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THERE'S A NEW SHERIFF IN TOWN: COMMISSIONER-ELECT ADAM SILVER & THE PRESSING LEGAL CHALLENGES FACING THE NBA THROUGH THE PRISM OF CONTRACTION

ADAM G. YOFFIE*

"*I have big shoes to fill.*"[1]
– NBA Commissioner-Elect Adam Silver

I. INTRODUCTION

Following thirty years as the commissioner of the National Basketball Association (NBA), David Stern will retire on February 1, 2014.[2] The longest-tenured commissioner in professional sports, Stern has methodically prepared for the upcoming transition by ensuring that Adam Silver, his Deputy Commissioner, will succeed him.[3] Following Stern's October 2012 announcement, the NBA Board of Governors ("Board") unanimously agreed to begin negotiating with Stern's handpicked successor.[4] By May 2013, Silver had signed his contract and officially had become NBA Commissioner-Elect.[5] The fifth individual to hold the position, Silver faces a wide

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* J.D., Yale Law School, 2011; B.A., Duke University, 2006. The author would like to thank Matthew Parlow, Adina Yoffie, Amy J. Yoffie, and Megan Shannon.

1. *See* Sun Xiaochen, *New Commissioner, Same Love for China*, CHINA DAILY (Mar. 28, 2013, 07:41), http://usa.chinadaily.com.cn/sports/2013-03/28/content_16351874.htm (quoting Commissioner-Elect Adam Silver speaking to reporters in China).

2. Brian Windhorst, *David Stern Has Date for Retirement*, ESPN.COM (Oct. 25, 2012, 8:02 PM), http://espn.go.com/nba/story/_/id/8550645/david-stern-retire-nba-commissioner-2014.

3. *See id.* Perhaps as a sign of a generational change in professional sports, longtime Major League Baseball Commissioner Bud Selig recently announced his intention to retire in January 2015. *See* Tyler Kepner, *Selig Says '14 Season Will Be His Last*, N.Y. TIMES, Sept. 27, 2013, at B12, *available at* http://www.nytimes.com/2013/09/27/sports/baseball/selig-to-formally-announce-he-will-retire-after-2014-season.html?smid=Pl-share.

4. Zach Harper, *Taylor: Adam Silver Has Signed NBA Commissioner Contract*, CBS SPORTS (May 3, 2013, 7:46 PM), http://www.cbssports.com/nba/blog/eye-on-basketball/22190286/taylor-adam-silver-has-signed-nba-commissioner-contract. The NBA Board of Governors is comprised of team owners and representatives and serves as the management body overseeing the league's operations. *See* Michael A. McCann, *The NBA and the Single Entity Defense: A Better Case?*, 1 HARV. J. SPORTS & ENT. L. 39, 49 (2010) [hereinafter *Single Entity Defense*].

5. *See* Harper, *supra* note 4.

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array of obstacles, which sports and business journalists have extensively chronicled during the past year.[6]

Therefore, it is no coincidence that, like Stern, Silver is an attorney who brings a breadth of legal expertise to the Commissioner's Office.[7] Both joined the NBA from prominent New York law firms and rose through the ranks by serving in a variety of positions before taking over the top job.[8] At Stern's invitation, Silver joined the NBA in 1992. Working alongside his mentor, the Commissioner-Elect has played a major role over the past two decades in the expansion of the league's international presence through the creation of NBA China, and growth of the league's digital footprint, including the launch of NBA TV and the development of the NBA.com network of websites.[9] Silver is also responsible for the NBA's involvement in the growing summer league, which serves as

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6. *See, e.g.*, Andrew Greif, *The 5 Biggest Issues Adam Silver Will Face as NBA Commissioner*, DIME MAG. (Oct. 25, 2012, 4:45 PM), http://dimemag.com/2012/10/the-five-biggest-issues-facing-adam-silver/ (listing challenges in following order: (5) NBA's place in Olympics; (4) uniform advertisements; (3) competitive balance; (2) tanking; (1) lockout-aversion); Maxwell Ogden, *5 Ways Adam Silver Could Ruin David Stern's Imprint on the NBA*, BLEACHER REP. (Oct. 27, 2012), http://bleacherreport.com/articles/1385493-5-ways-adam-silver-could-ruin-david-sterns-imprint-on-the-nba (listing key issues in following order: (5) logos on uniforms; (4) contracting franchises; (3) TV deals gone wrong; (2) U-23 basketball; (1) elimination of NBA draft lottery); Tom Van Riper, *The Next Commissioner: Adam Silver Strikes NBA Gold*, FORBES (Oct. 25, 2012, 5:10 PM), http://www.forbes.com/sites/tomvanriper/2012/10/25/the-next-commissioner-adam-silver-strikes-nba-gold/ (noting that Silver helped Stern manage league's costs, but explaining that Silver's own tenure will be defined by his ability to increase profits).

7. *See NBA Career Opportunities: Adam Silver Deputy Commissioner and Chief Operating Officer National Basketball Association*, NBA.COM, http://www.nba.com/careers/executives/silver.html (last visited May 26, 2013) [hereinafter *NBA Career Opportunities*] (describing Silver's pre-NBA career as federal law clerk in Southern District of New York and then as litigation associate focusing on media and antitrust cases).

8. *See id.* (discussing Adam Silver's employment at prestigious law firm Cravath, Swaine & Moore); *see also* Michael McCann, *Proskauer Rose is the Most Powerful Law Firm in Sports*, SPORTS ILLUSTRATED (Mar. 7, 2013, 12:43 PM), http://sportsillustrated.cnn.com/more/news/20130307/proskauer-rose/ (noting David Stern's prior employment with law firm Proskauer Rose). For a more detailed discussion of David Stern's transition to the NBA, see *infra* notes 32-44 and accompanying text.

9. *See NBA Career Opportunities*, *supra* note 7 (noting that Silver joined NBA in 1992 and has served as Special Assistant to Commissioner Stern; NBA Chief of Staff; Senior VP and COO, NBA Entertainment; and President and COO, NBA Entertainment); *see also id.* (describing NBA.com network as "consist[ing] of more than 60 unique websites, including NBA.com, WNBA.com, NBADLeague.com, team sites for three leagues, and 15 international sections of NBA.com" and noting that Silver also oversees NBA's game telecasts, which are carried in 215 countries and territories in forty-seven languages).

a prime example of his savvy in identifying new business opportunities.[10]

The increasing complexity of the professional sports industry calls for a highly skilled attorney-commissioner capable of navigating the myriad legal challenges facing the league and its subsidiaries.[11] Seeking to address those challenges by identifying and analyzing the most pressing legal issues facing Silver, this Article proceeds in five parts: Part II provides a historical overview of the NBA Commissioner's office, including a brief discussion of the major lawsuits the league faced during the tenure of Silver's four predecessors. Part III addresses contraction and the potential, multi-front, legal battle it presents. Part IV examines the Brooklyn Nets franchise within the context of the financial hurdles ahead for the league during the Silver era. Part V concludes.

II. The Office of the NBA Commissioner, Past-Present

The NBA is hardly the only sports league run by a commissioner. Commissioners now direct all four major sports leagues in the United States, as well as all of college football's powerhouse conferences and up-and-coming leagues such as Major League Soccer.[12] The rise of the office of the commissioner in sports can be

10. *See N.B.A. No Longer Sits Out the Summer*, N.Y. Times, July 21, 2013, at SP2, *available at* http://www.nytimes.com/2013/07/21/sports/basketball/nba-no-longer-sits-out-the-summer.html (noting that, at behest of Silver, NBA got directly involved in summer league in 2007, paying organizers to run event and assisting with promotion and organization, such that "[w]hat started as a six-team gathering that was thrown together on the fly in 2004 has blossomed into a 22-team assembly that includes a tournament, owners' meetings and one of the few chances for agents and representatives from all 30 teams to meet in one place to hash out contracts, discuss trades and lay the groundwork for future deals").

11. Although NHL Commissioner Gary Bettman, a former NBA general counsel, is currently the only other lawyer at the helm of a major sports league, Paul Tagliabue, Roger Goodell's predecessor at the National Football League, and Francis T. "Fay" Vincent, Jr., Selig's predecessor at Major League Baseball, were both highly regarded attorneys. *See* McCann, *supra* note 8 (noting that Bettman formerly worked as attorney at law firm of Proskauer Rose); *see also Paul Tagliabue*, Covington & Burling, http://www.cov.com/ptagliabue/ (last visited May 26, 2013) (discussing Tagliabue's skills, accomplishments and responsibilities as attorney and former commissioner); *History of the Game Doubleday to Present Day: Francis T. Vincent, Jr.*, MLB.com, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_8 (last visited May 26, 2013) (discussing Francis T. Vincent, Jr.'s experiences in law and as former Commissioner of Major League Baseball).

12. The four major sports leagues in the United States are the National Basketball Association (NBA), National Football League (NFL), Major League Baseball (MLB), and National Hockey League (NHL). *See* Monte Burke, *Average Player Salaries in the Four Major American Sports Leagues*, Forbes (Dec. 12, 2012, 3:29 PM), http://www.forbes.com/sites/monteburke/2012/12/07/average-player-salaries-in-the-four-major-american-sports-leagues/. College Football's Bowl Championship Series had six major conferences (Big Ten, Pac-12, SEC, ACC, Big 12, and Big

traced to the infamous Black Sox scandal, in which eight Chicago White Sox baseball players were allegedly bribed to throw a game in the 1919 World Series.[13] Following the suspected "fix," Major League Baseball installed Federal Judge Kenesaw Mountain Landis as its first commissioner.[14] Landis only accepted the position on the condition that he be granted plenary authority over all aspects of the league, thereby establishing the position of "omnipotent" sports commissioner that continues to this day.[15]

The Basketball Association of America ("BAA") selected Maurice Podoloff, a Yale-educated lawyer, as its first league president in 1946.[16] Podoloff, a Russian immigrant who stood five feet, two inches tall, spearheaded the BAA's merger with the National Basketball League ("NBL"), which became the NBA before the start of the 1949-1950 season.[17] Podoloff also instituted the 24-second shot

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East), but the newly constituted College Football Playoff will no longer include the Big East. The conference commissioners were at the heart of the negotiations over the future of college football's postseason. *See* Chris Dufresne, *Power Conference in College Football Gain Even More Strength*, L.A. TIMES, Apr. 24, 2013, *available at* http://articles.latimes.com/2013/apr/25/sports/la-sp-0426-dufresne-bcs-20130426. In August 1999, after spending sixteen years with the National Football League, Don Garber was named Commissioner of Major League Soccer. *See MLS Executives*, MLSSOCCER.COM, http://www.mlssoccer.com/executives/garber (last visited Oct. 17, 2013).

13. For the definitive account of the Black Sox scandal, see ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (1979).

14. *See* Brent D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 206 n.6 (2007) (citing *The Commissionership: A Historical Perspective*, MLB.COM, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com (last visited May 27, 2013)).

15. MICHAEL J. COZZILLIO, MARK S. LEVINSTEIN, MICHAEL R. DIMINO, SR. & GABRIEL A. FELDMAN, SPORTS LAW: CASES AND MATERIALS 57-58 (2d ed. 2007). For a more in-depth discussion of the evolution of the sports commissioner, see *id.* at 57-110; *see also* Robert I. Lockwood, Article, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 SPORTS LAW. J. 137, 140-47 (2008) (discussing "[d]evelopment of Commissioner Authority in Professional Sports").

16. *See* Mike Monroe, *The Commissioners*, NBA.COM, http://www.nba.com/history/commissioners.html (last visited May 26, 2013). At the time of his selection, Podoloff simultaneously served as the president of the American Hockey League, which he continued to run through the 1951-1952 season. *See* J. Gordon Hylton, *How the Morals Clause in Jack Molinas' Contract Saved the National Basketball Association in 1954*, FORDHAM SPORTS LAW FORUM, at 7 (2013), *available at* http://fordhamsportslawforum.com/wp-content/uploads/2013/05/How-the-Morals-Clause-in-Jack-Molinas-Contract-Saved-the-National-Basketball-Association-in-1954.pdf.

17. *See* Sam Goldaper, *Maurice Podoloff Dead at 95, Was First N.B.A. President*, N.Y. TIMES, Nov. 26, 1985, *available at* http://www.nytimes.com/1985/11/26/sports/maurice-podoloff-dead-at-95-was-first-nba-president.html. In 1948, the NBL's four best teams – Minneapolis Lakers, Rochester Royals, Fort Wayne Zollner Pistons, and Indianapolis Kautskys – joined the BAA. In 1949, the remaining six NBL franchises followed. *See* COZZILLIO, ET AL., *supra* note 15, at 301. For a more comprehensive examination of Podoloff's role in the development of professional

clock, which he credited with saving the league, and used the full extent of his power to expel a player for gambling.[18] Podoloff's reign also marked the beginning of antitrust litigation over the sale of team franchises.[19]

Walter Kennedy succeeded Podoloff as NBA President in 1963. The league changed his title to Commissioner in 1967 and experienced significant growth during the 1967-68 season.[20] He had previously served as the league's first publicity director.[21] Kennedy transformed the NBA from a regional league into a national one that expanded from nine teams to eighteen under his direction.[22]

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basketball, see CONNIE KIRCHBERG, HOOP LORE: A HISTORY OF THE NATIONAL BASKETBALL ASSOCIATION (2007); LEONARD KOPPETT, 24 SECONDS TO SHOOT: AN INFORMAL HISTORY OF THE NATIONAL BASKETBALL ASSOCIATION (1968).

18. *See* Goldaper, *supra* note 17; Hylton, *supra* note 16 (discussing expulsion of Jacob "Jack" Molinas, former first-round pick and NBA All-Star, for betting on games). Molinas sued the NBA, but the Federal District Court for the Southern District of New York ruled in the league's favor. *See* Molinas v. NBA, 190 F. Supp. 241 (S.D.N.Y. 1961). Molinas was not the only player who sued the league as a result of its crackdown on gambling. Cornelius "Connie" Hawkins, a former New York City high school star, initiated an antitrust lawsuit against the league for banning him from competition based on his alleged involvement in a point shaving conspiracy. *See* Hawkins v. NBA, 288 F. Supp. 614 (W.D. Pa. 1968). The league eventually settled with Hawkins out of court and then assigned his player rights to the expansion Phoenix Suns.

19. In its attempt to purchase the defunct Baltimore Bullets and move them to D.C., the Washington Professional Basketball Corporation sued the NBA for interfering in the transaction. *See* Wash. Prof'l Basketball Corp. v. NBA, 131 F. Supp. 596 (S.D.N.Y. 1955) (denying plaintiff's motion for temporary injunction on grounds that allegations of antitrust violations could not be adjudicated upon affidavits); *see also* Wash. Prof'l Basketball Corp. v. NBA, 147 F. Supp. 154 (S.D.N.Y. 1956) (denying defendant's motion to dismiss plaintiff's action for damages). Aspiring owners have repeatedly turned to the courts following unsuccessful attempts to purchase NBA franchises. *See, e.g.*, Levin v. NBA, 385 F. Supp. 149, 150, 152 (S.D.N.Y. 1974) (granting defendant's motion for summary judgment due to plaintiffs' failure to demonstrate that they were rejected by Board of Governors in their attempt to purchase Boston Celtics due to "anti-competitive reason" and noting that "the exclusion of the plaintiffs from membership in the league did not have an anticompetitive effect nor an effect upon the public interest"); *see also* Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1987) (involving litigation by competing groups seeking to purchase Chicago Bulls); NBA v. Minn. Prof'l Basketball, Ltd. P'ship, 56 F.3d 866, 871 (8th Cir. 1995) (affirming district court's decision to enjoin sale of Timberwolves and relocation of Timberwolves to New Orleans, thereby "preventing the parties' dispute about ownership and relocation of the Timberwolves from standing the NBA and its 1994-95 basketball schedule on its head").

20. *See* Lockwood, *supra* note 15, at 149. During Podoloff's first season as the newly dubbed "Commissioner," the Lakers opened the 17,000-seat L.A. Forum, league-wide attendance exceeded 4.4 million, and television ratings continued to rise. *See* BILL SIMMONS, THE BOOK OF BASKETBALL: THE NBA ACCORDING TO THE SPORTS GUY 103 (2009).

21. *See* Monroe, *supra* note 16.

22. *See id.*

Kennedy's tenure was marked by the formation of the National Basketball Players Association ("NBPA"), the league's first players' union, and the transfer from the owners to the commissioner of wide-ranging authority to direct the league, rendering Kennedy the most powerful administrator in professional sports.[23] Yet the league and its newly empowered commissioner still faced a wide range of antitrust lawsuits, including Spencer Haywood's successful challenge to the league's minimum age requirement.[24]

Larry O'Brien succeeded Kennedy in 1975.[25] A former national chairman of the Democratic Party and Postmaster General of the United States, O'Brien faced a multitude of legal hurdles from the outset of his tenure, including suits over franchise relocation.[26] Yet he worked with Congress to enable the top four teams in the American Basketball Association ("ABA")[27] – Nets, Spurs, Pacers, and Nuggets – to transition to the NBA, thereby removing the specter of costly antitrust litigation.[28] O'Brien also resolved what was

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23. *See id.* With competition from the upstart American Basketball Association (ABA), the NBPA negotiated the first collective bargaining agreement (CBA), which increased salaries and improved working conditions. *See* Lockwood, *supra* note 15, at 149.

24. *See* Denver Rockets v. All-Pro Mgmt., 325 F. Supp. 1049 (C.D. Cal. 1971) (holding that NBA's four-year college rule in which players must be four years beyond high school graduation to play in league violates Section 1 of Sherman Act, thereby reaffirming that professional basketball is subject to federal antitrust regulation). The NBA also faced litigation over discussions surrounding a potential merger between the ABA and NBA. *See* Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975) (denying ABA's motion to dissolve more-than-four-year-old preliminary injunction preventing merger of, or non-competition agreement between, NBA and ABA). For a further discussion of *Robertson*, see *infra* note 29.

25. *See* Sam Goldaper, *N.B.A. Picks O'Brien as New Commissioner*, N.Y. TIMES, Apr. 29, 1975, at 25.

26. *See, e.g.*, HMC Mgmt. Corp. v. New Orleans Basketball Club, 375 So. 2d 700 (La. Ct. App. 1979) (affirming trial court's denial of preliminary injunction and annulment of temporary restraining order in suit against Utah Jazz following its move from New Orleans). The court held:

> [I]t is sufficient to deny preliminary injunction where it is unlikely that plaintiff may obtain the relief sought on the merits. We note that to require the Jazz to play in the Superdome also requires us to order the NBA member teams to schedule and play those games. At this stage of the proceedings, and considering the preparations necessarily involved in such scheduling, we cannot conclude that plaintiffs' injuries will preponderantly outweigh the possible injuries to defendants.

Id. at 711.

27. *See* SIMMONS, *supra* note 20, at 111 n.48 (explaining how ABA cycled through six commissioners – George Mikan, Jack Dolph, Bob Carlson, Mike Storen, Todd Munchak, and Dave DeBusschere – in nine years).

28. *See generally* Richard Sandomir, *No Team, No Ticket Sales, but Plenty of Cash*, N.Y. TIMES, Sept. 7, 2012, at B9, *available at* http://www.nytimes.com/2012/09/07/sports/basketball/former-aba-owners-ozzie-and-daniel-silna-earn-millions-from-nba.html. Contrary to popular belief, the NBA and ABA did not actually "merge."

arguably the greatest legal challenge the league ever faced, an NBPA-driven antitrust lawsuit attacking the reserve clause.[29] In the face of these challenges, with Executive Vice President David Stern by his side, O'Brien negotiated a landmark collective bargaining agreement ("CBA") with the players in 1983 that averted a strike and paved the way for unparalleled growth.[30] The historic CBA created the first salary cap in professional sports, guaranteed revenue for the players, and instituted a substance abuse program.[31]

Stern then succeeded O'Brien when the latter retired in 1984.[32] Stern had worked as the league's outside counsel for more than a decade before assuming the "in-house" position of General Counsel in 1978.[33] He served in that role for two years before his promotion to Executive Vice President in 1980 and then Commis-

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Rather, the ABA folded, and the collapsed league's top four teams joined the NBA. Although legally significant, the distinction is immaterial from a practical perspective. *See* COZILLIO, ET AL., *supra* note 15, at 302 (discussing folding of ABA within context of antitrust and professional basketball).

29. Oscar Robertson served as the president of the NBPA from 1965 until his retirement in 1974. He filed a class action lawsuit against the NBA that challenged, amongst other issues, the reserve clause restricting the movement and bargaining power of players. *See About the Big O*, THE BIG O, http://www.thebigo.com/AboutOscarRobertson/RuleMore.php (last visited Oct. 18, 2013). In 1975, a federal district court in the Southern District of New York "conclude[d] at least tentatively since the record [was] not complete, that the reserve clause . . . [was] not [a] mandatory subject[ ] of collective bargaining," and that the perpetual reserve system was "analogous to price-fixing devices condemned as per se violative of the Sherman Act," since it "allow[ed] competing teams to eliminate competition in the hiring of players and invariably lower[ed] the cost of doing business." *See* Robertson v. NBA, 389 F. Supp. 867, 891, 893 (S.D.N.Y. 1975) (footnote and citations omitted). Yet the court would not render any conclusions regarding the reserve clause's legality in advance of trial. *See id.* at 896. In permitting plaintiffs to proceed as a class, the court nonetheless paved the way for a settlement that eliminated the controversial clause. *See* Robertson v. NBA, 72 F.R.D. 64, 69 (S.D.N.Y. 1976) ("The settlement effectuates a radical modification of the disputed practices in respect of the college draft and options for future services. In addition, there will be a phasing out of the reserve compensation rules, arbitration of disputes, a covenant by the class not to sue, appointment of a Special Master to supervise and enforce the settlement agreement, and retention of jurisdiction by the court to assert final authority in the enforcement of the settlement terms.") (footnote omitted).

30. *See* Monroe, *supra* note 16.

31. *See* Showalter, *supra* note 14, at 209 n.34 (citing Dan T. Rosenbaum & Andy Stein, *Re-Negotiating the NBA Collective Bargaining Agreement* (Sept. 24, 2003), *available at* http://www.uncg.edu/bae/people/rosenbaum/NBA/cba1.pdf).

32. *See* Monroe, *supra* note 16.

33. *See id.* On January 14, 1964, two hours before the start of the All-Star game and its broadcast on ABC, the players told Kennedy that they would not play unless the owners agreed to a pension plan. Kennedy saved the All-Star Game and the television contract by agreeing to facilitate a pension deal with the owners. *See* SIMMONS, *supra* note 20, at 97-98 (2010).

sioner in 1984.[34] Under Stern, the league has grown to thirty teams in the United States and Canada. Stern's NBA is also an international powerhouse with offices located throughout the world.[35] Stern ensured that the league was quick to embrace digital technology through the development of NBA.com and NBA.com TV.[36] He also exercised his authority to oversee conduct both on and off the court.[37] As one legal scholar noted, the Stern-led NBA has engaged in the systematic manipulation of fans and media to justify its

34. For a more complete discussion of Stern's tenure as commissioner, see Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DePaul J. Sports L. & Contemp. Probs. 45, 45 (2010) ("David Stern has enjoyed expansive disciplinary authority that extends beyond the basketball court, micromanaging virtually all player conduct so long as it is related to a player's employment with the NBA. . . . Stern's use of power is arguably unmatched by the commissioners of any of the other three major sports leagues in the United States.").

35. *See* Monroe, *supra* note 16 ("As Commissioner, [Stern] has presided over the expansion of the league . . . and the globalization of the sport. NBA players compete in competitions worldwide, including the Olympic Games, under the aegis of the International Basketball Federation (FIBA), and the NBA has offices in Europe, Australia and Asia."); *see also* Harvey Araton, *Series Was an Exclamation Point for James and for Stern*, N.Y. Times, June 22, 2013, at D3, *available at* http://www.nytimes.com/2013/06/22/sports/basketball/a-maturing-james-is-only-getting-started.html (noting that after 2013 NBA finals, Stern's last playoffs, "the Spurs, with their rich international blend of players over the last decade, have been a true reflection of Stern's greatest achievement, [the] open[ing] [of] a new global frontier" for basketball).

36. *See* Monroe, *supra* note 16 (adding that "[u]nder Stern's guidance the NBA has enjoyed its period of greatest growth and taken basketball to the forefront of the global sports scene"). Although the NFL reigns as the nation's most popular sport, basketball is overtaking baseball. *See* Jonathan Mahler, *Is the Game Over?*, N.Y. Times, Sept. 29, 2013, at SR1, *available at* http://www.nytimes.com/2013/09/29/opinion/sunday/is-the-game-over.html ("In 2012, the N.B.A.'s regular reason ratings on ABC were nearly double those of Major League Baseball on Fox."). Stern, however, has also faced his fair share of setbacks. In one of the more memorable lawsuits against the league, and one of the rare legal losses for the Commissioner, a federal district court upheld the authority of a grievance arbitrator to rule on suspensions imposed on players for a brawl with fans. *See* Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, No. 04 Civ. 9528 (GBD), 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005). Following the altercation at a Pacers/Pistons game in Detroit, in which players entered the stands and fought with fans, Stern handed down stiff suspensions. *See id.* at *1. Yet the grievance arbitrator found that the behavior in question did not involve "conduct on the playing court," and, therefore, Stern did not have *sole* discretion to punish the players. *See id.* at *4.

37. *See* Wilson, *supra* note 34, at 45 (asserting that "David Stern has enjoyed expansive disciplinary authority that extends beyond the basketball court, micromanaging virtually all player conduct so long as it [ ] related to a player's employment with the NBA"). Stern's heavy-handed style also produced positive outcomes, such as the league's widespread support for Jason Collins following his coming out as the first openly gay active athlete in one of the four major American sports leagues. *See* Howard Beck, *Approval, But No New Team, for Collins*, N.Y. Times, July 9, 2013, at B11, *available at* http://www.nytimes.com/2013/07/09/sports/basketball/approval-but-no-new-team-yet-for-collins.html?smid=Pl-share (highlighting fact that Collins' former teams offered supportive statements and that "Commis-

wholesale usurpation of player autonomy.[38] Stern has imposed strict dress codes[39] and levied fines for post-game commentary by players and coaches, even going so far as to impose a gag order in advance of media day press conferences to steer the conversation favorably towards the league.[40] Stern's tenure has also been marked by repeated labor litigation that has led to owner-imposed lockouts and shortened seasons in 1999 and 2011. During the former, the teams only played fifty regular season games, as opposed to the standard eighty-two.[41] During the latter, the NBA players decertified their union and eventually ended up agreeing to play a shortened sixty-six-game season.[42] Although the labor unrest did not cause the loss of an entire season, the players made clear that decertification and other, potentially less savory, tactics were at their disposal.

With such recent labor strife in mind and less than three months until Silver's transition, the Commissioner-Elect would be wise to consider how he will shape his legacy.[43] Silver is highly un-

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sioner David Stern, *who has a long track record of progressive policies*, welcomed the moment") (emphasis added).

38. *See* Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy,* 8 U. PA. J. LAB. & EMP. L. 819, 821 (2006) (describing demand by Chicago Bulls that Eddie Curry undergo DNA testing prior to re-signing with team and implementation of rookie wage scale as examples of NBA's broader attempt to arrogate authority at players' expense).

39. *See id.* at 827-31. The controversial dress code raised allegations of racism and exemplified Commissioner Stern's power over the players. *See* Mike Wise, *Opinions on the NBA's Dress Code Are Far From Uniform*, WASH. POST, Oct. 23, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/22/AR2005102201386_pf.html (quoting All-Star Allen Iverson accusing NBA of "targeting [his] generation–the hip-hop generation").

40. *See* Michael Lee, *David Stern to Gilbert Arenas: Don't Talk About Gun Incident*, WASH. POST (Sept. 22, 2010, 11:47 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/22/AR2010092205677.html (describing Commissioner Stern's instruction to NBA All-Star Gilbert Arenas and Washington Wizards owner Ted Leonsis not to discuss prior year's dispute over guns, in which Arenas was eventually suspended for fifty games and sentenced to stay in halfway house for one month for bringing guns into the Wizard's locker room).

41. *See NBA Lockout Chronology*, CNNSI.COM, http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology (last visited Dec. 21, 2013).

42. *See* Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 VAND. J. ENT. & TECH. L. 473, 475 (2013); *see also* Steve Aschburner, *Sides Make Deal Official, Camps Begin Friday*, NBA.COM, http://www.nba.com/2011/news/features/steve_aschburner/12/08/labor-agreement/index.html (last visited July 21, 2013).

43. Stern has not gone quietly, recently pushing through a change to the NBA finals, moving from a 2-3-2 to a 2-2-1-1-1 format. *See* Brian Windhorst, *Vote Is Unanimous to Change Finals*, ESPN.COM (Oct. 23, 2013, 5:39 PM), http://espn.go.com/nba/story/_/id/9867672/nba-owners-unanimously-vote-change-finals-format.

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likely to reverse the trend towards greater consolidation of power in the Commissioner's Office.[44] Yet he will still need to find the right balance between aggressive legal posturing and negotiated settlement. One need look no further than the controversial issue of contraction to find an example of the potential legal challenges facing Silver on all fronts. Contraction may be nothing more than an unrealistic abstraction, more bargaining chip than reality. And as discussed below, it is unlikely to lead ultimately to legal defeats for the league. Yet the multi-front warfare it could spawn is emblematic of the legal intricacies associated with running a modern-day sports league and the challenges ahead for Silver in his new role as Commissioner.

III. The Legal Ramifications of Franchise Contraction

A. Intersection of Antitrust & Labor Law

Federal antitrust and labor law are in tension with one another; the former encourages competition by prohibiting "restraint[s] of trade or commerce" while the latter encourages collaboration that often leads to such restraints.[45] As a result, Congress passed the Norris-LaGuardia Act[46] and sections 6 and 20 of the Clayton Act, which collectively constitute the "statutory labor exemption" that removes unionized activity from antitrust claims under Section 1 of the Sherman Act.[47] Unions, however, are only one-half of the equation; they need to reach agreements with their

44. Although Silver is unlikely to cede any ground to the players, he has already made a point of seeking greater consensus from the owners than his predecessor did when making major decisions, such as negotiating a new television agreement. *See* Kurt Helin, *New CBA, New Looming TV Deal Means No NBA Teams for Sale*, NBC Sports ProBasketballTalk (Sept. 11, 2013, 1:11 PM), http://probasketballtalk.nbcsports.com/2013/09/11/new-cba-new-looming-tv-deal-means-no-nba-teams-for-sale/.

45. *See* Sherman Antitrust Act, 15 U.S.C. § 1 (2006). *See generally* Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales after* Brady v. NFL *and* Anthony v. NBA, 45 U.C. Davis L. Rev. 1221, 1223 (2012) [hereinafter *Balancing the Scales*] (describing "inherent[ ] conflict" between antitrust law and labor law in context of professional sports through examination of recent lockouts and union dissolutions in the NFL and NBA); Gabriel Feldman, Brady v. NFL *and* Anthony v. NBA: *The Shifting Dynamics in Labor-Management Relations in Professional Sports*, 86 Tul. L. Rev. 831, 848-54, 857 (2012) [hereinafter *Shifting Dynamics*] (noting that eventual resolution of antitrust-labor conflict between owners instituting lockouts and players decertifying their union "will play a critical role in shaping the collective bargaining dynamics in professional sports").

46. 29 U.S.C. §§ 101-115 (2013).

47. *See* Feldman, *Balancing the Scales*, *supra* note 45, at 1228 (noting that Supreme Court has read Norris-LaGuardia Act and applicable provisions of Clayton Act "to protect unilateral union conduct from antitrust challenge") (footnote omitted).

employers.[48] To provide a framework for such negotiations, the Supreme Court developed the non-statutory labor exemption, which similarly removes collective bargaining from the purview of Section 1.[49] Under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d), an employer (here, the NBA Board of Governors) and the employee-selected representative (here, the NBPA) are obligated to bargain collectively.[50] Since October 1967, the NBA and the NBPA have agreed to fourteen successive CBAs.[51] Yet the most recent CBA was unique in its inclusion of a particular provision.

B. Contraction: Introduction

In one of his more memorable interviews following "the decision" to take his talents to South Beach, LeBron James spoke in favor of contraction to compensate for what he perceived as the

48. The National Labor Relations Act (NLRA) governs labor-management relations in the private sector, including the realm of professional sports. The NLRA encompasses the Wagner Act of 1935, the Taft-Hartley Act of 1947, and the Landrum-Griffin Act of 1959. *See* 29 U.S.C. § 151 *et seq.* For a broader discussion of labor law and sports, see COZZILLIO, ET AL., *supra* note 15, at 649-710. For a discussion of the effects of collective bargaining on the NBA, see Alexander C. Krueger-Wyman, Note, *Collective Bargaining and the Best Interests of Basketball*, 12 VA. SPORTS & ENT. L.J. 171, 173-79 (2012) [hereinafter *Best Interests*]. The NBA's recognition of the union prevents individual players from negotiating with the league. *See* N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

49. *See* Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965). For example, the salary cap agreed to via collective bargaining is not subject to Section 1 analysis. *See* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987). For a more comprehensive discussion of the evolution of the nonstatutory labor exemption, see Jonathan S. Shapiro, Note, *Warming the Bench: The Nonstatutory Labor Exemption in the National Football League*, 61 FORDHAM L. REV. 1203, 1207 (1993) ("The Supreme Court has recognized a nonstatutory exemption to protect employers from liability for antitrust violations based on 'a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business [as expressed in the Sherman Act].'") (footnote omitted).

50. Each NBA team has a representative on the Board which makes decisions regarding the league's business and policies. "Furthermore, with various powers assented to by each NBA franchise, the NBA commissioner very much serves as a centralizing force over NBA teams." McCann, *Single Entity Defense*, *supra* note 4, at 49 (footnote omitted). The NBPA aims to protect NBA players' rights, ensuring "every conceivable measure is taken to assist players in maximizing their opportunities and achieving their goals, both on and off the court." *About the NBPA*, NAT'L BASKETBALL PLAYERS ASS'N, http://www.nbpa.org/about-nbpa (last visited Dec. 22, 2013). For a discussion of the NBA's relationship with the NBPA, see McCann, *Single Entity Defense*, *supra* note 4, at 43-47 (noting that "[t]he relationship between the NBA and NBPA has seen its highs and lows" but emphasizing that "[n]egotiation between the NBA and NBPA is crucial for the league's success and for the league's capacity to avoid antitrust rebuke").

51. *See* Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 686 (2d Cir. 1995) (accounting for all CBAs prior to 1995, 1999, 2005, and 2011 CBAs).

dearth of talent necessary to support thirty teams.[52] James bluntly stated: "'[Contraction] is not my job; I'm a player but that is why it, the league, was so great [in the '80s]. . . . It wasn't as watered down as it is [now].'"[53] James was not the only prominent NBA figure at the time discussing the possibility of contraction. During the 2011 lockout, Commissioner Stern publicly noted that players and owners were both open to the possibility.[54]

The NBA is currently comprised of thirty teams.[55] Throughout its history, the NBA has followed a steady path of growth through the assimilation of teams from competing leagues[56] and has not contracted since the 1954-55 season, when the first iteration of the Baltimore Bullets franchise was eliminated.[57] Yet, overall, ten teams have ceased operations since the merger between the Basketball Association of America and National Basketball League.[58] Unlike

52. *See* Henry Abbott, *LeBron James' Decision: The Transcript*, ESPN.COM (July 8, 2010, 11:35 PM), http://espn.go.com/blog/truehoop/post/_/id/17853/lebron-james-decision-the-transcript (announcing LeBron James' decision to leave Cleveland Cavaliers for Miami Heat). Speaking to reporters, LeBron James commented: "'Imagine if you could take Kevin Love off Minnesota and add him to another team and you shrink the [league]. Looking at some of the teams that aren't that great, you take Brook Lopez or you take Devin Harris off these teams that aren't that good right now and you add him to a team that could be really good.'" *Id.* [alteration in original]. James added: "'[I'm] [n]ot saying let's take New Jersey and let's take Minnesota out of the league. But hey, you guys are not stupid, I'm not stupid, it would be great for the league.'" Brian Windhorst, *LeBron James Discusses Contraction*, ESPN.COM (Dec. 24, 2010, 8:14 PM) http://sports.espn.go.com/nba/truehoop/miamiheat/news/story?id=5952952.

53. *Windhorst, supra* note 52.

54. *See* Cindy Borne, *Commissioner David Stern Isn't Ruling Out NBA Contraction*, WASH. POST (Aug. 15, 2011, 11:26 AM), http://www.washingtonpost.com/blogs/early-lead/post/commissioner-david-stern-isnt-ruling-out-nba-contraction/2011/08/15/gIQAePs2GJ_blog.html (explaining on ESPN podcast that contraction was not something owners were against). Stern explained: "'In fact, when you talk about revenue sharing, a number of teams have said that if you have a team that is perpetually going to be a recipient, aren't you better off with the ability to buy them in? . . . The players actually have been heard to suggest that as well . . . .'" *Id.*

55. *See* NBA, *Teams*, http://www.nba.com/teams/ (last visited Jan. 23, 2014).

56. Non-NBA professional basketball teams have folded. Ten teams from the BAA and NBL were eliminated upon their merger to form the NBA. *See* Scott Rosner, *Squeeze Play: Analyzing Contraction in Professional Sports*, 10 VILL. SPORTS & ENT. L.J. 29, 33-34 (2003) (citing JAMES QUIRK & RODNEY FORT, PAY DIRT 446-59 (2d ed. 1995)) [hereinafter *Squeeze Play*]. Only four of the ABA's teams survived after the league folded. *See* Sandomir, *supra* note 28 (listing New York Nets, San Antonio Spurs, Indiana Pacers, and Denver Nuggets as surviving teams).

57. *See* Rosner, *Squeeze Play*, *supra* note 56, at 34. "The significance of contraction is that it allows teams to make greater use of the league monopoly capital and to increase political capital for the existing teams." *Id.* (citing GERALD W. SCULLY, THE MARKET STRUCTURE OF SPORTS 18 (1995)).

58. *See* Scott R. Rosner, *The History and Business of Contraction in Major League Baseball*, 8 STAN. J.L. BUS. & FIN. 265, 269-70 (2003) (listing first team to fold as Providence Steamrollers in 1949, followed by Anderson Packers, Chicago Stags,

franchise relocation, in which a team moves to a different city and often assumes a new name under the control of an alternative ownership group, contraction refers to the complete removal of a team from the league. Franchise relocation and the ensuing litigation are a constant threat to league stability and a drain on league resources.[59] The recent battle between Sacramento and Seattle over the future of the Kings is emblematic of the emotional and fiscal toll associated with even the threat of such relocation.[60] Relocated franchises, nonetheless, at least offer the prospect of attracting fans in a new geographic location.[61] Contracted franchises, on the other hand, cease to exist as a member of the league and bargaining unit covered by the CBA.

The goal of contraction is to increase the bottom line for each team by eliminating those that are unable to generate sufficient local revenue to achieve competitive balance and financial stability.[62] Contraction is not only relevant right now as a result of the "Great Recession"[63] but also due to the league's over-expansion in the '80s and '90s, in which the NBA added six teams within a span of seven years.[64] In spite of contraction's fiscal relevance, no major sports

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Denver Nuggets, St. Louis Bombers, Sheboygan Redskins, and Waterlook Hawks in 1950, as well as Washington Capitals in 1951, Indianapolis Olympians in 1954, and Baltimore Bullets during 1954-1955 season) [hereinafter, *History and Business*]. Franchise scarcity permits "the clubs to exercise leverage over local governments and taxpayers when seeking new stadia because they can use the threat of relocation." *Id.* at 277.

59. *See generally* Brett Gibbs, Note, *Antitrust and Sports League Franchise Relocation: Bringing* Raiders I *into the Modern Era of Antitrust Law*, 29 HASTINGS COMM. & ENT. L. J. 217 (2007) (describing "significant economic impact" franchise relocation has on all parties involved, including cities and fans).

60. *See* Dale Kasler, Tony Bizjak & Ryan Lillis, *Sacramento Mayor Kevin Johnson Tells the Story of How the City Kept the Kings*, SACRAMENTO BEE, June 15, 2013, *available at* http://www.sacbee.com/2013/06/15/5498635/sacramento-mayor-kevin-johnson.html (describing high-stakes battle between high-bidding Seattle ownership group and hastily formed Sacramento investor team).

61. In 2008, the Seattle Supersonics became the fourth NBA franchise to relocate since 1985 when its new ownership group moved the team to Oklahoma City and changed the name to the Thunder. *See* Elizabeth Odian, Article, *Preventing Sonicsgate: The Ongoing Problem of Franchise Relocation*, 18 SPORTS LAW. J. 67, 68 (2011) (footnote omitted).

62. *See* Rosner, *Squeeze Play*, *supra* note 56, at 37.

63. For an in-depth discussion of the impact of the "Great Recession" on the league, particularly within a labor context, see Matthew J. Parlow, *The NBA and the Great Recession: Implications for the Upcoming Collective Bargaining Agreement Renegotiation*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 195 (2010) (describing economic downturn's impact on growing gap between "haves" and "have-nots").

64. *See* Rosner, *History and Business*, *supra* note 58, at 277 (listing addition of franchises in Charlotte and Miami in 1988; Orlando and Minneapolis in 1989; and Toronto and Vancouver in 1995). Such overexpansion has made it increasingly difficult for teams to find desirable relocation cities, as is evident from recent

league in the modern era has actually contracted.[65] Yet, in 2001, MLB owners voted 28-2 to eliminate two teams prior to the 2002 season.[66] Although the league did not end up following through[67]–in no small part due to the subsequent litigation and labor negotiations–the vote set a precedent within the four major professional sports leagues.[68] In the build-up to the 2011 lockout, Commissioner Stern alleged that twenty-two of the thirty teams in the NBA were losing money.[69] Stern estimated the teams' collective losses at approximately $370 million per season.[70] The NBPA countered that only a handful of teams were actually suffering financially, and that their monetary problems largely could be alleviated through enhanced revenue sharing.[71] Regardless of the veracity of either side's claims, the ensuing negotiations, lockout, union decertification, and eventual agreement produced a CBA that for the first time included a provision on contraction.[72] As a result, Silver

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moves to small-market Memphis (from Vancouver) and New Orleans (from Charlotte). *See id.*

65. For a history of contraction in major league baseball, see Rosner, *History and Business*, *id.* at 267 (describing frequent contraction of teams that took place in early era of professional baseball).

66. *See id.* at 265 (noting that, due to combined economic losses of $232.241 million in 2001, MLB owners voted 28-2 to eliminate or contract two teams prior to 2002 season) (footnote omitted).

67. The Montreal Expos moved to Washington, D.C., and became the Nationals before the 2005 season. *See Franchise Timeline*, WASHINGTON NATIONALS, http://mlb.mlb.com/was/history/timeline.jsp (last visited Oct. 19, 2013). Although it took a few years, the Minnesota Twins eventually moved into a new stadium. *See* Jim Caple, *Inside New Target Field: Outdoor Baseball Returns to Minnesota for the First Time in 29 Years. Dress in Layers*, ESPN.COM (Apr. 12, 2010), http://sports.espn.go.com/mlb/columns/story?columnist=caple_jim&id=5073045.

68. Although not one of the four major sports leagues in North America, Major League Soccer contracted two teams (Miami Fusion and Tampa Bay Mutiny) as a result of economic problems. *See* Jack Bell, *Major League Soccer Eliminates Two Teams*, N.Y. TIMES, Jan. 9, 2002, at D6, *available at* http://www.nytimes.com/2002/01/09/sports/soccer-major-league-soccer-eliminates-two-teams.html. Subsequently, the 2004-2010 MLS CBA addressed the possibility of contraction repeatedly. *See* COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER & MAJOR LEAGUE SOCCER PLAYERS UNION (Dec. 1, 2004–Jan. 31, 2010), *available at* http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/2004MLS_MLSPA_CBA.pdf.

69. *See* Larry Coon, *Is the NBA Really Losing Money?*, ESPN.COM (July 12, 2011, 12:39 AM), http://sports.espn.go.com/nba/columns/story?columnist=coon_larry&page=NBAFinancials-110630.

70. *See id.*

71. *See id.* The NBPA claimed that the majority of league's alleged losses stemmed from the perfectly legal but somewhat disingenuous "amortization of intangible assets" stemming from the annual deduction of a portion of the purchase price of the team when calculating losses. *See id.*

72. *See* NBA COLLECTIVE BARGAINING AGREEMENT 463 (Dec. 2011), revised May 30, 2013, *available at* http://www.ipmall.info/hosted_resources/SportsEntLaw_In-

will be the first non-lame-duck Commissioner to preside over the league in which the governing agreement between the owners and players explicitly addresses "contraction."[73]

Under Article XL, Section 2, the CBA states:

> If, during the term of this Agreement, the NBA decides to contract the number of Teams, (a) the NBA shall provide written notice of such decision to the Players Association, and (b) the NBA and the Players Association shall negotiate and agree upon the effects of such decision on the players and the procedures to be followed in connection therewith.[74]

The conventional thinking may be that contraction is not a serious possibility, and that the recent above-market bids for the Kings indicate that expansion into Seattle is more likely than contraction.[75] The CBA provision, however, speaks for itself, especially within the context of the outstanding regulatory obstacles in Seattle[76] and dis-

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stitute/UNHSportsEntLaw_Institute.asp [hereinafter CBA 2011]. The league's By-Laws and Constitution are not available to the public.

73. Expansion, on the other hand, has been included as an explicit provision of the past four CBAs: 2011 (Art. XL); 2005 (Art. XL); 1999 (Art. XL); 1995 (Art. XXXIX). The 1995-96 season was the last time the league actually expanded, through the addition of the Toronto Raptors and Vancouver Grizzlies (since moved to Memphis), two new franchises that were not compensating for the relocation of a prior franchise in the city (as was the case with the more recent addition of the Charlotte Bobcats following the Charlotte Hornets move to New Orleans). *See* Bob Condotta, *Is Expansion Really an Option for NBA, Sonics Group?*, SEATTLE TIMES (May 4, 2013, 9:24 PM), http://seattletimes.com/html/nba/2020924314_expansion05.html.

74. CBA 2011 (Art. XL, Sec. 2).

75. *See* Nick Eaton, *Report: NBA, Chris Hansen in 'Productive' Talks for Seattle Expansion Team*, SEATTLE PI (June 12, 2013, 1:38 PM), http://blog.seattlepi.com/sonics/2013/06/12/report-nba-chris-hansen-in-productive-talks-for-seattle-expansion-team/. *But see* Kurt Badenhausen, *Will Expansion Solve Sacramento and Seattle Fight over Kings?*, FORBES (Apr. 29, 2013, 6:36 PM), http://www.forbes.com/sites/kurtbadenhausen/2013/04/29/will-expansion-solve-sacramento-and-seattle-fight-over-kings/ (quoting Stern as saying, "I haven't heard [expansion talk] in any shape or form, particularly when we don't know at this time what the next television network contract would be"). The NBA would also be pressured to open the expansion process to competitive bidding, in which other cities could vie with Seattle for a professional basketball team. *See* Condotta, *supra* note 73 (quoting sports law scholar Michael McCann as citing league's historical precedent for expansion and desire to avoid legal challenges as favoring open bidding system that would likely include Seattle, Vancouver, Kansas City, St. Louis, Pittsburgh, and Las Vegas).

76. The agreement to build a new stadium in Seattle, seen as necessary for a future NBA team, requires a full review under the State Environmental Policy Act. *See* Lynn Thompson, *Seattle Center in Arena Review–But Sodo Still Gets the Arena*, SEATTLE TIMES (Oct. 26, 2012, 9:43 PM), http://seattletimes.com/html/localnews/2019535100_arenaimpacts27m.html. For a comprehensive discussion of the role of

mal on-court performance of the most recent expansion team, the Charlotte Bobcats.[77] A step as bold as contraction would also firmly announce Silver's arrival as Commissioner and endear him to owners eager to see if he can match the unrivaled economic growth enjoyed under his predecessor.[78] Based on the league's structure for revenue sharing, contraction–in conjunction with a new, record-breaking television contract following the 2015-2016 season[79]–could go a long way toward improving the owners' bottom lines.[80]

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such environmental studies, see Alex Porteshawver, Symposium, *Under Review: Stadium Construction and State Environmental Policy Acts*, 21 MARQ. SPORTS L. REV. 339 (2010) (analyzing application of state environmental laws to sports stadium development).

77. *See Jordan's Bobcats Clinch Worst Record*, FOX SPORTS (Apr. 27, 2012, 12:59 AM), http://msn.foxsports.com/nba/story/Charlotte-Bobcats-of-Michael-Jordan-clinch-worst-record-ever-042612 (noting that 2012 Bobcats finished with worst winning percentage, .106, in NBA history). In the last four seasons, the team's record is 106-206, and the franchise has only had a winning record one season since it joined the league. The team is changing its name back to the Hornets, who made the playoffs seven times during its fourteen-year tenure in the city before moving to New Orleans. *See* Ben Golliver, *Michael Jordan Announces Charlotte Bobcats to Change Name to 'Hornets' in 2014*, SI.COM (May 21, 2013), http://nba.si.com/2013/05/21/michael-jordan-charlotte-bobcats-hornets-name-change/.

78. The NBA would likely have to buy the contracted team at an above-market price in order to wind down its operations. *See* Rosner, *History and Business*, *supra* note 58, at 280. The recent rise in franchise prices may render such a move less likely. *See* Helin, *supra* note 44. But the league would also gain the former city as a bargaining chip for future teams in need of new stadiums and considering relocation. *See* Rosner, *History and Business, supra* note 58, at 280. The NBA, moreover, has experience purchasing financially distressed teams, as it did in New Orleans. *See* Krueger-Wyman, *Best Interests*, *supra* note 48, at 171-72.

79. The current contracts with ESPN/ABC and TNT generate $930 million annually, but the next deals, which are likely to include competitive bidding from Rupert Murdoch's recently formed Fox Sports 1, may reach $2 billion per year. *See* Badenhausen, *supra* note 75 (discussing current television rights fees for NBA); *see also* Richard Sandomir, James Andrew Miller & Steve Eder, *To Protect Its Empire, ESPN Stays on Offense*, N.Y. TIMES, Aug. 26, 2013, at A1, *available at* http://www.nytimes.com/2013/08/27/sports/ncaafootball/to-defend-its-empire-espn-stays-on-offensive.html (discussing potential challenges ESPN faces from Fox Sports 1).

80. *See* John Ourand & John Lombardo, *NBA Ready to Discuss Rights Deal*, SPORTS BUS. J. (May 13, 2013), http://www.sportsbusinessdaily.com/Journal/Issues/2013/05/13/Media/NBA-TV-rights.aspx (discussing upcoming negotiations for NBA media rights). Under the current system, the NBA teams equally divide the national television and licensing revenue, as well as the international money, but do not share local television or gate revenue. An expansion team pays a one-time fee to the owners but then expands the pie for revenue sharing over the long term. *See* McCann, *Single Entity Defense*, *supra* note 4, at 51 (noting that, overall, teams only share approximately 25 percent of all revenue). The former ABA teams receive slightly less than an equal share of the television revenue based on the agreement they signed when they joined the league. *See* Badenhausen, *supra* note 75.

C. Contraction: Labor Law

The inclusion of a contraction-specific provision in the CBA reduces the likelihood of labor-related litigation. Under the collective bargaining requirements of the NLRA, the parties must "meet at reasonable times and confer in good faith with respect to" the mandatory subjects of collective bargaining. Such "mandatory subjects" refer to "wages, hours, and other terms and conditions of employment."[81] The inherent ambiguity of the phrase "other terms and conditions of employment" has given rise to extensive litigation between owners and players across the major sports leagues.[82] Following the MLB's decision to contract two teams, the Major League Baseball Players Association ("MLBPA") filed a grievance alleging that the owners were guilty of unfair labor practices for failure to secure the union's approval in advance.[83] The owners countered that they were only obligated to bargain regarding the fallout from contraction, such as the need to disperse the displaced players.[84] With the grievance pending, the parties reached a new CBA that delayed contraction until at least after the 2006 season and included an agreement to drop the grievance.[85] Yet in the MLB's case, the CBA (known in baseball as the "Basic Agreement") did not include a provision for contraction. Instead, the 2000 MLB Constitution authorized contraction if three-fourths of the clubs voted in favor.[86] Here, the NBA CBA's explicit inclusion of "contraction" seemingly renders the issue moot, since the players have conceded that the owners can unilaterally contract a team as long as they provide the NBPA with advance written notice. The players, for their part, are required to negotiate and agree upon the procedures for carrying out the contraction. In the event that the parties fail to agree, the CBA provides for a "System Arbitrator" to resolve any

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81. 29 U.S.C. § 158(d) (2013).

82. *See* J. Benjamin Staherski, Comment, *Contraction in Major League Baseball: Do Owners Have a Duty to Bargain in Good Faith with the Union Before Shutting Down or Relocating a Team?*, 108 Penn St. L. Rev. 881 (2004) (holding that under 29 U.S.C. § 158(d) and applicable case law, owner does not have to bargain with Major League Baseball Players' Association prior to contracting team).

83. *See* John T. Wolohan, *Major League Baseball Contraction and Antitrust Law*, 10 Vill. Sports & Ent. L.J. 5, 5-6 (2003) (describing circumstances surrounding MLB Commissioner Bud Selig's announcement that two teams might be contracted from league).

84. See Rosner, *History and Business*, *supra* note 58, at 266.

85. *See* Wolohan, *supra* note 83, at 6 n.5.

86. *See* Major League Baseball v. Butterworth, 181 F. Supp. 2d 1316, 1319 (N.D. Fla. 2001).

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disputes, and for an Appeals Panel to review the System Arbitrator's findings of fact and conclusions of law.[87]

The tersely worded provision, however, should put Silver on notice. For starters, under the definitional section of the CBA, the term "negotiate" refers "to a player or his representatives on the one hand, and a Team or its representatives on the other hand" and covers the "engage[ment] in any written or oral communication relating to the possible employment, or terms of employment, of such player by such Team as a basketball player, regardless of who initiates such communication."[88] Contraction, of course, does not involve an individual player and will only serve to exacerbate tensions within the union and among the players' representatives. More importantly, the ambiguity of contraction's status as a mandatory subject of collective bargaining enhances the likelihood that the players would respond to any threat of contraction by invoking the union's right to terminate the CBA after the sixth season and then seek to reach a new agreement that does not include such a provision.[89] By pursuing such a path, the players would aim to deny the NBA the unilateral right to contract a franchise, knowing that the owners would only be able to retain that right by proving to the courts that contraction is not a mandatory subject of collective bargaining.

Although no court has been asked to rule on whether contraction of a professional sports team constitutes such a subject, the owners would likely prevail. In *First National Maintenance Corp. v. NLRB*,[90] the Supreme Court addressed whether an employer had the duty to bargain over the partial closure of its business. Ruling in favor of the employer, the Court divided partial closures into three categories based on the degree to which the management decision impacted the relationship between employer and employee.[91] As in *First National*, the partial closure in question here falls into the third category involving "a direct impact on employment," but focused only on the economic profitability of the cancelled contract.[92] First National provided its corporate customers

87. *See* CBA 2011 (Art. XXXII, "System Arbitration").

88. CBA 2011.

89. *See id.* (Art. XXXIX, Sec. 1). The current CBA, effective December 8, 2011, continues through June 30, 2021. Each side retains the right, however, to terminate the agreement on June 30, 2017. *See id.* (Art. XXXIX, Sec. 2) (exercising option to terminate requires serving other side with written notification before December 15, 2016).

90. 452 U.S. 666 (1981).

91. *See id.* at 676-77.

92. *Id.* at 677.

with basic housekeeping services in exchange for covering fixed labor costs and a set fee. When Greenpark Care Center cut its set fee in half, First National discontinued its service. Like First National's decision, the NBA's decision would be driven in part by labor costs and lead to the loss of jobs for union members, but it would also represent a broader business decision grounded in concerns over the league's profitability, or lack thereof.[93] Again, labor costs would clearly be a factor, but it is not as if the league would subcontract the lost union work to nonunionized players or necessarily attempt to relocate the franchise.[94] In addition to the reduced labor costs, the NBA would no longer need to invest in the contracted franchise via revenue sharing. Although the individual teams pay player salaries and generally shoulder capital costs, such as stadium repair, the league contributes to both by subsidizing financially underperforming franchises.[95] The NBPA, moreover, would have no ability to influence economic factors outside of salaries, such as gate receipts, advertising, etc. In short, the league would be making "an economically motivated decision to shut down part of a business" that would outweigh any minimal benefit from permitting the union to participate in reaching such a decision.[96]

D. Contraction: Nonstatutory Labor Exemption

In the event that the NBPA opted-out of the current CBA and failed to reach a new agreement, the question would shift to whether the nonstatutory labor exemption continued to protect contraction from antitrust attack. In *Bridgeman v. National Basketball Association*,[97] current and former professional basketball players sued the league in the United States District Court for the District of New Jersey, arguing that assorted player restraints violated antitrust laws. The challenged restraints – the college player draft, salary cap, and right of first refusal –had been included in the prior

93. *See id.* ("This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'") (citing Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964)).

94. *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (ruling that company's decision to subcontract its work constituted mandatory subject of collective bargaining).

95. For an in-depth overview of the economics behind sports stadiums, see Kevin J. Delaney & Rick Edelstein, Public Dollars, Private Stadiums: The Battle over Building Sports Stadiums (2003).

96. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 680, 686 (1981).

97. 675 F. Supp. 960 (D.N.J. 1987) (discussing Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976)).

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CBA.[98] But the CBA expired following the 1986-87 season, and at the time of the suit, the NBPA and NBA were unable to reach a new agreement.[99] The NBA responded by filing an unfair labor practice with the National Labor Relations Board demanding that the NBPA return to the negotiating table. The league, meanwhile, continued to abide by the old CBA and countered in federal court that the nonstatutory labor exemption was still applicable after the agreement expired as long as the league continued to apply the challenged restraints without alteration. Seeking to find common ground between the two sides, the court "[found] no merit in the players' contention that restrictions included in a CBA should lose their antitrust immunity the moment the agreement expires."[100] Yet the court also rejected the NBA's argument that the antitrust exemption applied indefinitely following the expiration of an agreement as long as it "maintain[ed] the status quo by not imposing any new restraints."[101] In attempting to craft a compromise for when the exemption expires after the termination of a CBA, the court instituted a two-part test: (1) the employer continues to impose the player restraint without modification; and (2) the employer "reasonably believes" that the restraint, or a close variation of it, will be included in the next CBA.[102] Based on the second factor,

98. *See id.* at 962. ("Under the right of first refusal, an NBA team has the right to retain a veteran free agent's services indefinitely by matching offers received by that player from other NBA teams."). The draft and right of first refusal were included in the 1980 CBA that expired on June 1, 1982. In 1983, the NBA tried to introduce the salary cap, and the players filed suit. The NBPA and NBA resolved the matter by entering into a Memorandum of Understanding that modified the expired 1980 CBA. The modified CBA included the college draft, right of first refusal, and the salary cap, and ran through the 1986-87 season. *See* Bridgeman v. Nat'l Basketball Ass'n, 675 F. Supp. 960, 962 (D.N.J. 1987).

99. Following the expiration of the CBA, the NBA and NBPA entered into a Moratorium Agreement for the purpose of facilitating negotiations. The players commenced this action on the day that the Moratorium Agreement expired. *See* Nat'l Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994).

100. *Bridgeman*, 675 F. Supp. at 965. The court grounded its ruling in the collective bargaining concept of "impasse." Following the expiration of a CBA, an employer cannot unilaterally alter a subject of mandatory bargaining before negotiations reach an "impasse." *See* Taft Broadcasting Co., 163 N.L.R.B. 475 (1967) (summarizing factors for assessing existence of impasse).

101. *Bridgeman*, 675 F. Supp. at 966 ("This facile manner of evading the antitrust laws would discourage unions from entering collective bargaining agreements, since doing so might forever bar them from challenging those restraints in court.").

102. *Id.* at 967 (referring to second part of test, *Bridgeman* court explained, "[w]hen the employer no longer has such a reasonable belief, it is then unilaterally imposing the restriction on its employees, and the restraint can no longer be deemed the product of arms-length negotiation between the union and the employer"). *But see* Powell v. Nat'l Football League, 930 F.2d 1293 (8th Cir. 1989) (extending nonstatutory labor exemption from antitrust laws beyond impasse).

the NBPA could make a strong argument that contraction would lose its exemption. Unlike the restraints challenged in *Bridgeman*, contraction has not been a regular provision included since the initial CBAs between the league and union. As noted above, contraction appeared in the CBA for the first time in 2011. Therefore, the owners would not be able to conclude reasonably that contraction would be included in any subsequent CBAs.

Other courts, however, have not been as favorable to players' unions.[103] In *National Basketball Association v. Williams*,[104] the same issues arose following the expiration of the 1988 CBA after the 1993-94 season. The court found that the nonstatutory labor exemption was valid as long as a collective bargaining relationship existed between the two sides and suggested decertification of the union as an option for terminating its application.[105] In *Brown v. Pro Football, Inc.*,[106] the United States Supreme Court upheld the application of the nonstatutory labor exemption to the NFL's unilateral imposition of uniform salaries for development squad players following collective bargaining to the point of impasse. Although refusing to delineate an exact demarcation point, the Court approvingly cited to the lower court's suggestion that the exemption would only cease to apply following the collapse of the collective-bargaining relationship, as determined via union decertification.[107] In *Brown*, moreover, the NFL was trying to impose a novel restriction that had never been subject to prior collective bargaining. Contraction, on the other hand, was part of the 2011 collective bargaining process. Therefore, the union would likely need to decertify the union in order to remove contraction from the protective realm of the exemption and challenge the maneuver in federal court on antitrust grounds.

E. Single-Entity Status Revisited

Challenging contraction on anti-trust grounds also raises the perennial question of the league's status as a single-entity under Section 1 of the Sherman Act.[108] Single entities are not subject to

103. *See, e.g.*, *Powell*, 930 F.2d 1293 (applying nonstatutory labor exemption from antitrust laws beyond impasse, as long as parties maintained labor relationship).

104. 857 F. Supp. 1069, *aff'd*, *in part*, 45 F.3d 684 (2d Cir. 1995).

105. *See id.* at 1078.

106. 518 U.S. 231 (1996).

107. *See id.* at 235 (citing Brown v. Pro Football, Inc., 50 F.3d 1041, 1057 (D.C. Cir. 1995)).

108. 15 U.S.C. § 1 (2013).

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Section 1 scrutiny because as unitary actors they cannot come together in concerted action to restrain trade.[109] Although, as discussed below, contraction would likely survive antitrust scrutiny, the mechanics for carrying it out are worth considering. The applicable CBA provision provides few specifics. Yet as the MLB prepared to do, the NBA would probably purchase the targeted team before formally contracting it. The owner losing his team would not pass on the opportunity to reap hundreds of millions of dollars from the NBA, and the league would not want to risk a sale to another owner opposed to contraction. The league would also assume the outstanding player agreements for the purposes of arranging a dispersal draft and covering contractual liabilities. Therefore, the contracted team would become a subsidiary of the league, seemingly triggering the application of *Copperweld Corp. v. Independent Tube Corp.*,[110] in which the Court held that a parent and its wholly owned subsidiary constitute a single enterprise immune from Section 1.[111]

Yet in the landmark case *American Needle, Inc. v. National Football League*,[112] the Supreme Court rejected the NFL's argument for single entity status within the context of intellectual property licensing. The thirty-two teams had come together to form National Football League Properties ("NFLP"), which collectively licensed the teams' intellectual property.[113] In 2000, NFLP switched from granting nonexclusive licenses to multiple vendors, to granting Reebok International Ltd. an exclusive decade-long license.[114] American Needle, a prior vendor excluded by the new Reebok license, brought suit in federal court under the Sherman Act.[115] The unanimous opinion by Justice Stevens focused on the role of the teams as independent actors, each with a "separate corporate con-

109. *See* Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues:* American Needle *and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 835 (2009) (arguing against application of single entity status to sports league on theoretical and practical grounds). Legal single entities, however, may still violate § 1 when competitors owned the single entity in order to facilitate concerted activity. *See* United States v. Sealy, Inc., 388 U.S. 350 (1967).

110. 476 U.S. 752 (1984).

111. For a discussion of *Copperweld* and its application within the sports context, see McCann, *Single Entity Defense*, *supra* note 4, at 55; Meir Feder, *Is There Life After Death for Sports League Immunity?* American Needle *and Beyond*, 18 VILL. SPORTS & ENT. L.J. 407, 409 (2011).

112. 130 S. Ct. 2201 (2010).

113. *See id.* at 2207. The NBA has a similar entity in NBA Properties, Inc.

114. *See id.*

115. *See id.*

sciousness."[116] Stevens conceded that the teams share common interests through their mutual desire to promote the league, but noted that "they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."[117]

Therefore, the league and its member teams do not constitute a single entity. But a contracted team purchased by the league, albeit on a vote by the other teams' owners, operates with the same "unity of purpose" as the parent league itself.[118] Although the league has purchased teams in the past, such as the then-New Orleans Hornets, the transitional ownership period was for the distinct purpose of identifying a new owner capable of operating the franchise.[119] Under contraction, an independent competitor would be ultimately subsumed by the joint venture in which it was formerly a member.[120] Therefore, in electing to carry out contraction, the league would not be operating as a single entity. Yet once it purchases the team, the NBA would be able to make a strong argument that it was acting as a single entity when it terminates the former independent unit and now wholly owned subsidiary.

F. Contraction: Antitrust

As Justice Stevens pointed out in *American Needle*, failing to qualify as a single entity does not trap sports leagues.[121] The lack of single entity status just means that NBA restraints are subject to Section 1 scrutiny.[122] Even though contraction would "restrict competition and decrease output," Supreme Court precedent dictates that

116. *Id.* at 2212 (noting competition on playing field and in arena of business).

117. *Id.* at 2213 (citations omitted).

118. *Copperweld*, 467 U.S. at 771-72.

119. *See* Press Release, Nat'l Basketball Ass'n, NBA to Purchase New Orleans Hornets (Dec. 6, 2010), http://www.nba.com/2010/news/12/06/hornets/index.html.

120. Such action would seemingly fit within the NBA's more recent business strategy that focuses on the aggressive development and operation of wholly owned subsidiaries–such as NBA Properties, the Developmental League (D-League), Women's NBA (WNBA), and NBA China. *See generally* McCann, *Single Entity Defense*, *supra* note 4, at 40 (exploring connection between NBA and its related corporate entities within context of single entity status).

121. *American Needle*, 130 S. Ct. at 2216.

122. Contraction fits neatly under Justice Stevens' description of the relevant inquiry: "[W]hether there is a contract, combination . . . or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests and thus of actual or potential competition." *Id.* at 2212 (internal quotation marks and citations omitted).

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it would not be "illegal per se" because, like other sports leagues, the NBA relies on horizontal restraints in order to produce its product.[123]

The question for contraction is whether it would be subject to traditional "rule of reason" scrutiny or to "quick look" rule of reason. The former revolves around one question: whether the challenged restraint is more pro-competitive than it is anticompetitive.[124] The latter combines rule of reason and per se analyses.[125] In *American Needle*, Justice Stevens suggested that restraints such as the establishment of a licensing subsidiary would likely pass an analysis in which rule of reason scrutiny is applied by the reviewing court "in the twinkling of an eye."[126] Yet in the sports league context, courts and commentators have generally favored the intermediate "quick look" level of analysis.[127]

Contraction is not as easy to classify as the licensing of intellectual property in that it is both anti-competitive and pro-competitive. By eliminating one of the thirty teams (3.3 percent of the league), the NBA would reduce competition for the remaining twenty-nine teams. Absent accompanying structural changes, there would be one less team to compete for that final playoff spot. Regardless of changes to the playoff format, however, there would be one less team capable of winning the championship. On the other hand, contraction is also pro-competitive by redistributing limited talent to a reduced number of franchises, thereby enhancing the competitive balance between the remaining teams.[128] Yet as alluded to above, the mechanism for carrying out contraction would merit serious review. Would the league, via the Commissioner's office, single-handedly decide that a team should be contracted or would the owners be required to approve such a decision? And if the latter,

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123. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100 (1984).

124. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

125. In a pre-*American Needle* law review article, Michael McCann and Joseph Rosen described the "quick look" rule of reason as a "hybrid form of scrutiny" that "blends rule of reason and per se analyses." Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 735-36 (2006).

126. *American Needle*, 130 S. Ct. at 2217 (citing *Bd. Of Regents*, 468 U.S. at 109 n.39).

127. *See* McCann & Rosen, *Legality of Age Restrictions*, *supra* note 125 (citing Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137, 147-48 (1999)).

128. *See* Windhorst, *supra* note 52 (quoting LeBron James as describing net-competitive benefit of contracting teams).

by how many votes?[129] In purchasing the then-New Orleans Hornets and arranging for a new owner, the NBA set a dangerous precedent that may prevent it from contracting a team in the future. Instead of contraction, fans, local business owners, and politicians will inevitably expect the league to purchase the team in question and play dealmaker in identifying a new ownership group.

Given the competing pro- and anti-competitive aspects of contraction, a district court would likely deny a motion to dismiss by the NBA. At a minimum, the court would need to make factual findings on the record before rendering judgment, thereby putting the league at risk of paying treble damages.

G. Contraction: State-Level Litigation

The "parade of horribles" has already transitioned from a CBA containing a provision for contraction to union decertification and antitrust litigation. Contraction, however, would also generate opposition outside of the players' union. Major League Baseball's flirtation with contraction, for example, spurred litigation at the local level. In *Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership*,[130] the Minnesota Court of Appeals upheld a temporary injunction obligating the Minnesota Twins to play its 2002 home games at the Hubert H. Humphrey Metrodome Stadium, thereby preventing the contraction of the team in advance of the 2002 season. The Plaintiff, a state governmental entity created to construct and operate the Metrodome, brought suit against the Twins following reports that MLB intended to contract the franchise. Under the use agreement between the two parties, the team did not pay any rent for its regular season home games, but the Commission took a percentage of concessions and advertising, as well as rent from any postseason games.[131] The Commission initiated a declaratory judgment action seeking specific performance of the use agreement and an injunction preventing the league from interfering in the contractual relations between the two parties.[132] In upholding the lower court's award of a temporary injunction, the appeals court did not rule on the merits. But it affirmed on the grounds that in addition to the loss of non-fixed revenue, the Commission would not have been able to fulfill the statutory purpose for the

129. The public's lack of access to the league's By-Laws and Constitution make it impossible to determine if such decisions have already been made.

130. 638 N.W.2d 214 (2002).

131. *See id.* at 219.

132. *See id.* at 219-20.

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stadium, which was built and operated for the enjoyment of sports fans.[133] The court rejected the MLB/Twins argument that calculable money damages precluded a temporary injunction and that the court was barred from considering harm to the public, which was not a party to the suit.[134] The Twins had already exercised its 2002 option under the use agreement, published a schedule, sold season tickets, and had yet to approve contraction via the owner's sale of the team to the league.[135] The court further explained that the stadium was publicly financed, generally untaxed, and offered intangible benefits to the city.[136]

The failure to follow through with contraction precluded an ultimate resolution to the matter, but the suit is instructive for the NBA in that the inclusion of a contraction clause in the CBA has, unsurprisingly, no bearing on contractual agreements between local teams and home cities.[137] For example, the Minnesota Timberwolves–a frequent focus of any contraction discussions–play in the publicly owned Target Center.[138] The stadium opened in 1990 with the assistance of $23 million in public subsidies and was eventually sold in full to the Minneapolis Community Development Authority ("MCDA") for $54.6 million.[139] At the time of the sale,

133. *See id.* at 223 (citing Minn. Stat. Ann. § 473.581 and City of New York v. N.Y. Jets Football Club, Inc., 394 N.Y.S. 2d 799, 803 (Sup. Ct. 1977)).

134. *See id.* at 223-24.

135. *See id.* at 226.

136. *See id.* at 224-25. In *Butterworth*, the league was more successful in its suit for injunctive relief. *See* 181 F. Supp. 2d 1316 (N.D. Fla. 2001). Following baseball's vote to contract, the Florida Attorney General issued Civil Investigative Demands to MLB, the Commissioner, and the two MLB teams in the state (Marlins and Devil Rays) under his authority to investigate federal and state antitrust violations. *See id.* at 1318. The court accepted the league's argument that the "business of baseball," including contraction, was exempt from federal and state antitrust laws. *See id.* at 1318.

137. Although dealing with franchise relocation, as opposed to contraction, Elizabeth Odian proposes an innovative response: community ownership, à la the Green Bay Packers. *See* Odian, *Preventing Sonicsgate*, *supra* note 61. Yet community ownership as an alternative to contraction presents its own host of problems, including the high costs associated with taking a team public and the limited revenue sharing in the NBA, as compared to the NFL, that would be necessary to cover the funding of operations and player salaries. *See id.* at 83 (footnotes omitted).

138. *See Timberwolves: Kevin Love Brushes Off LeBron James' Contraction Comments*, TwinCities.com (Dec. 27, 2010, 12:01 AM), http://www.twincities.com/sports/ci_16951503.

139. *See* James Quirk, *Stadiums and Major League Sports*, *in* Sports, Jobs & Taxes: The Economic Impact of Sports Teams and Stadiums 225, 238-39 (Roger G. Noll & Andrew Zimbalist eds., 1997) (noting that Minneapolis issued $70.8 million in general obligation bonds and MCDA issued $12.7 million in revenue bonds to cover purchase price, pay off previous bonds used to buy land and ensure sufficient financing and reserve obligations).

the new team owner signed a thirty-year rental agreement.[140] Unlike the Twins, the Timberwolves pay rent to the governmental entity that owns the arena for the use of the stadium, thereby making damages somewhat easier to calculate.[141] Yet the agreement is complicated by the involvement of an outside vendor that is responsible for covering all operation and maintenance expenses in exchange for the receipt of operating revenues.[142] In short, the City, which relies on the Timberwolves to cover interest and amortization payments and is working with the team on a $100 million renovation of the arena, would pose a formidable legal obstacle to any league plans for contraction.[143]

IV. Labor Relations & Contraction in the Prokhorov Era

In the fall of 2009, Russian billionaire Mikhail D. Prokhorov invested $200 million for an eighty percent stake in the then-New Jersey Nets and a forty-five percent stake in a planned Brooklyn arena.[144] As expected, the team has since moved to the Barclays

140. *See id.* (describing rental agreement as including provision permitting Glen Taylor, franchise owner, to move team if he loses money in consecutive years but requiring him to give MDCA opportunity to purchase team for same price he paid, plus three percent per year).

141. *See id.* at 238 (describing complex funding formula between franchise owner and city of Minneapolis).

142. *See id.* (stating that Ogden Entertainment initially managed day-to-day operations of arena but management has since changed hands multiple times).

143. *See id.* at 239 (noting that average revenues under financing plan between City and Timberwolves is just equal to amount that would cover interest and amortization payments and that burden of economic uncertainty falls primarily on City). Sports fans themselves, especially season ticket holders, are likely to bring an antitrust suit against the league as direct purchasers suffering a concrete harm. *See, e.g.*, McCoy v. Major League Baseball, 911 F. Supp. 454, 458 (W.D. Wash. 1995) (holding that fans lacked standing to challenge baseball's antitrust exemption due to absence of evidence indicating owners intended to harm them, indirect nature of injury, and origin of their damages). The Clayton Act allows private parties to bring such actions for damages and injunctive relief. *See* 15 U.S.C. § 12 *et seq.* *See, e.g.*, Laumann v. NHL, 907 F. Supp. 2d 465 (S.D.N.Y. 2012) (permitting subscribers to out-of-market television packages for professional baseball and hockey games to proceed with their suit and sue MLB and NHL, amongst others, under antitrust). Yet in weighing whether localized fans have standing, a court would need to "evaluate [their] harm, the alleged wrongdoing by the defendants, and the relationship between them." Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 535 (1983). The plaintiff fans would need to contend with Supreme Court precedent recognizing that "Congress did not intend antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 534 (internal quotations omitted). Their harm, nonetheless, would appear to be far more direct and traceable to the league than that of television subscribers dealing with distributors.

144. The former owner of the perennial Euroleague contender CSKA Moscow, Prokhorov has recently received permission to move the team's ownership vehicle to Russia to comply with Russian election laws restricting the international

Center at the intersection of Atlantic and Flatbush Avenues and has changed its name to the Brooklyn Nets. The first international owner in the NBA, Prokhorov has wasted little time in putting his vast wealth to work.[145] Next season, the Net's payroll of $101 million will be the highest in the league.[146] After signing aging Celtics superstars Kevin Garnett and Paul Pierce, the Nets will pay a league-record $82 million luxury tax bill.[147] Following the acquisition, Prokhorov bluntly stated: "Frankly speaking, I'll do whatever I can do in order to reach [a] championship here in Brooklyn. . . . For me, it was the goal when I bought the N.B.A. team."[148] With a fortune estimated at $13 billion, Prokhorov is the league's second richest owner and fourteenth billionaire owner in the NBA.[149] Yet unlike some of his colleagues, Prokhorov has spent with seemingly reckless abandon, and in the process created a major threat to the stability of the league.[150]

From a labor and employment perspective, Prokhorov has disregarded the carefully calibrated compromises reached in the most

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holdings of Russian political candidates. *See* Paul Sonne, *The Nets Are About to 'Move' to Russia*, WSJ.COM (June 14, 2013, 1:56 PM), http://online.wsj.com/article/SB10001424127887323734304578543601212910428.html. He ran for president in 2012 and won seven percent of the vote. *See* Andrew E. Kramer, *Political Endurance Test for Russian Billionaire*, N.Y. TIMES (Aug. 29, 2013), at A4, *available at* http://www.nytimes.com/2013/08/29/world/europe/political-endurance-test-for-russian-billionaire.html.

145. *See* Charles V. Bagli, *Richest Russian's Newest Toy: An N.B.A. Team*, N.Y. TIMES (Sept. 24, 2009), at A1, *available at* http://www.nytimes.com/2009/09/24/sports/basketball/24nets.html.

146. *See* Howard Beck, *For NBA's Version of Steinbrenner, $183 Million Is No Object*, N.Y. TIMES (July 19, 2013), at A1, *available at* http://www.nytimes.com/2013/07/19/sports/basketball/for-nets-prokhorov-nbas-version-of-steinbrenner-183-million-is-no-object.html ("The Nets' payroll next season will surge to a league-high $101 million, triggering a league-record luxury tax bill of about $82 million.").

147. *See id.* (describing Nets as title contenders based on team's starting lineup that includes current or former NBA All-Star at all five positions, each earning at least $11 million next season). "The estimated $82 million bill will be more than triple what the Nets paid in luxury taxes for the last 11 seasons combined. It is more than all teams combined paid last season." *Id.*

148. *Id.*

149. *See id.* (noting that Portland Trail Blazers' Paul Allen is wealthiest owner with estimated net worth of $15 billion).

150. There may be a sound business argument for expending such sums on the roster; the value of the team increased by nearly fifty percent when it moved from New Jersey to Brooklyn. *See* Beck, *supra* note 146. The recent high-profile trades have also caused a surge in season-ticket sales. *See id.* Yet the chief executive of the team and arena conceded that the increase in ticket and paraphernalia sales is unlikely to match the luxury tax bill. *See id*; *see also* Windhorst, *supra* note 43 ("'I haven't looked at the Nets' balance sheet, but my guess is they're not necessarily going to be profitable,' said Stern, referring to owner Mikhail Prokhorov's decision to pay an estimated $80 million in luxury taxes alone this upcoming season.").

recent CBA aimed at restoring financial parity to the NBA.[151] For the most part, the more restrictive CBA has been successful in reigning in the spending of teams like the Dallas Mavericks, which passed on re-signing Tyson Chandler to a $56 million contract following the team's 2011 Championship.[152] Mark Cuban, the outspoken Mavericks owner, cited the new CBA as justification for his decision.[153] Under the new tax system, the teams will no longer pay a dollar-for-dollar luxury tax penalty.[154] Instead, the tax starts at $1.50 per dollar over the set threshold and then increases for every $5 million spent.[155] The Nets are not the first team to exceed the $100 million payroll mark, but they are the first team to be penalized so severely under the new agreement. The $82 million tax bill is expected to surpass the complete payrolls of at least twenty-five teams next season.[156] Such disparity in pay is likely to spur labor unrest as the players see wider gaps between their salaries and the owners push for greater restrictions on compensation.[157] There may be little the Board of Governors can do if one of the owners is willing to operate his team in a financially irrational manner with-

151. *See* Krueger-Wyman, *Best Interests*, *supra* note 48, at 186 (describing new CBA as benefitting small-market teams like Milwaukee Bucks and Utah Jazz through achieving greater "[c]ompetitive [b]alance" by "virtually strip[ping] perennial over-spenders of the ability to violate the salary cap (*at least without paying dearly for it*)") (emphasis added).

152. *See* Beckley Mason, *In a Changed N.B.A., Two Differing Steps in Texas*, N.Y. TIMES, July 21, 2013, at SP5, *available at* http://www.nytimes.com/2013/07/21/sports/basketball/minimizing-need-for-a-second-star-can-be-perilous.html. In order to reduce its tax bill, the defending champion Miami Heat waived Mike Miller, who played an integral role in 2013 NBA Finals against the San Antonio Spurs. *See* Brian Windhorst, *Heat Waive Veteran Mike Miller*, ESPN.COM (July 17, 2013), http://espn.go.com/nba/truehoop/miamiheat/story/_/id/9482980/miami-heat-waive-mike-miller-amnesty-clause (noting that maneuver will save team approximately $17 million in luxury taxes for upcoming season, halving team's anticipated tax bill, which will still exceed luxury tax bill paid during 2012-2013 season).

153. *See Mason*, s*upra* note 152 (quoting Dallas Mavericks' owner Mark Cuban, "Because of the new set of rules . . . there's going to be a different market for pricing players. And when there's a different market for pricing players, you've got to introduce a different methodology for building a team.").

154. *See* Beck, *supra* note 146 (noting that big-spending NBA teams that previously paid dollar-for-dollar penalty will not pay more punitive penalty at higher rate).

155. *See id.*; *see also* Larry Coons, NBA SALARY CAP FAQ, http://www.cbafaq.com/salarycap.htm#Q21 (last visited Aug. 4, 2013) (noting that in subsequent seasons, luxury tax will also include "repeater rate" based on whether the team was subject to penalty in prior seasons).

156. *See* Beck, *supra* note 146 (highlighting massive over-spending of Nets, including steep penalty, as compared to other teams within NBA).

157. The owners may want to consider an even more punitive tax system or a hard cap that fiscally reckless owners could not circumvent. Yet the players would understandably oppose both, especially the latter, given the likelihood of depressing salaries.

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out regard to profit. But futility is unlikely to stop all parties involved from trying. Given that under the NLRA, the parties must "meet at reasonable times and confer in good faith with respect to" the mandatory subjects of collective bargaining, including "wages," any attempts to reign in profligate owners will require additional negotiating and enhance the prospect that either side will opt-out of the CBA following the 2016-2017 season.[158] The most recent work stoppage, which included an offensive lockout, union decertification, and highly contentious litigation, demonstrates the magnitude of the Prokhorov-driven challenges ahead for Silver.[159]

The Nets' spending spree, moreover, may not translate into immediate talks of contraction, but it will further expose the already discernible gap between the "haves" and "have-nots."[160] Under the current CBA, up to fifty percent of the tax money can be distributed to those teams that fall below the penalty.[161] Although none of the money has to be redistributed to the non-taxpayers,[162] the remaining money – at least fifty percent – must be used for "league purposes." In 2011-12, the NBA devoted all of the tax revenue to its revenue sharing program.[163] The revenue sharing system is separate from the luxury tax and aims to correct the disparities stemming from the impact big-market teams have on increasing the salary cap, and thereby the expenses of smaller-market teams.[164]

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158. 29 U.S.C. § 158(d) (2013). The current CBA runs through the 2020-21 season, but either party may opt out following the 2016-17 season, as long as notice is given by December 15, 2016. *See* Coons, *supra* note 155, at 9.

159. For an overview of the underlying legal issues driving the 2011 work stoppage, see Feldman, *Shifting Dynamics*, *supra* note 45.

160. Contraction, even the mere prospect of it, would greatly exacerbate labor relations, as it would mean a reduction in employment opportunities for players. Under the 2011 CBA, each team committed to maintaining twelve or thirteen players on its Active List. *See* CBA 2011, *supra* note 72, at Art. XXIX, Sec. 1 ("Active Roster Size"). During the regular season, each team is required to employ at least fourteen players in the aggregate. *See id.*, at Art. XXIX, Sec. 3(a) ("Minimum League-Wide Roster").

161. *See* Coons, *supra* note 155, at 22.

162. *See id.*

163. *See id.*

164. *See id.* at 24 (noting that salary cap is calculated in part based on league's basketball-related income ("BRI"), which is partly driven by revenue generated by larger market teams, thereby creating arms race in which wealthier teams can drive up costs for poorer teams by bringing in more revenue and increasing costs for players); *see also* Andrew Brandt, *The Big Deal over BRI: How Basketball Related Income is Affecting the Latest Round of NBA Labor Negotiations*, ESPN.COM (Nov. 5, 2011, 6:19 PM), http://espn.go.com/nba/story/_/id/7194222/basketball-related-income-affects-nba-lockout-talks (providing comprehensive discussion of BRI); *see also* Coons, *supra* note 155, at 24 ("The league's revenue sharing plan works in parallel with the CBA (including luxury tax) as a one-two punch to address franchise economic disparity. It is designed to help redistribute money from high-revenue

Under the revenue sharing program, teams contribute equal shares of their revenues, and the total amount is then divided equally amongst the franchises. As a result, the teams with lower revenues contribute less and receive more in absolute dollars.[165] Yet, under the revenue sharing system, teams must meet certain revenue requirements based on their home city's market potential and therefore face the prospect of being penalized under the system.[166] In 2012-13, the league devoted half of the tax money to the revenue sharing program and half to the non-taxpaying teams.[167]

Prokhorov's profligacy will force Silver to weigh carefully such percentage allocations, especially since the tax money is guaranteed at the outset of the season regardless of whether smaller market teams meet revenue benchmarks. The revenue sharing system is also structured in such a way that it is more focused on team profitability than financial parity. The Nets precedent, however, could lead the owners to opt-out of the CBA in order to alter the distribution of payments between teams.[168] Although the owners were wise to grant the league flexibility in rendering allocation determinations, they cannot unilaterally change the system since such a change would have a direct impact on player salaries and therefore constitute a "mandatory subject of collective bargaining."

V. Conclusion

Less than eight weeks into the 2013-14 season and three months till Silver becomes the NBA's fifth commissioner, the NBPA lacks an executive director and only recently elected its new union president. Yet for the first time since Patrick Ewing's term ended in 2001, the players' union has a superstar president in All-Star point guard Chris Paul.[169] Silver may rightfully view the election of Paul as a positive – providing him with a strong negotiating partner in

teams (generally in big markets) to needier teams (generally in small markets). By 2013, 14 of all 30 teams are projected to be profitable under this system if they meet reasonable revenue and expense standards.").

165. *See id.*

166. Revenue benchmarks are measured against average league revenues and vary broadly from sixty-five percent in New Orleans to 160 percent in New York and Brooklyn. *See id.*

167. *See id.*

168. *See* CBA 2011, *supra* note 72, Sec. 12(f)(1) ("Each Team whose Team Salary exceeds the Tax Level for any Salary Cap Year shall be required to pay a tax to the NBA.").

169. *See* Howard Beck, *Clippers' Paul to Lead Union*, N.Y. Times, Aug. 22, 2013, at B14, *available at* http://www.nytimes.com/2013/08/22/sports/basketball/paul-to-lead-players-union.html.

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advance of the rapidly approaching option for either side to opt-out of the CBA – or as a negative – invigorating a newly emboldened union seeking to reestablish itself following infighting and a damaging CBA that heavily favored the owners.[170]

Regardless of his view, Silver will face a number of financial and legal obstacles ahead during his first years as commissioner. No issue embodies those challenges more so than contraction. Newly added to the most recent CBA, contraction is an untested tool in the four major professional sports leagues that offers the *prospect* of a financial boon to the owners, but also invites significant labor and antitrust legal challenges. Nonetheless, Silver will retain far more power, as well as minimize legal challenges, by ensuring that the contraction provision remains in the next CBA. In the event that the provision is stripped, he should consider seeking targeted legislation from Congress in the vein of the Sports Broadcasting Act that permits the major professional sports leagues to sign joint broadcasting agreements without violating antitrust laws.[171] By retaining the right to contract without fear of being held liable for treble damages, Silver would possess a powerful tool against players fearful of losing their jobs, recalcitrant owners considering relocation, and financially strapped cities and states refusing to support new arenas. In short, contraction would go a long way towards helping him fill those "big shoes."

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170. *See id.* (noting internal audit that charged former executive director Billy Hunter with gross mismanagement); *see also* Krueger-Wyman, *supra* note 48, at 184-91 (describing lopsided CBA that heavily favored owners at expense of players).

171. 15 U.S.C. §§ 1291-1295 (2013).