a technique commonly used in discrimination studies.<sup>271</sup>

The statistical model employed in this Article relates the 1988 salary of an individual hitter or pitcher to the individual's 1987 performance characteristics and to his team's attractiveness to national and local television venues. The following equations were estimated:

For 1987-88 hitters:

$$\text{Salary} = b_0 + b_1 \text{exp} + b_2 \text{exp} \times \text{exp} + b_3 \text{runs} + b_4 \text{rbi} + b_5 \text{hr} + b_6 \text{ab} + b_7 \text{h} + b_8 \text{n} + b_9 \text{ltv} + b_{10} \text{lrev} + b_{11} \text{race}$$

where:

---

1993 season, twenty-eight teams play Major League Baseball. Two additional teams, the Arizona Diamond Backs and the Tampa Bay Devil Rays, will begin play in 1998.

268. See *infra* Table 3. Actual NBC telecast totals were obtained from a confidential source.

269. Hill discounts the possible effect of national television telecasts on salaries and marginal revenue product calculations due to the equal sharing of these revenues. See James R. Hill, *The Threat of Free Agency and Exploitation in Professional Baseball: 1976-1979*, 25 Q. REV. ECON. & BUS. 68 (1985).

270. Players who changed teams after 1987 have the natural log of their 1988 salaries regressed on the number of appearances their 1987 team made on national television. This is based on the assumption that a player who changed teams after the 1987 season was paid a salary reflecting his 1987 personal and team characteristics.

271. For a discussion of multiple regression analysis in discrimination cases, see SULLIVAN, *supra* note 165, § 3.4.3, at 91-103.

b0	=	the intercept term. If all other variables equaled zero, b0 would equal the player's salary.
exp	=	experience in the Major Leagues measured in years. <sup>272</sup>
exp × exp	=	experience squared. The squaring of the experience term is done to allow for the likely concavity of the earnings profile. This means that as a player's career progresses, we can expect his salary to increase for a period, peak, and then fall over time as his productivity decreases. <sup>273</sup>
runs	=	runs scored
hr	=	home runs
ab	=	at bats
h	=	hits
n	=	national television appearances by the player's team in 1987
ltv	=	local television appearances by the player's team in 1987
lrev	=	local television revenue and radio revenue earned by the player's team in 1987 (in millions of dollars)
r(0-1)	=	race. A value of 1 is assigned to white players, 0 for minorities. Thus, if the coefficient on race equals 100, it means that being white carries a salary premium of \$100, holding all other variables constant.

For 1987-88 pitchers:

$$\text{Salary} = b_0 + b_1 \text{exp} + b_2 \text{exp} \times \text{exp} + b_3 \text{wins} + b_4 \text{saves} + b_5 \text{ip} + b_6 \text{er} + b_7 \text{n} + b_8 \text{ltv} + b_9 \text{lrev} + b_{10} \text{race}$$

where exp, exp × exp, n, ltv, lrev, and race are the same variables used in the 1987-88 hitter's equation

---

272. The use of total years of experience as defined by Major League Baseball is superior to the experience variable used in other studies, which typically define experience as the total number of years in which a player played in at least one Major League game. The latter measurement is imprecise if one of the objectives is to measure the impact of free agency on salary discrimination. Players in the early stages of their careers are routinely brought to the Major Leagues for the last few weeks of a season. Some players compete in a few games each year for two or three years, but these appearances would not constitute full seasons. For a player to accumulate one full season in the Major Leagues, he must be on a Major League roster for at least 172 days during that season. Therefore, including players who actually have less than six full seasons of experience in the free-agent classification would not provide accurate measurements of the free agency market's impact on salary disparities. The only exception to the experience term selected here is for players who were on a Major League roster for the entire 1988 season, but for less than a full season in 1987. In order to capture all players who received a 1988 salary, those players who began their careers in 1987, but did not meet the official 172-day requirement that season, are included in this Article. This exception did not lead to any problems with the empirical results. Additionally, the experience term was squared to capture previously ignored intertemporal quadratic effects of experience on earnings.

273. The squaring of the experience term was not used in the multiple regression for players with less than three years experience.

wins	=	total wins by the pitcher
saves	=	total saves by the pitcher
ip	=	innings pitched
er	=	earned runs

The performance variables included in the model were based on examinations of prior research and on personal familiarity with productivity measures that are typically employed in arbitration proceedings and in annual selections of Major League Baseball's top performers. Moreover, using these variables is superior to simple averages in at least one respect: combining at-bats with hits and innings pitched with earned runs, to create batting averages and earned run averages, respectively, creates distortions that hinder adequate comparison of players. For example, in 1987, Jack McDowell (then of the Chicago White Sox) pitched twenty-eight innings and allowed six earned runs for a 1.93 earned run average. Roger Clemens of the Boston Red Sox pitched 281.67 innings, allowed ninety-three earned runs, and ended the season with a 2.97 earned run average. Was McDowell a more productive pitcher than Clemens? Focusing solely on earned run averages, the answer would appear to be "yes," if no breakdown were given on innings pitched and earned runs. Hence, the challenges created by multi-collinearity are overlooked in favor of more precision in comparisons between players and racial or ethnic groups.<sup>274</sup>

Problems remain, however, with the data set. For example, the variables selected for this study fail to account for defensive prowess or for stealing bases; thus, players like Chuck Carr, who were undoubtedly paid more for fielding prowess and stealing bases, may not be completely accounted for in our study. Furthermore, by not grouping players by position, the model used in this Article fails to reflect the varying degrees of importance of certain positions in controlling the outcome of a game.<sup>275</sup> For instance, arguments could be made that catchers and shortstops are paid more for their leadership abilities in terms of manipulating defensive schemes and pitch selection than an

---

274. Previous tests for multi-collinearity between each variable revealed strong correlations between some of the terms (e.g., at-bats and hits, innings pitched, and earned runs), yet the ratios fail to present sufficient deleterious effects on the viability of each variable as an influential factor in explaining salary discrepancies. Multi-collinearity may exist where one variable is a linear function of another variable.

275. Ideally, the model should restrict the analysis to a specified level of innings pitched or at-bats to alleviate this measurement problem, but this is not done here in order to allow for analysis of all players. Since twenty-nine of the 252 pitchers in 1987 were minorities, it is likely that reducing the survey to those players with a certain number of innings pitched might eliminate any meaningful comparison of minorities and whites.

outfielder.<sup>276</sup>

There are two justifications for excluding these possibilities. First, since minority players make up a relatively small percentage of catchers, pitchers, and middle infielders, it makes grouping by position very difficult and would, in all likelihood, prevent the use of regression equations for minorities.<sup>277</sup> Second, we assume that all players (except pitchers) hit with some degree of proficiency to remain in the Major Leagues, and hitting prowess tends to affect salaries more than defensive skill.<sup>278</sup>

#### D. Results

##### 1. HITTERS

For the first inquiry—hitters from 1987 to 1988—the results were mixed. In each submarket, the coefficient for race was positive, suggesting a correlation that favored white hitters, yet no statistically significant evidence existed to suggest discrimination based on race or ethnicity.<sup>279</sup> There was some evidence of discrimination, however, when the arbitration and free agency submarkets were combined. Within this grouping, white hitters earned \$26,781.56 more than minority hitters, at a significance level of 0.18. This result should be cautiously accepted because it falls below the most commonly accepted significance level of 0.05.

At this point, it is beneficial to discuss what is meant by a level of significance of 0.18. Contrary to how it is often described in the legal literature, a level of significance of 0.18 does not mean we are 82% *confident* that we have made the right decision in accepting or rejecting the hypothesis. Rather, as a decision rule, a significance level of 0.18 informs us that there are about eighteen chances in 100 that we would reject the hypothesis when it should be accepted.

In his classic work, R.A. Fisher suggested that one chose a specific significance level as a rule of decision.<sup>280</sup> One would discount evidence that failed to reach the prior established significance level. Fisher sug-

---

276. The average 1996 salaries by position are: first basemen (\$3,435,956), designated hitters (\$2,731,460), outfielders (\$2,350,206), third basemen (\$1,841,775), shortstops (\$1,745,613), starting pitchers (\$1,722,704), catchers (\$1,690,470), second basemen (\$1,647,443), and relief pitchers (\$537,646). See *Salaries in Baseball Average \$1,119,981*, *supra* note 34, at 2.

277. Because of the small number of minority players at certain positions, disaggregation would eliminate most of the degrees of freedom for error.

278. See Jack A. Chambless, *Poor Underpaid Millionaires*, WALL ST. J., July 5, 1994, at A12.

279. For example, in the monopsony submarket, white hitters earned \$304.57 more than minorities, but at a significance level of only 3%. In the arbitration years, white hitters earned \$13,443.73 more than black and Hispanic hitters at a 57% significance level. During the free agency period, whites earned \$35,467.44 more than their minority counterparts at a significance level of 79%.

280. STATISTICAL METHODS FOR RESEARCH WORKERS (14th ed. 1970).



gests a trichotomized approach to significance levels, by regarding any test of significance that results in a larger than 0.05 significance level as unpersuasive. He regards any test of significance that results in a significance level more extreme than 0.02 as clearly persuasive.

Fisher did not regard significance levels as decision rules "on which alone to accept or reject a hypothesis."<sup>281</sup> "The level of significance is therefore best thought of as but one item of evidence, rather than as the sole basis for a decision."<sup>282</sup> Thus, a result significant at the 0.18 level should have some persuasive power, even though the result is far from convincing.<sup>283</sup>

## 2. PITCHERS

As Table 4 illustrates, minority pitchers from 1987-88 did not fare as well.<sup>284</sup> With all pitchers grouped into the first equation, performance, experience, and television appearances all played a role in determining income. As expected, the earnings profile was convex, indicating an erosion of market power for pitchers as they age. It is also interesting to note that playing on a team that appeared on national television was lucrative for all players. Each appearance added \$21,102.12 to the average pitcher's salary. However, within this area of baseball, meritocracy seems to wane in significance, because other than experience, no other variable was as lucrative to white pitchers as their race. The premium paid to the pitcher who happened to be Caucasian was \$62,434.02.

Evidence of discrimination was more pervasive when the labor market was disaggregated. In order to maintain sufficient degrees of freedom for error, it was not possible to examine each component of the trichotomized labor market.<sup>285</sup> Therefore, the market was divided into two segments—the first consisting of players within the reserve system, and the second made up of pitchers in their free agency years. Tables 5 and 6 illustrate a pattern of discrimination against younger minority pitchers who are unable to enter a free labor market. The same did not hold true for older pitchers.<sup>286</sup>

For players with less than six years of experience, white pitchers earned \$67,942.86 more than minority pitchers at a significance level of

---

281. Meir, *supra* note 214, at 12.

282. *Id.* at 12-13.

283. *See id.* at 13.

284. *See infra* Table 4.

285. In 1987, there were only twenty-nine minority pitchers in all of Major League Baseball, and only three with less than three years of experience.

286. *See infra* Tables 5 & 6.

0.01.<sup>287</sup> For pitchers who could enter the free agent submarket, it appears that only a correlation between race and salary exists, with whites earning more than minorities, but not in a statistically significant manner.

When the regressions were run for white and minority pitchers separately, a very interesting result was uncovered. Table 7 shows that for the 217 white pitchers who performed in the Major Leagues in 1987 and 1988, performance and experience were the only variables that held any great weight in determining their compensation.<sup>288</sup> As expected, wins, saves, innings pitched, and experience added to the white pitchers' salary, while giving up earned runs and getting old hurt their earnings. No media variable was significant at more than 0.11. In that instance, appearing on national television as a team added \$10,637.21 to the white pitcher's pay.

However, Table 8 paints a far different picture for minority pitchers. Here, the only variable that was statistically significant for this group was the number of times their respective team appeared on national television. Every appearance added \$112,190.96 to the average minority's pay—over \$100,000 more than their white counterparts. Thus, it seems counterintuitive that minorities would be discriminated against in terms of pay. In fact, minority pitchers who played on teams that had a great deal of media exposure in 1987 did benefit financially. However, this result may be explained using the theory outlined in the next section.

### E. *Positive Profits and Discrimination*

For economists, the practice of salary discrimination is antithetical to the goal of profit maximization. The benchmark analysis of this thesis stems from the work of Professor Gary Becker. Becker has argued that there is an economic price to pay, in the form of higher production costs associated with lower than optimal productivity and lower profits, when employers act on their propensity for discrimination and purposely pay minorities less or refuse employment altogether.<sup>289</sup> Becker points out that, if an employer's rival has no propensity to discriminate, the unbiased firm will enjoy measurably higher rates of output and profit in the long run.<sup>290</sup> Becker's analysis suggests that where competition is intense, paying a premium for discriminatory tendencies effectively

---

287. Disaggregating the data did not significantly impact the value of the adjusted R-squared. With all pitchers included, the R-squared was 61.94. The R-squared for the pitchers with one to five years of experience was 60.89.

288. See *infra* Table 7.

289. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

290. See *id.* at 39.

places the discriminating firm in a precarious position relative to other firms in the industry, perhaps even leading to bankruptcy.<sup>291</sup>

Becker's argument fits nicely into the economic structure of Major League Baseball. If baseball owners attempt to maximize profits, then choosing to discriminate against highly productive minority players would be a costly mistake. A recent study found that every game a Major League team wins adds over \$349,000 in revenue to its bottom line, and winning obviously depends upon player productivity.<sup>292</sup> If an owner chooses to discriminate, the team will probably lose more games as a function of fielding relatively unproductive players and, thus, will also lose revenue.

A study by Gwartney and Hayworth confirms the legitimacy of Becker's analysis applied to baseball. The authors analyzed the winning percentages and earnings of Major League Baseball teams during the 1947-56 period. This was the period of baseball history after Jackie Robinson's arrival in Los Angeles as a member of the Dodgers. Gwartney and Hayworth found that the "top eight teams in terms of 'black player years' won 5.6 percent more of their games than did the eight teams with the least representation of black players during the 1950-56 period."<sup>293</sup> Moreover, the authors discovered that "[t]he five teams with the most black players won 58 percent of their games during the 1952-56 period" compared to just 46% for the other eleven teams.<sup>294</sup>

In terms of revenue, it was noted that teams willing to hire "as few as four black players" earned, on average, over \$200,000 more than teams that were slower to desegregate their ranks.<sup>295</sup> However, the authors found that despite being able to substitute black players for whites at lower salaries (the salaries of black players were artificially suppressed by low pay in the Negro Leagues), less than half of the Major League teams had employed black players five years after desegregation.<sup>296</sup>

This unwillingness to profit from the availability of cheap, productive black players in the 1950's, along with the \$62,434 premium paid to white pitchers forty years after the integration of baseball, is not explained by Becker's work. Economic theory fails to explain the per-

---

291. Indeed, marginal and average variable costs of production would likely increase in proportion to an employer's discriminatory actions. If the employer operates in an industry that is intensely competitive, higher costs easily lead to insolvency.

292. See Michael Hiestand, *Algebraic Equations Factor Out for Players*, USA TODAY, July 7, 1994, at 3C.

293. James Gwartney & Charles Hayworth, *Employer Costs and Discrimination: The Case of Baseball*, 82 J. POL. ECON. 873, 876 (1974).

294. *Id.*

295. *Id.* at 880.

296. See *id.*

sistence of salary or employment discrimination with its myopic assumption that owners invariably act to maximize profits. Given baseball's extensive history of discrimination, it is possible, and even likely, that owners could earn positive profits over time while willingly foregoing maximum profits to indulge some racist tendencies, even in competitive labor markets. This supposition takes root in the works of Gerhard Tintner<sup>297</sup> and Armen Alchian,<sup>298</sup> who created theoretical framework grounded in the evolutionist "survival of the fittest" concept to explain both successful and unsuccessful behavior of business firms.

Tintner suggests that, to assume that profit maximization is a primary goal or reality of business, is to assume that participants in the profit-pursuing endeavor have perfect information and are capable of solving complex problems that contain a host of variables<sup>299</sup> (i.e., humans do not have the ability to satisfy either criterion). Relying on this framework, Alchian contends that the "decisions and criteria dictated by the economic system" are more important than the decisions made by the individuals that operate within that system.<sup>300</sup> Thus, Alchian argues that, "realized positive profits, not maximum profits, are the mark of success and viability. It does not matter through what process of reasoning or motivation such success was achieved. The fact of its accomplishment is sufficient."<sup>301</sup>

Tintner's and Alchian's work applies equally to the business of Major League Baseball. First, the owners of Major League Baseball teams have suffered from the problems alluded to by Tintner. That is, no owner has perfect information as to the probability of whether a particular team will be a winning one, nor are they able to solve the problem of assembling the best team when so many variables, such as coaching skill, fan support, weather, and team chemistry exist. Therefore, without knowing what mix of players will be the most proficient, the owner may wish to act on some racist attitudes by fielding a team that is primarily white, or by paying minority players lower salaries for reasons other than ability, experience, or marketability. If owners act on these racial prejudices and, thus, act based on imperfect information, it would not necessarily result in an unproductive team. Indeed, through

---

297. See Gerhard Tintner, *The Theory of Choice Under Subjective Risk and Uncertainty*, 9 *ECONOMETRICA* 298-304 (1941); Gerhard Tintner, *The Pure Theory of Production Under Technological Risk and Uncertainty*, 9 *ECONOMETRICA* 305 (1941); see also Gerhard Tintner, *A Contribution to the Nonstatic Theory of Production*, in *STUDIES IN MATHEMATICAL ECONOMICS AND ECONOMETRICS* 92 (Oscar Lange et al. eds., 1968).

298. See Armen Alchian, *Uncertainty, Evolution and Economic Theory*, in *ECONOMIC FORCES AT WORK* 15-35 (1950).

299. See *id.* at 17.

300. *Id.* at 19.

301. *Id.* at 20.

good luck—a feature of business Alchian contends is prevalent—an owner might discriminate and still have a winning team, if his white players happen to perform well.

If the owners do not attempt to maximize profit, they can find a window of opportunity to forego higher than “realized positive profits” and practice discrimination. This practice could be measured by multiplying the premium the average owner is willing to pay white players, by the number of whites in the respective cohort. In 1988, the owners paid 217 white pitchers an average racial premium of \$62,434.02, effectively incurring costs that were \$13,548,182.34 higher than if no discrimination had existed.

If baseball is a unitary economic system rather than a collection of independently acting owners, any owner could discriminate against minorities within the system and not be punished financially if the system has a built-in mechanism to assure revenue to even the most inefficient team. In many instances, owners have commented that baseball is not a profitable pursuit, or that a key reason for team ownership stems from the nonpecuniary benefits of running a club.<sup>302</sup> However, once a team is purchased, the owner benefits by sharing in an equally-divided pool of national television revenue, no matter how poorly the team is run. In addition, teams share in the gate receipts of other clubs when they travel to rival cities. Owners have recently come out in favor of a more generous revenue-sharing plan, despite evidence from other sports that equalizing payrolls may not impede the progress of wealthy teams in gaining star players, and thus, earning more money as a function of winning games.<sup>303</sup>

The mere suggestion of revenue sharing indicates that Alchian is correct in asserting that profit maximization is not the objective of operating a business. If the owners agreed to such a plan, in effect, they would change the “economic system” such that inefficient, poorly managed teams would be insulated from ineptitude as long as they could share in the success of teams who had “realized positive profits.” As long as less profitable teams share in this pool of dollars, discrimination would be a less costly pursuit to the extent that the owners would now be underpaying minorities with someone else’s profits.

Our finding that a positive correlation exists between being white and earning a higher salary in all three hitter submarkets (a statistically significant premium of more than \$62,000 paid to white pitchers and

---

302. For a discussion on the extensive nonpecuniary benefits derived from team ownership, see ZIMBALIST, *supra* note 142, at 32-33; HELYAR, *supra* note 49, at 244-46; *see also* Mike Fish, OWNERS IN IT FOR MONEY, FUN OR BOTH, ATLANTA J./ATLANTA CONST., Aug. 19, 1994, at E6.

303. *See* Peter King, *Deion vs. Dallas*, SPORTS ILLUSTRATED, Sept. 26, 1994, at 66-67.

even the \$112,000 paid for every appearance on national television to minority players), can be explained by the works of Tintner and Alchian, but not by standard neoclassical, labor market theory. In the case of hitters, the strongest correlation between race and salary—and the largest income spread due to race—was found in the free agency submarket. If owners were going to discriminate, it makes sense that this would be the submarket where such favoritism toward whites would be uncovered. After all, players in their first three years of service are generally promoted to the Major Leagues due to satisfactory development in the minor leagues, not due to owner preference.

Within the arbitration submarket, a third party, not necessarily the owner, determines the final compensation of the player in question. However, it is during the free agency period that owners are often involved in bringing specific players to their organization through the process of bidding on the available pool of baseball players. If the owners wanted to pay a white player more than a minority player, not only do they have more power in this market to control compensation, but with average salaries of more than \$500,000 in 1988, paying a premium of close to \$37,000 could easily be masked within such large payouts to all players and allowed for positive profits to exist during that time.

This study shows discrimination against all minority pitchers. Yet, the only variable that was statistically significant in explaining minority pitcher salaries was the national television variable.

In addition to addressing the role of luck and chance in determining the distribution of profits, Alchian pointed out the role that competition plays in determining intertemporal profits. He suggested that “wherever successful enterprises are observed, the elements common to these observable successes will be associated with success and copied by others in their pursuit of profits or success.”<sup>304</sup>

The fact that only twenty-nine out of 246 pitchers in 1987 were minorities suggests that in a changing “environment,” where the appearance of occupational segregation can draw swift legal and economic consequences, a rational owner would be inclined to pay a premium to the most visible minorities on his payroll (in this case, the pitcher who appears on national television) and still pay that pitcher a salary that is discriminatory. Indeed, if ongoing discriminatory practices in overall compensation exist, wouldn’t an owner seek out one of only twenty-nine participants in that highly visible portion of the labor market and pay that person a salary reflecting his ability in order to mask the real salary structure of baseball, which ignores productivity and experience in favor

---

304. Alchian, *supra* note 298, at 28-29.

of anomalistic representation on the network telecasts? Alchian's discussion of "copying" successful strategies in the pursuit of profits is compelling. If Becker's analysis is to be interpreted literally, paying anyone for non-productivity characteristics would be inefficient, especially in an industry where productivity is the key to profit maximization.

### III. PROPOSAL

When the owners and players met at the end of the 1993 season and throughout the 1994 season to negotiate a new collective bargaining agreement, both sides proposed widely divergent options to replace the current system. The owners' desire to regain control of the game, coupled with the players' eagerness to maintain the status quo assured not only a strike, but also the failure to play the World Series. As the owners and players came closer to reaching an agreement in 1996, the need to consider whether the market they construct perpetuates and masks discrimination is paramount. These conflicting perspectives signal the need for both sides to reevaluate their interests and consider new alternatives.<sup>305</sup> This call to reevaluate the terms and conditions of the labor market is not blunted by the new collective bargaining agreement. This part of the Article proposes a model of the labor market aimed at eradicating discrimination and restoring a balance of power, all in support of the long-term health of Major League Baseball.

#### A. *Abolish the Amateur Draft and Modify the Reserve System*

At the beginning of professional baseball, players moved freely from one team to another at the end of each season.<sup>306</sup> This player-hopping resulted in the escalation of player salaries and bidding wars between teams. To significantly reduce players' salaries and to increase revenues,<sup>307</sup> the owners convened a secret meeting and adopted the first reserve rule on September 30, 1879.<sup>308</sup>

At roughly the same time, Hall of Fame player Cap Anson refused to play against a team that had signed a black man named Moses Fleetwood Walker as its catcher.<sup>309</sup> On the heels of this overt act of racism, the owners met not to punish the perpetrators of the act, but to join them.

---

305. Several of the suggestions in this Article are similar to proposals contained in the report of the Baseball Economic Study Committee. For a discussion of the report, see GREENBERG, *supra* note 47, § 5.20(2), at 255-56 (Cum. Supp. 1995).

306. See Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW. J. 183, 184 (1994).

307. See *id.*

308. See DWORKIN, *supra* note 81, at 10.

309. See Scully, *supra* note 225, at 225; Lonnie White, *Morning Briefing: The Barrier Had*

In yet another “gentlemen’s agreement,” the owners agreed to discriminate against African-Americans by not signing them to professional baseball contracts.

It is not surprising that similar racist collusion could happen again. Under the present system, a player is drafted in the amateur draft with no opportunity to test the market by seeking competing bids. A player also has no meaningful choice if drafted by someone he perceives to be racist. Moreover, the number of rounds in the draft may exceed thirty, with the teams selecting players until they have tapped out the present labor pool. Consequently, a player selected in the amateur draft does not know how much his services would bring on the market. If the player does not know what his market value is, then an owner may exploit the player. Coupling an amateur draft with a six-year minor league program and a three-year reserve rule in the Major Leagues compounds this problem. Thus, the current labor submarket is anti-competitive and provides a potential breeding ground for discrimination, which is unchecked by market forces.

The traditional justifications for the reserve rule ring hollow in light of historical facts.<sup>310</sup> However, one persuasive argument in support of a reserve rule is that it permits a team to recoup its developmental costs incurred on behalf of a player. Unlike other major sports, Major League Baseball maintains a complex minor league system. Major League teams sink huge amounts of funding into scouting, personal instruction for players, and minor league programs. To prevent free-rider problems, a team must be able to protect its investment in a player and recoup its costs. The problem, of course, is that the traditional reserve system may propagate discrimination based on race.

Although the tension between recoupment of costs by owners and protecting players from discrimination may seem intractable, there is a solution. This proposal would keep intact a reserve system in Major League Baseball and abolish the amateur draft. Abolishing the draft permits a player to test the market and to sign with owners with good reputations for dealing with minorities. Once a player gathers that information, signing under some form of reserve system should not pose a problem of discrimination, so long as the reserve period is reasonable in light of all the circumstances.

### B. *Eliminate Arbitration*

The theories of labor market discrimination as applied to Major

---

*Long Been Broken*, L.A. TIMES, Feb. 17, 1993, at C2; Stig Jantz, *Hidden History Hall of Famer Cap Anson Was Baseball’s Best Player and Most Strident Racist*, SPORT, May 1993, at 70.

310. See *supra* text accompanying notes 39-46.



League Baseball are straightforward. In the absence of competition for labor inputs, owners who derive some "psychic benefits" from discrimination will pay minorities salaries that are less than what their performances warrant and less relative to those of white players. If monopsony power were eliminated to some degree, salaries for all players could be expected to rise and be commensurate with productivity. Teams would no longer appropriate rents from specific training, since other teams could bid for player services and owners would not be able to afford discriminatory payment schemes. The tests of these theoretical predictions provide no conclusive evidence that discrimination against minorities existed before the reserve clause was altered, yet empirical evidence support the hypothesis that minority players are at least better off under a scheme of competitive labor markets.

But what about players caught between monopsonistic exploitation and freedom to move? While each of the previous studies provides a foundation for further research, each fails to capture the true labor market structure many players face. This is because there exists a third group of players not strictly bound by the remnants of the reserve clause, but who have yet to put in the years necessary to become free agents—players who have qualified or will qualify for final-offer salary arbitration, but are not free to change teams.

As noted, final-offer arbitration (although it predated free agency) did not play a significant role in driving salaries toward marginal revenue product for players until the new free agency market was created that assisted arbitrators in making salary decisions.<sup>311</sup> Therefore, because arbitration has become such an influential tool for players in seeking salary increases, omitting the last segment of this "quasi-trichotomized labor market" could distort any study on the effect labor market changes have on salary disparities. This is especially true since the rights afforded players in this segment of the labor market are often quite different from those for free agents and players operating under the reserve rule.

Although the system of final-offer arbitration recently has undergone some changes, during the statistical years selected for this study, a player who had completed at least three full seasons in the Major Leagues could file for salary arbitration upon expiration of his most recent contract.<sup>312</sup> Under this system, the player and his team's manage-

---

311. See *supra* text accompanying notes 104-07; see also JACK SANDS & PETER GAMMONS, *COMING APART AT THE SEAMS* 60-61 (1993).

312. The cutoff was changed from two years to three years as a result of an agreement between the players and owners in 1988, which stemmed from the issues that arose during the 1985 players' strike. See GREENBERG, *supra* note 47, § 5.17, at 423.

ment present their salary demands and offers, along with supporting evidence, such as highlighted performance statistics, which assist arbitrators in selecting one of the two proposed salaries. The arbitrator or panel of arbitration is not at liberty to "split the difference"<sup>313</sup> in making his/their final decision. However, players with three to six years of experience who "lose" their hearings almost always receive salaries greater than what they received in previous seasons. As MacDonald and Reynolds point out, "losing arbitration is not significant, confirming the general impression that players eligible for salary arbitration have little downside risk and good upside potential from arbitration."<sup>314</sup> MacDonald and Reynolds also found that arbitration has "a stronger independent effect on salaries than the much-publicized free agency."<sup>315</sup>

Incorporating this segment of the baseball players' market into the model constructed in this Article has some intuitive appeal. If a player can file for salary arbitration, he will assumably receive an award commensurate with economic factors (such as performance) if arbitrators are, in fact, impartial and base their decisions on these variables.<sup>316</sup> The question then becomes: what are the key determinants of salaries for white and minority baseball players who are eligible for arbitration, but not free agency? The answer should be that players of different racial and ethnic groups will be evaluated based on similar productivity characteristics. Thus, including all three segments of the baseball players' labor market in the model allows detailed examination of the degree to which white and minority players are paid in accordance with performance, experience, and media attractiveness under monopsonistic, free-market, and third-party influences.

In light of recent studies that claim salary discrimination does not exist in Major League Baseball, the question arises whether previous studies accurately reflected the structural changes that have taken place in baseball in accounting for possible divergent outcomes when determining salaries among whites, blacks, and Hispanics. The answer appears to be that they do not. Acknowledging the growing influence of the media in baseball and the intertemporal trichotomization of the players' labor market raises the possibility that salary discrepancies based on nonperformance measures may exist.

Another alternative to the current salary arbitration system is to modify the process. The owners have proposed that three arbitrators

---

313. Diana Knude, *Baseball's Being Very Good to Him*, DALLAS MORNING NEWS, Mar. 11, 1990, at 1H (quoting Gerald Scully).

314. MACDONALD & REYNOLDS, *supra* note 246, at 17-18.

315. *Id.* at 3.

316. MacDonald and Reynolds cite recent evidence that "final-offer arbitrators chose the offer closest to the appropriate award." *Id.* at 18 n.17.

hear a dispute. Presently, if either side is unhappy with an arbitrator's decision, that arbitrator is fired. For example, the owners fired Peter Seitz after the Messersmith/McNally decision. Not surprisingly, since arbitration's inception, both sides have won almost equal numbers of hearings. An arbitrator should objectively base his decision on the information presented at the hearing, and not with an eye on job security. If an arbitrator fears dismissal for his decision, he cannot render an impartial decision; therefore, an arbitrator should serve a specified limited term to minimize his interest in the outcome.

Ironically, the owners originally proposed salary arbitration. They apparently did not foresee the interplay of salary arbitration with free agency, which led to escalating salaries. Since the two systems are based on different criteria, free agent salaries should be excluded from salary arbitration. However, given the impact of free agency on arbitration awards, this proposal may be too late to be effective.

Based on these deficiencies with the arbitration system, this Article proposes to abolish salary arbitration. Eliminating the mandatory draft, shortening the reserve period, and expanding the right to free agency would significantly reduce any negative effect on players from the removal of arbitration. Furthermore, owners are better off, since under the present arbitration system, an owner has no right to refuse to pay a salary awarded through arbitration.

### C. *Expand Free Agency*

Former Oakland Athletics owner Charlie Finley believed players' escalating salaries would lead to Major League Baseball's extinction, and suggested opening up free agency to all players.<sup>317</sup> Some have given credence to this idea under the theory of supply and demand. Accordingly, increasing the number of players eligible for free agency would work as an artificial salary cap, and decelerate the current pace of escalating players' salaries.<sup>318</sup> By increasing the number of free agency candidates, "salaries would have to accommodate what the market would bear."<sup>319</sup> If the theory holds, the market would ultimately correct itself. As their financial situation worsens, owners would not bid as vigorously for free agents; thus, free agent salaries would level off. As an added benefit, since free agent salaries set the market for salary arbitra-

---

317. See HELYAR, *supra* note 49, at 197. When Charlie Finley was asked in 1992 if he wanted to own a Major League Baseball team, Finley replied, "[d]efinitely not. I would not want to go bankrupt." Franz Lidz, *Charlie Finley*, SPORTS ILLUSTRATED, Aug. 10, 1992, at 5, 6.

318. See Michael K. Ozanian & Stephen Taub, *Big Leagues, Big Business*, FIN. WORLD, July 7, 1992, at 35.

319. *Id.*

tion awards, those awards would also level off.<sup>320</sup>

These arguments are sound and support an expanded free agency market. Restricted supplies of shortstops or left-handed set-up men result in the high bidding of salaries for such services. Expanding free agency will reduce salaries and should help to root out the discrimination. Racial discrimination, which can be hidden in an anti-competitive market, can be exposed and its consequences ameliorated in a market more closely approximating a free market.

#### D. *Rejection of a Salary Cap*

For the first time since 1904, Major League Baseball failed to showcase its two best teams when the 1994 World Series was canceled by twenty-six of twenty-eight owners.<sup>321</sup> Ostensibly, the Fall Classic fell victim to the owners' demand that players accept a salary cap, like professional football and basketball players. Meanwhile, the National Football League ("NFL"), faced with similar problems, announced a settlement of their long-standing labor dispute. Under the settlement, the NFL introduced a salary cap that becomes effective when 67% of the NFL's gross revenues goes to player salaries.<sup>322</sup> Once it reaches that point, the salary cap limits the amount teams can spend on salaries to 64% of their gross revenues.<sup>323</sup>

It may not be appropriate, however, to compare the NFL to Major League Baseball. First, football clubs draw most of their revenues from national television contracts, which they share equally.<sup>324</sup> In contrast, while Major League Baseball teams share national television revenue, larger market teams also generate sizable incomes from local television and radio sources, which they do not share with other teams. The new collective bargaining agreement modestly changes this relationship. This creates an imbalance unknown to the NFL. Second, since owners want to recoup their investment,<sup>325</sup> Major League Baseball expends much of its revenue on player development through its minor league system. In contrast, the NFL relies upon college football as their minor league to develop its players.

Richard Ravitch, former chief negotiator for the owners, unsucces-

---

320. *See id.*

321. Baltimore Orioles owner Peter Angelos and Cincinnati Reds owner Marge Schott refused to sign the document that ended the 1994 season.

322. *See* Steve Berkowitz & Christine Brennan, *Poring Over Fine Points in NFL Pact; Salary Cap Outlined*, WASH. POST, Dec. 24, 1992, at 1D.

323. *See id.*

324. *See* Ken Rosenthal, *Another Voice NFL-Style Compromise No Blueprint for Baseball*, ATLANTA J./ATLANTA CONST., Dec. 25, 1992, at H2.

325. *See* SCULLY, *supra* note 47, at 123.

fully sought to eliminate salary arbitration and adopt a salary cap. He urged the players to look at current numbers and consider the future of Major League Baseball.<sup>326</sup> Donald Fehr, representing the players, responded by saying, "[p]eople talk about what the game is like, and what we have [to] do [to] make sure the game is in good shape in 2010. Well, that may be. But I don't have many clients who think they'll be playing in the year 2010."<sup>327</sup> Fehr believes that since salaries are determined by overall revenue, they would automatically adjust if the revenues decreased.<sup>328</sup>

Players are unlikely to approve a salary cap until they are convinced that Major League Baseball's financial situation is as bleak as the owners claim, and unless there is no other method to confront the alleged problem.<sup>329</sup> Fehr believes that the owners should get their own "house" in order before demanding that players sacrifice their salaries.<sup>330</sup>

What Fehr and Ravitch fail to mention when assessing the impact of a salary cap on the game of baseball, is the deleterious effect any cap will have on the salaries of players affected by discriminatory remunerations. A salary cap would act to exacerbate salary discrimination in baseball for one salient reason: monopsonization of a labor market affords employers with discriminatory tendencies the opportunity to practice discrimination without worrying about other employers snatching up the most productive players, regardless of their race. Since a salary cap truncates a player's ability to be geographically mobile, the player must try to "fit" under the cap by either accepting his current team's best offer, or the best offer of teams who still have funds under the cap. This quasi-reserve system is precisely the condition Becker alluded to when he argued that monopsony power increases, rather than decreases, discrimination, since minorities have fewer opportunities to shop their services around to the highest bidder.<sup>331</sup>

The 1996 agreement does not include a salary cap, but does include a modest luxury tax on the five highest salaries above \$51 million. In theory, the tax poses similar potential discriminatory opportunities and

---

326. See *Point/Counterpoint Owners Seek Partnership but Players Are Wary*, ATLANTA J./ATLANTA CONST., Feb. 17, 1993, at G3.

327. *Id.*

328. See *id.*

329. See Ross Newhan, *At Least Baseball Has Cue*, L.A. TIMES, Jan. 8, 1993, at C1.

330. See *id.* Fehr points to Major League Baseball's judicially-created antitrust exemption status as one of the problems confounding the negotiations. Without the exemption, the federal government could place more pressure on the owners in negotiation with the players.

331. See BECKER, *supra* note 289, at 110.

should be avoided; however, the actual tax is so modest that it will have little effect on the labor market.

#### E. *Reject Revenue Sharing Among Clubs*

Revenue sharing proposals force larger market clubs to share local broadcasting revenues with smaller market teams, thus subsidizing the latter's operations. The larger market teams balk at this idea, since it cuts directly into their profits. In their view, revenue sharing among teams forces financially stronger teams to support weaker ones. According to former Major League pitcher Jim Kaat, revenue sharing is a form of socialism with no guarantee that small market owners would use the revenue to improve their clubs.<sup>332</sup> Charlie Finley saw revenue sharing as the inevitable solution if teams from smaller markets are expected to survive and to be competitive.<sup>333</sup> Revenue sharing proposals call the owners' perceived bluff on the issue of whether they have the best interests of the game at heart.

As previously discussed, the 1996 agreement provides that teams will share local television revenues, that the top-revenue teams will transfer revenue to the lower-revenue teams, and that players will contribute a modest percentage of their salaries to them. There is no assurance, however, that the money will be used by lower-revenue teams to increase their competitiveness.

It may appear that the players are neutral regarding revenue sharing among teams. Revenue sharing may seem to cost players little, however, revenue sharing forces financially strong teams to subsidize the operations of financially weaker teams. As a result, revenue sharing might act to exacerbate salary discrimination in baseball, since employers with discriminatory tendencies have the opportunity to practice discrimination even if such acts are inefficient and reduce revenues. This is true because someone else—another owner—is paying the costs associated with the discrimination.

#### IV. CONCLUSION

The question of salary discrimination on the basis of race or ethnicity appears to be far from a dead issue. The evidence provided in this Article suggests that salary determinations do, in fact, vary by race and ethnic classifications when accounting for the sweeping changes that have taken place in the structure of the players labor market during the past fifteen years, and the substantial increase in television revenues.

---

332. Interview with Jim Kaat on *ESPN Baseball Tonight* (Aug. 19, 1994).

333. See Lidz, *supra* note 317.

The parties to the collective bargaining agreement in Major League Baseball should reassess the terms constructing the labor market in the 1996 agreement, in light of highly significant evidence of discrimination. These terms of employment should be carefully scrutinized in an effort to uncover conscious and unconscious discrimination in setting salaries in Major League Baseball. Until a frank assessment of the racial impact of the terms of the labor market in Major League Baseball is undertaken, Major League Baseball's sordid past regarding race cannot be relegated to the corners of history.

TABLE 1. RACIAL/ETHNIC COMPOSITION OF MAJOR LEAGUE  
BASEBALL IN 1987

Racial/Ethnic Group	Hitters	Pitchers	Total
White	249 (60.1%)	223 (88.5%)	472 (71.8%)
Minority	165 (39.9%)	29 (11.5%)	194 (29.1%)
Total	414	252	666

TABLE 2. 1987 LOCAL TELEVISION BROADCAST RIGHTS AND TOTAL  
TELECASTS (HOME AND AWAY COMBINED)

Rank (#)	Team	Rights (in millions of dollars)	Telecasts
1	New York Yankees	14.80	75
2	New York Mets	9.30	75
3	Philadelphia Phillies	6.10	90
4	Toronto Blue Jays	4.68	35
5	California Angels	4.40	50
6	Pittsburgh Pirates	3.92	45
7	Los Angeles Dodgers	3.85	46
8	Texas Rangers	3.80	60
9	Houston Astros	3.75	74
10	Montreal Expos	3.60	44
11	Baltimore Orioles	3.56	40
12	Boston Red Sox	3.51	75
13	Cleveland Indians	3.50	60
14	Chicago White Sox	3.30	67
15	Detroit Tigers	3.30	45
16	Kansas City Royals	3.00	45
17	Chicago Cubs	2.90	150
18	Minnesota Twins	2.73	68
19	San Francisco Giants	2.65	38
20	Cincinnati Reds	2.30	46
21	Oakland Athletics	2.20	33
22	Milwaukee Brewers	2.17	60
23	St. Louis Cardinals	2.16	44
24	San Diego Padres	2.12	49
25	Atlanta Braves	1.79	145
26	Seattle Mariners	1.60	62

SOURCE: Robert Sobel, *Network Picture Split: ABC Says It's Losing Money, While NBC Is Upbeat; Flagship Stations Predicting Hot TV Sales Season*, TELEVISION/RADIO AGE, Mar. 2, 1987, at 37.



TABLE 3. 1987 NATIONALLY TELEVISED BASEBALL GAMES BY THE  
NATIONAL BROADCASTING COMPANY, INC.

Team	Total appearances	Wins	GB <sup>a</sup>
1. Chicago Cubs	11	76	18½
2. Los Angeles Dodgers	10	73	17
3. New York Yankees	10	89	9
4. Detroit Tigers <sup>b</sup>	9	98	0
5. New York Mets	9	92	3
6. Atlanta Braves	7	69	20½
7. Boston Red Sox	7	78	20
8. St. Louis Cardinals <sup>b</sup>	6	95	0
9. California Angels	5	75	10
10. Cincinnati Reds	5	84	6
11. Houston Astros	5	76	14
12. Toronto Blue Jays	5	96	2
13. Baltimore Orioles	4	67	31
14. San Francisco Giants <sup>b</sup>	4	90	0
15. Chicago White Sox	3	77	8
16. Philadelphia Phillies	3	80	15
17. Kansas City Royals	2	83	2
18. Montreal Expos	2	91	4
19. San Diego Padres	2	65	25
20. Texas Rangers	2	75	10
21. Cleveland Indians	1	61	37
22. Milwaukee Brewers	1	91	7
23. Oakland Athletics	1	81	4
24. Minnesota Twins <sup>c</sup>	0	85	0
25. Pittsburgh Pirates	0	80	15
26. Seattle Mariners <sup>d</sup>	0	78	7

<sup>a</sup> GB = games out of first place at the end of 1987 season.

<sup>b</sup> Playoff team in 1987.

<sup>c</sup> World champions in 1987.

<sup>d</sup> As of 1989, the Mariners had never appeared on national television. ENTERTAINMENT & SPORTS PROGRAMMING NETWORK, SPRING TRAINING REP., Mar. 20, 1989.

TABLE 4. RESULTS OF MULTIPLE REGRESSION ANALYSIS OF 1988  
SALARY FOR ALL PITCHERS

Independent Variable	b (Slope) (\$)	Standard Error	t	Significance of t
Exp	120,109.95	12,711.60	9.45	.0000
Exp x Exp	-3,793.92	666.79	-5.69	.0000
Wins	21,705.31	8,300.87	2.61	.0095
Saves	7,039.37	2,790.99	2.52	.0123
Innings Pitched	2,197.66	980.61	2.24	.0260
Earned Runs	-4,146.15	1,621.90	-2.56	.0112
National Television	21,102.12	6,663.52	3.17	.0017
Local Television	753.91	723.80	1.04	.2987
Local Revenue	-11,641.92	7,195.56	-1.62	.1070
Race	62,434.02	27,589.70	2.26	.0246

 $R^2 = .62$ 

N = 246

Intercept = 336,940

TABLE 5. RESULTS OF MULTIPLE REGRESSION ANALYSIS OF 1988  
SALARY FOR PITCHERS WITHIN THE RESERVE SYSTEM

Independent Variable	b (Slope) (\$)	Standard Error	t	Significance of t
Exp	36,082.94	75,530.00	.48	.6338
Exp x Exp	3,750.88	11,745.90	.32	.7501
Wins	21,391.71	8,752.69	2.44	.0162
Saves	-29.18	2,963.29	-.01	.9922
Innings Pitched	3,324.59	1,014.21	3.28	.0014
Earned Runs	-7,005.75	1,524.38	-4.60	.0000
National Television	-1,392.83	6,173.62	-.23	.8219
Local Television	1,040.01	735.60	1.41	.1603
Local Revenue	2,128.44	6,969.65	.31	.7607
Race	67,942.86	26,493.70	2.56	.0117

 $R^2 = .61$ 

N = 118

Intercept = 93,484.40

TABLE 6. RESULTS OF MULTIPLE REGRESSION ANALYSIS OF 1988  
SALARY FOR PITCHERS WITH MORE THAN 6 YEARS OF  
EXPERIENCE (I.E., POTENTIAL FREE AGENTS)

Independent Variable	b (Slope) (\$)	Standard Error	t	Significance of t
Exp	196,622.59	37,610.70	5.23	.0000
Exp x Exp	-6,686.61	1,500.70	-4.46	.0000
Wins	16,904.90	12,599.60	1.34	.1823
Saves	11,024.95	4,162.66	2.65	.0092
Innings Pitched	2,009.01	1,538.89	1.31	.1943
Earned Runs	-2,143.48	2,715.87	-.79	.4316
National Television	42,214.15	10,811.80	3.90	.0002
Local Television	522.50	1,093.55	.48	.6337
Local Revenue	-22,144.30	11,193.50	-1.98	.0503
Race	50,513.32	46,062.40	1.10	.2751

$R^2 = .46$

N = 128

Intercept = 892,744.90

TABLE 7. RESULTS OF MULTIPLE REGRESSION ANALYSIS OF 1988  
SALARY FOR ALL WHITE PITCHERS

Independent Variable	b (Slope) (\$)	Standard Error	t	Significance of t
Exp	124,142.06	12213	10.16	.0000
Exp x Exp	-4,056.30	631.75	-6.42	.0000
Wins	19,173.41	8,041.65	2.38	.0180
Saves	6,835.41	2,770.73	2.47	.0144
Innings Pitched	2,877.01	978.02	2.94	.0036
Earned Runs	-5,392.39	1,646.46	-3.28	.0012
National Television	10,637.21	6,628.27	1.60	.1101
Local Television	1,722.38	706.42	2.44	.0156
Local Revenue	-8,545.78	7064.26	-1.21	.2278

$R^2 = .65$

N = 217

Intercept = 432,014.10

TABLE 8. RESULTS OF MULTIPLE REGRESSION ANALYSIS OF 1988  
SALARY FOR ALL MINORITY PITCHERS

Independent Variable	b (Slope) (\$)	Standard Error	t	Significance of t
Exp	-70,495.07	79,960.80	-.88	.3890
Exp x Exp	9,122.05	5,446.92	1.67	.1104
Wins	69,624.03	43,434.70	1.60	.1254
Saves	2,104.44	10,782.00	.20	.8473
Innings Pitched	-1,777.13	3,826.57	-.46	.6476
Earned Runs	-490.05	4,907.49	-.10	.9215
National Television	112,190.96	25,920.60	4.33	.0004
Local Television	-3,581.21	2,928.99	-1.22	.2364
Local Revenue	-4,6117.17	79,960.80	-.88	.3890

$R^2 = .75$

N = 29

Intercept = 138,789.73