

**Why Highly Paid Athletes Deserve More Antitrust  
Protection  
Than Ordinary Unionized Workers**

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Our nation's broad consensus about how the American economy should function is expressed in large part through two sets of statutes enacted by Congress -- our antitrust and labor laws. The Sherman Act and its statutory progeny mandate a general principle of unrestrained competition in the marketplace as the best mechanism for efficiently allocating resources, preventing unjustified use of economic power, and generally improving the economic welfare of American citizens. The National Labor Relations Act and its statutory progeny mandate a general principle permitting workers to engage in a regulated restraint of competition in the labor market and collective bargaining with employers, as the best mechanism for equalizing bargaining power between workers and management, limiting industrial disruption, and enhancing the economic welfare of millions of American workers (and thereby the American economy generally).

In *Brown v. Pro Football, Inc.*,<sup>1</sup> the Supreme Court held that federal labor laws completely shield from antitrust challenge

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<sup>1</sup> 116 S.Ct. 2116 (1996).

agreements among the owners of professional football teams to implement, over the union's objection, a plan that restrains competition among teams that would otherwise exist in the labor market. The decision will adversely affect consumers (sports fans) in two ways -- neither of which is discussed by the Court in *Brown*.

First, the decision increases the likelihood that efforts by management to impose unreasonable trade restraints will result in strikes or other industrial disruption. We recognize the opposing argument -- that the decision minimizes the risk that management will lock out its players to force them to agree to a labor-exempt collective bargaining agreement -- but on balance we believe that management is more sensitive to public relations and less likely to engage in a lockout than players are to strike. Moreover, decisions finding player restraints to be unreasonable trade restraints in violation of the antitrust laws have traditionally been followed quickly by collective bargaining agreements that restore labor peace.<sup>2</sup> Thus, to the extent that

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<sup>2</sup> See *Reynolds v. NFL*, 584 F.2d 280 (8th Cir. 1978) (upholding collective bargaining agreement entered into as part of settlement of *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976)); *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1986) (upholding portion of collective bargaining agreement entered into as part of settlement of *Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977); *White v. NFL*, 822 F. Supp. 1389, 1412-16, 1435-36 (D. Minn. 1993) (describing settlement of antitrust litigation after jury verdict against NFL).

the opinion was based on the implicit judgment that permitting unions to bring antitrust litigation results in greater transactions costs in achieving the goal of a collective bargain,<sup>3</sup> we believe the evidence to date would not support that judgment.

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<sup>3</sup> As Judge Patricia Wald noted in her dissent to *Brown* on the court of appeals, the rule adopted by her colleagues on the D.C. Circuit (and now by the Supreme Court):

creates new incentives, none of them helpful to the bargaining process. First, some employees--especially those in a weak bargaining position--are under pressure not to enter into collective bargaining at all, lest the existence of a bargaining relationship license unilateral employer imposition of anticompetitive terms. See Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-sports Markets*, 1989 UTAH L. REV. 617, 658-59 (describing disincentives to collective bargaining if unilaterally-imposed terms are exempt from antitrust coverage). Second, as the majority recognizes, some employees will be encouraged to decertify their unions rather than risk unilateral multiemployer imposition of terms at impasse. See also Goldman, *supra*, at 658-59. Such a consequence is not mere speculation, but represents the actual upshot of the Eighth Circuit's decision in *Powell* upholding a broad nonstatutory labor exemption like that of the majority here. ...New incentives for employees not to engage

Most importantly, the decision facilitates club owners' agreement on trade restraints that reduce the quality and entertainment value of their product, reductions that are economically justifiable for members of a monopoly sports league because their fans have no reasonable substitutes for their patronage. Specifically, we believe that restraints imposed by owners that would be subject to successful antitrust challenge but for *Brown* reduce the competitive balance among teams in a league, and thus the excitement and interest in the championship season.

The fundamental flaw in the *Brown* majority opinion, written by Justice Stephen Breyer, lay in its failure to appreciate or fully analyze the unique economics of professional sports that distinguish this industry from the typical unionized industry.

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in collective bargaining--and the bizarre prospect of employers attempting to force employees to remain in a union so as to preserve the employers' valuable antitrust exemption--run directly contrary to the overarching purpose of the labor laws to encourage bona fide collective bargaining.

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A rule that ousts antitrust law only to encourage fewer collective bargaining agreements seems contrary to the purposes of both the labor laws and the antitrust laws.

*Brown v. Pro-Football, Inc.*, 50 F.3d 1041, 1065 (D.C. Cir. 1995), *rev'd*, 116 S. Ct. 2116 (1996).

Labor market restraints among professional sports fans are much more likely to result in allocative inefficiencies in the labor market that will directly result in a reduction in quality in the product market -- the offering of season-long competition among numerous teams within a sports league. Although Justice Stevens argued in dissent that sports league restraints deserved different treatment,<sup>4</sup> his argument was not based on the benefits of labor market competition for consumers. Both opinions' exclusive focus on the rights of labor and management without regard to consumer interests led the majority to conclude that the only differences between professional athletes and ordinary factory workers were that the former were better paid and had greater bargaining power.<sup>5</sup> As a result, the majority reached the flawed conclusion that the proper reconciliation of relevant antitrust and labor policies in this case should be based on a paradigm of collective bargaining over fixed wage scales between an industrial workers' union and a group of employers who would otherwise compete both in the labor market for workers and in the product market for the output of their manufactured goods.

In his insightful contribution to this symposium, Professor Jeffrey Harrison has hypothesized that there is more to *Brown* than meets the eye in light of its authorship by Justice Breyer,

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<sup>4</sup> *Brown*, 116 S. Ct. at 2130-31.

<sup>5</sup> *Brown*, 116 S.Ct. at 2126.

a recognized antitrust *cognoscenti*.<sup>6</sup> Perhaps, in light of the requirements for integrated activity by a sports league, Justice Breyer concluded that player restraints would almost always pass muster under the rule of reason and thus little would be lost by declaring them exempt.<sup>7</sup> If, as we maintain, player restraints harm consumers, it is unlikely that they would almost always pass muster.<sup>8</sup>

Perhaps, Harrison supposes, Justice Breyer applied the Coase Theorem and concluded that, since a judicial declaration that player restraints were lawful or unlawful could be easily set aside by a collective bargain to the contrary, the allocation of rights would not affect the efficient result.<sup>9</sup> We believe that recent history would not support such a conclusion. Contrary to what Coase would predict if bargaining costs are indeed low in sports, significant lessening of trade restraints were achieved

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<sup>6</sup> citation to Jeffrey Harrison's article in this symposium: AT BULLETIN

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<sup>7</sup> *Id.* at \_\_\_\_ . {AT Bull. eds: need page cite to Harrison: if you send me his page proofs I will provide}

<sup>8</sup> For a detailed argument for the opposite conclusion -- that most of the controversial player restraints employed by professional sports teams would not be upheld under the Sherman Act, see Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 601.

<sup>9</sup> Harrison, *supra* note 6 at \_\_\_\_ . {AT Bull: need Harrison page proofs}

in baseball,<sup>10</sup> football,<sup>11</sup> and basketball<sup>12</sup> only after an external legal reallocation of rights from management to labor.

Thus, with, we hope, the proper amount of hesitation in light of Justice Breyer's expertise in antitrust and regulatory issues, we conclude that he erred in rejecting special treatment for professional athletes. The major difference between collective bargaining by professional athletes and by ordinary factory workers is that in the former case the athletes' interests are aligned with consumers.<sup>13</sup> Because the Sherman Act is a "consumer welfare prescription,"<sup>14</sup> this alignment explains why athletes deserve greater antitrust protection than factory workers who have concluded that *reducing* competition is in their own interest.

Part I of this Article criticizes *Brown's* failure to distinguish for antitrust purposes between typical industrial labor bargaining, where the union seeks to *reduce* labor market competition to benefit workers, and sports bargaining, where the

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<sup>10</sup> *Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs v. Major League Baseball Players Ass'n*, 66 Lab. Arb. Rep. (BNA) 101 (Dec. 23, 1975).

<sup>11</sup> See *White v. NFL*, 822 F. Supp. 1289, 1412-16, 1435-36 (D. Minn. 1993) (describing settlement of antitrust litigation after jury verdict against NFL).

<sup>12</sup> *Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

<sup>13</sup> For a more comprehensive discussion of this point, see Ross, *supra* note 8.

<sup>14</sup> *Reiter v. Sonotone*, 442 U.S. 330, 344 (1979).

union seeks to increase labor market competition. The economic effect of typical labor bargaining is markedly different than sports bargaining. In the case of a typical industry, union successes will either have an adverse effect on consumers (higher prices due to higher wages or more costly working conditions) or no effect on consumers (if employers are unable to reflect labor costs in higher prices). The demands of players' unions for freer labor markets, in contrast, benefit consumers by promoting an improved allocation of players among teams. When this important difference is recognized, it becomes apparent that consumer interests protected by the antitrust laws, interests which play little or no role in typical industrial labor bargaining, must be considered in the sports context. In Part II, we explain our hypothesis that competition among teams for players' services improves competitive balance by facilitating the movement of quality players from superior teams to inferior ones. We then test this hypothesis using Major League Baseball's dramatic change from an industry characterized by virtually no competition for player services to one marked by vigorous labor market competition. The empirical results support our hypothesis. Finally, in Part III, we suggest areas for future study in light of our thesis that *Brown* incorrectly ignored consumer interests in reconciling antitrust and labor policies.

## I

### THE FLAWED REASONING OF THE *BROWN* MAJORITY



Sensible application of antitrust and labor law requires judges to appreciate the practical economic effect of the doctrines they establish. The very structure of Justice Breyer's majority opinion in *Brown* reflects the opinion's failure to recognize the unique economics of professional sports leagues, and his incongruous<sup>15</sup> insistence on viewing this case entirely from a labor law perspective. Once the opinion moves from the settled principle that agreements between employers and unions that restrain trade in the labor market are exempt from antitrust attack to the contested question whether agreements among employers to restrain trade without union consent are exempt, Justice Breyer immediately proceeds to a concise discussion of the difficulties of applying antitrust laws to conventional multi-employer industrial bargaining. Part III of the opinion then rejects several suggested limitations on a multi-employer agreement to restrain trade following an impasse in bargaining with the union, in each case explaining why these limitations are

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<sup>15</sup> In light of his own background as an antitrust professor. We note that none of Justice Breyer's colleagues in the majority came to the bench with a strong antitrust background. (The other justice with pre-judicial antitrust expertise, Justice Stevens, dissented.) The Brief for the Petitioner in *Brown* devoted only one paragraph and a footnote to the effect of these labor market restraints on fans. In the interest of full disclosure, we note that one of this article's authors, serving as *pro bono* counsel to two consumer advocacy groups, sought to file a brief on behalf of the plaintiffs in *Brown* but was requested not to do so by plaintiffs' counsel.

undesirable in the context of typical industrial bargaining. Finally, the opinion turned to the plaintiffs' argument that "irrespective of how the labor exemption applies elsewhere to multiemployer collective bargaining, professional sports is 'special.'"<sup>16</sup> In particular, the Court rejected the argument that professional sports are special because players' special individual talents lead to individualized negotiations with teams. The Court found this important distinction to simply be "a feature, like so many others, that might give employees (or employers) more (or less) bargaining power." "Indeed," Justice Breyer concluded, "it would be odd to fashion an antitrust exemption that gave additional advantages to professional football players (by virtue of their superior bargaining power) that transport workers, coal miners, or meat packers would not enjoy."<sup>17</sup> The conclusion that the only unique economic aspect of professional sports is that players have greater individual bargaining power than their blue collar colleagues in the AFL-CIO counterparts follows from the majority's insistence on viewing professional sports solely through a labor law lens.

The varied and special talents of professional athletes, however, affects not only the labor market but the product market as well. Unlike meat packers of similar training and seniority, athletes' services are not fungible, and the allocation of players among teams in a league will affect the overall quality

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<sup>16</sup> *Brown*, 116 S. Ct. at 2126.

<sup>17</sup> *Id.*

and entertainment value of the league's product for consumers. Because for many sports fans there are no reasonable substitutes to the one major league in each sport, team owners can exercise both monopsony power over players and monopoly power in the sale of their product, permitting owners to agree on inefficient means of allocating players that lowers the quality of their product, without fear that consumers will shift their patronage to a competitor. When the meat packers union demands that the labor market be restrained while the NFL Players Association demands that the labor market be unrestrained, this is not simply a reflection of the relative bargaining power of labor in these two different contexts. Consumers have no interest challenging the ability of management to impose an otherwise lawful 5% industry-wide pay increase in the meat-packing industry, over the objection of meat packers demanding a 10% increase. Consumers do have an interest, however, in whether football players are allocated among clubs in an efficient manner designed to enhance the quality of the overall league product, or allocated in an inefficient manner than reduces the quality of the product.<sup>18</sup>

There is strong evidence that fans respond more favorably to competition in leagues featuring competitive balance -- when teams have a reasonable chance to contend for the championship every few years.<sup>19</sup> Perhaps the most striking piece of anecdotal

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<sup>18</sup> See Ross, *supra* note 8.

<sup>19</sup> The definition comes from Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 486 (E.D. Pa. 1972).

evidence is the case of the great New York Yankee teams of the mid-1920s. The 1926 champions were a very good team, and they drew 1,027,000 fans. The 1927 team was one of the best ever, winning 110 games while losing just 44 and finishing 19 games ahead of a very good Philadelphia Athletics team. Nevertheless, this team drew only 137,000 more fans to Yankee Stadium, while attendance in the rest of the league declined by 437,000.<sup>20</sup> More systematically, economists Henry Demmert and Roger Noll have both demonstrated that attendance increases with competitive balance.<sup>21</sup>

The Supreme Court has recognized that competitive balance is a legitimate goal for sports leagues -- indeed, a sufficiently pro-consumer goal that it could potentially be used to justify otherwise unreasonable restraints of trade.<sup>22</sup> Indeed, for many years the conventional wisdom was that labor market restraints actually promoted competitive balance; thus, it was the owners who argued that the unique interdependence of sports league teams compelled special antitrust treatment for sports.<sup>23</sup> It follows,

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<sup>20</sup> JAMES QUIRK & RODNEY FORT, *PAY DIRT* 242 (1992).

<sup>21</sup> Roger Noll, *Attendance and Price Setting*, in *GOVERNMENT AND THE SPORTS BUSINESS* 155-56 (R. Noll ed., 1974); HENRY DEMMERT, *THE ECONOMICS OF PROFESSIONAL TEAM SPORTS* 11 (1973).

<sup>22</sup> *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 118 (1984).

<sup>23</sup> See, e.g., *Flood v. Kuhn*, No. 71-32 (O.T. 1971), Brief for the Respondents at 7; *Mackey v. NFL*, 543 F.2d 606, 620-22 (8th Cir.1976).

then, that if the evidence demonstrates that sports league restraints affirmatively *harm* competitive balance, the special aspects of sports must also be recognized.

Recognition that the paradigm of traditional multi-employer bargaining does not fit the special framework of sports leagues provides answers to a number of the problems that Justice Breyer suggested would result from the contrary holding in *Brown*. Labor law permits a multi-employer bargaining group to impose its last best offer if good faith bargaining is at an impasse.<sup>24</sup> Justice Breyer concluded that subjecting the collective decision to impose terms to antitrust scrutiny was a problem because "unlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors ... in virtually any respect whatsoever."<sup>25</sup> Breyer's authority, of course, is a non-sports one -- an important antitrust precedent that maintained that competing motion picture distributors could not agree to insert arbitration provisions in contracts with exhibitors, no matter how reasonable and appropriate these provisions were.<sup>26</sup> In contrast, competing sports teams are permitted to agree with one another on important respects of their game, including television rights,<sup>27</sup> franchise location,<sup>28</sup> and restraints on competition for

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<sup>24</sup> NLRB v. Katz, 369 U.S. 736 (1962).

<sup>25</sup> *Brown*, 116 S.Ct. at 2122.

<sup>26</sup> Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930).

<sup>27</sup> United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953).

players' services,<sup>29</sup> as long as the agreement is reasonable. Thus, Breyer's observation that antitrust liability is problematic because "it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable"<sup>30</sup> applies with much weaker force, if at all, to sports restraints.<sup>31</sup>

Breyer next posed the question, assuming the antitrust laws applied, "what are employers to do once impasse is reached?"<sup>32</sup> In the context of a typical industry, where non-exempt multi-employer agreements are *per se* illegal, this poses significant problems. Virtually anything trucking companies did, following

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<sup>28</sup> *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987).

<sup>29</sup> *McNeil v. National Football League*, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,771-72 (D. Minn.).

<sup>30</sup> *Brown*, 116 S.Ct. at 2120.

<sup>31</sup> Similarly, the majority's concern that antitrust precedents would allow inferences of conspiratorial conduct from uniform behavior of rivals, so that a jury might find virtually any conduct by rival employers to be illegal under the antitrust laws, *id.*, is premised on the notion that employer agreements in the non-sports context are probably illegal *per se*. In the sports context, no one disputes that the owners have in fact agreed to restrain trade; the issue always is whether the restraint is reasonable under the Sherman Act.

<sup>32</sup> *Id.* at 2122-23.

impasse with the Teamsters, would be illegal if not exempt. In the sports context, owners would need to agree on some set of rules for the league to operate regardless of the existence of collective bargaining. The answer to Breyer's question is simply that they will need to agree on a set of rules that pass antitrust muster -- rules that only restrain trade to the extent reasonably necessary to promote competitive balance or other legitimate goals.<sup>33</sup>

Justice Breyer's response to this answer is the key to understanding the opinion. The answer we propose means each particular sports league restraint would have to be evaluated, under the antitrust rule of reason, on a case-by-case basis. His response:

But any such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the Labor Board. The laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from the antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy. See *supra*, at 2120; see also [*Meat Cutters v.*] *Jewel Tea*, 381 U.S. [676] at 716-19 [1966] (opinion of Goldberg, J.).<sup>34</sup>

This quote is an amazing rhetorical "sleight-of-hand." It is indisputably true that throughout Anglo-American legal history judges have used the doctrine of restraint of trade, including its Sherman Act codification, as a means of imposing their own

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<sup>33</sup> See Ross, *supra* note 8.

<sup>34</sup> 116 S.Ct. at 2123.

typically anti-union views of "socially or economically desirable collective-bargaining policy," and that one of the purposes of federal labor law was to end that practice.<sup>35</sup> Our dispute with the *Brown* majority was not in its delegation to the NLRB of authority to determine whether the National Football League's imposition of a player-market restraint was unsound *collective bargaining* policy. Our dispute is that the restraint hurt consumers. And the United States Supreme Court has insisted that federal judges, to paraphrase Justice Breyer, retained the power to determine, through the antitrust laws, what is socially or economically desirable *competition policy* by *balancing* potentially conflicting labor and antitrust policies when labor market restraints also had a significant effect on consumers.<sup>36</sup> Here is what Justice Breyer *didn't* say in this revealing

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<sup>35</sup> Actually, Congress sought to limit this practice in establishing both the statutory labor exemption in the Clayton Act and in restricting federal court jurisdiction over labor disputes in the Norris-LaGuardia Act, both of which preceded the National Labor Relations Act's passage in 1935.

<sup>36</sup> See, e.g., *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 621-22 (1975) (implied labor exemption for management serves to accommodate antitrust and labor statutes and was inapplicable where effect on business market too direct and legitimate concerns of unions not implicated); *United Mine Workers v. Pennington*, 381 U.S. 657, 664-65 (1965) (agreement concerning mandatory subject of bargaining not automatically exempt from Sherman Act, and exemption inapplicable when impact on product market through effective exclusion of employers' rivals too great).



quotation: (1) the key precedent to hold that federal judges do not simply apply an administratively-enforced labor law where both labor and product market restraints are at issue is *Meat Cutters v. Jewel Tea*, where a labor market restraint that prevented consumers from purchasing packaged meat at night was upheld only because it was actively sought by, and essential to, the key labor interests of the *union*;<sup>37</sup> (2) Justice Arthur Goldberg's view that antitrust courts did not have reviewing authority where the subject involved a mandatory subject of collective bargaining, no matter what the effect on consumers as a matter of competition policy, was a *concurring* opinion that was rejected by six justices in *Jewel Tea*;<sup>38</sup> and (3) that one of Justice Goldberg's law clerks during that term was a young Harvard graduate named Stephen Breyer.

In sum, the fact that sports league labor restraints are fundamentally different from typical multi-employer collective bargaining reveals the flawed reasoning of the majority opinion in *Brown*. Assuming *arguendo* that antitrust judges have no

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<sup>37</sup> *Meat Cutters v. Jewel Tea Co.*, 381 US. 676, 689-90 (1965) (plurality opinion of White, J.).

<sup>38</sup> See *Mine Workers v. Pennington*, 381 U.S. 676, 697 (1965) (opinion of Goldberg, J., concurring in *Jewel Tea* and dissenting in *Pennington*); *Jewel Tea*, 381 U.S. at 735 (Douglas, J., dissenting) (finding antitrust liability because of competition policy concerns, despite relationship between restraint and collective bargaining permitted under labor law).

business determining whether the National Football League's imposition of labor market restraints are reasonable vis-a-vis workers or employers, the question remains whether antitrust judges should determine whether these rules are reasonable vis-a-vis consumers. To answer this question requires, at least, an appreciation of how labor market rules affect millions of ordinary citizen-voters on whose behalf the antitrust laws were enacted. As the next Part demonstrates, these rules affect the ability of fans who patronize monopoly sports leagues to enjoy exciting championship seasons. In contrast, rules agreed to by the typical industrial employer have little effect on product quality; competition, both among firms who are party to multi-employer bargaining, and firms not part of the bargaining process, remains available for the protection of consumers. This is why athletes deserve more antitrust protection than factory workers.

## II

### THE ECONOMIC EFFECT OF SPORTS LEAGUE PLAYER RESTRAINTS ON CONSUMERS

Even though it is clear that the antitrust laws apply to labor markets as well as any others,<sup>39</sup> Justice Breyer's view that the labor laws shift the locus of policy-making for collective bargaining policy to the NLRB has greater force if these policy concerns were the only ones present. The argument is woefully incomplete, however, when the question is raised whether the restraints are "reasonable" for owners to take vis-a-vis consumers.

Most rules to which multi-employer bargaining groups would agree without union consent have little effect on consumers. Trucking companies or electrical contractors typically agree on a wage scale and work rules, but oftentimes the employers' position is closer to the interests of consumers than that of the unions. When, for example, product market competition is vigorous and reduced costs (from lower wages or other labor-related cost

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<sup>39</sup> Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926) (employer agreement to restrain trade among merchant seafarers held illegal under the Sherman Act). See also Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1947) (the "statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.... The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

savings) are likely to be reflected in lower prices, consumers hardly have an interest in subjecting employers to close antitrust scrutiny of their agreements.

In contrast, consumers have a vital interest in subjecting sports leagues to close antitrust scrutiny. Consumers want close and exciting contests. Each year, most teams have disappointing seasons; most sports fans live in the hope that *their* team can improve and that the few successful teams decline in performance. Our thesis is that an unrestrained labor market facilitates this regenerative process. An unrestrained market allows teams that did not contend for the championship to obtain, in the marketplace, quality players they need to improve. Conversely, teams that are successful often face significant new salary demands and pressure from younger players that make it more difficult for them to retain all their talented players. In contrast, we believe that a restrained labor market harms this process. Teams that need to improve find it difficult to do so, for the only way to obtain talented players is to trade an equally talented player off their current roster. Dominant teams can build dynasties because their highly talented players have no other options but to remain on the team.

For many years, the conventional economic wisdom did not agree with our hypothesis. Rather, many economists argued that the allocation of player talent is not affected by player restraints; rather, they argued, a player will end up on the same team (the one that values his services the most) regardless of the level of restraint in the labor market. The only effect of

the labor market rules, the conventional wisdom concluded, concerned the distribution of salary -- a free agent would receive a large salary, while the player's former team would receive significant compensation in a restricted market when assigning a player's contract rights to a more highly valued venue.<sup>40</sup> However, studies of Major League Baseball, where the labor market was transformed within a one year period in 1976 from a regime of almost complete monopsony -- the famous reserve clause tying a player to a team for life -- to virtually unlimited free agency for players with more than six years of major league service, now point to the conclusion that player restraints do indeed affect the allocation of players and the competitive balance among teams.<sup>41</sup>

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<sup>40</sup> The proposition was first articulated in Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956).

<sup>41</sup> These studies are detailed in Ross, *supra* note 8. See, e.g., ANDREW ZIMBALIST, *BASEBALL AND BILLIONS* 95 (1992) ("[b]y any measure, competitive balance has not only not become more unequal since [the onset of free agency in] 1976, it has become noticeably more equal."); David A. Besanko & Daniel Simon, *Resource Allocation in the Baseball Players' Labor Market: An Empirical Investigation*, 21 (#1) REV. BUS. & ECON. RES. 78-79 (1985) (data showing that pitching, as measured by earned run average, was more balanced after 1976 "suggest that if anything has happened, within-season competitive equality has increased since free agency"); *id.* at 82-83 (study of the period from 1976-82 found that while 55% of free agents moved to larger markets, 56% moved to teams with a worse winning percentage; among superior players, 59% moved to

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larger markets, but 64% moved to teams with inferior records); Eric M. Leifer, *Endogenizing context: opportunity, organization, and dealmaking in major league baseball*, 23 SOC. SCI. RES. 263, 283 (1994) (analysis of 211 free agent acquisitions from 1975 to 1987 found that smaller city teams were more likely to acquire players from larger city teams than vice versa, and that teams were least likely to acquire free agents from teams with inferior records); Stephen F. Ross, *Monopoly Sports Leagues*, 73 Minn. L. Rev. 643, 673-76 (1989) (comparable seven-year periods showed increase in number of teams finishing within 10 games of the pennant winner from 34 to 48 after free agency; increase in pennant winners from 11 to 17; decrease in teams winning four of seven pennants from four to one; and decrease in races where no teams finished within 10 games of pennant winner from eight to three); Alan Balfour & Phillip K. Porter, *The Reserve Clause in Professional Sports: Legality and Effect on Competitive Balance*, 42 LABOR L.J. 8, 15 (1991) (comparing 1961-76 and 1977-88, and finding decrease in percentage of races where no team finished within five games of pennant winner from 50% to 25%). Cf. Trial Declaration of Roger G. Noll, *NBA v. Williams*, 94 Civ. 4488 (KTD) (S.D.N.Y.) ¶ 11 (analysis of basketball suggested "greater restrictions against competition are more likely to create situations in which teams are persistently good or persistently bad").

Two recent works by Professors James Quirk and Rodney Fort suggest that the data do not support the hypothesis that player restraints harm competitive balance. JAMES QUIRK & RODNEY FORT, *PAY DIRT* (1992); Rodney Fort & James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. ECON. LIT. 1265, 1291 (1995). For a critique of their analysis,

We performed our own statistical comparison of teams in the post-free agent period compared to teams in the prior period. First, we selected a method of measuring competitive balance and examined whether the era without significant player restraints displayed significantly improved balance. Next, we directly tested our hypothesis that player restraints result in an inefficient allocation of players by examining the reallocation of pitchers between seasons under the pre-1976 reserve clause and the post-1976 era of free agency. Our results support our hypothesis: teams were more balanced after 1976 than before, and more quality pitchers moved away teams that were in contention toward teams that had been out of contention once player restraints were removed in 1976.

As part of this investigation, we looked at team records from 1961 to 1992. We chose these two periods in order to bifurcate the period of 32 years into even sets of 16 years: 1961 to 1976 (the pre-free agency period) and 1977 to 1992 (post-free agency period). The first set of team statistics we looked at was the year-to-year correlation of team records to each team's record in the prior year. Our hypothesis that free agency makes

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see Ross, *supra* note 8, at 654-58, arguing that their data does support our hypothesis, although not to the high degree required for statistical significance, and that their principal measure of competitive balance -- the average dispersion of win-loss percentages over time -- is an inadequate measure of those aspects of competitive balance that fans desire.

it more difficult for talent-laden teams to re-sign all their quality players and makes it easier for teams with inferior talent to quickly improve through the acquisition of free agents suggests that we would expect to see a weaker relationship between team's winning percentage from one year to the next in the post-free agency era. That is, we would expect to see more persistence in team winning records under the reserve clause.

In order to test this proposition we ran a set of four regressions of the form:

$$(1) \text{ WinPCT} = \alpha + \beta_1 \text{ WinPCT}(-1) + \beta_2 \text{ WinPCT}(-2) + \beta_3 \text{ WinPCT}(-3)$$

Where:

WinPCT = Team winning percentage

WinPCT(-L) = Team winning percentage, lagged L years.

We ran this regression over the entire 32 year period, and for each of the two 16-year subperiods. The results are shown in Tables 1 to 4. In Table 1, we show the combined results over the 32 year period, without making any distinction between the pre- and post- free agency eras. The coefficients on the lagged winning percentage variables can be interpreted as the relationship between the any team's current winning percentage and its percentage in the lagged year. For example, a team whose winning percentage is 10 percentage points higher in the previous year will have 3.8 points of that improvement carry over into the subsequent year, all else being equal.<sup>42</sup> The table shows that

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<sup>42</sup> Note all winning percentages are expressed in real number format a winning percentage of 250 equals 0.250.



winning percentages are most closely related to the most recent year and trail off over time. From a statistical standpoint, the relationships have a much greater significance level for the more recent lags. Table 1 is used as a benchmark against which we compare regression results calculated over each subset of years.

Table 2 shows the results for the pre-free agency era. Table 3 shows the results for the post-free agency era. The regression results show that there is a greater time persistence of winning records in the pre-free agency era than in the post-free agency era. For example, for the one-year lag, the pre-free agency value is 0.44 compared to the lower post-free agency value of 0.33. For the two-year lag, the coefficient values are similar to one another, with the post-free agency value somewhat higher. For the three-year lag, the pre-free agency value is 0.102 (and nearly significant at the 95% level of confidence), whereas the post-free agency value is 0.028 and is not significant at any reasonable level of significance. This last statistic is particularly important if one sees three-year "cycles" for good teams to fall back and poor teams to contend as desirable for sports fans.

A final set of regression results is shown in Table 4. In this regression, we combined the two periods, but included an intercept dummy variable `Free` (assigning a value of unity for the 1977-92 period), as well as interaction dummy variables for the lagged winning percentages (`PCTFree(-1)`, `PCTFree(-2)` &

PCTFree(-3)).<sup>43</sup> Using this regression format we can test whether or not individual regressions for each period are statistically different from one another. The regression results are consistent with the results mentioned above -- the lag periods had more impact in the pre-free agency period. From a statistical standpoint, the one year-lag interaction term (PCTFree(-1)) has a confidence level of almost 90 percent.<sup>44</sup>

*We conclude from these tests that the persistence of winning percentages over time appears to have weakened in the period of free agency. This is consistent with our hypothesis that player restraints harm consumers' interest in competitively balanced seasons, and would appear to reject the counter-hypothesis, which underlies the Brown case, that the only interested parties concerning the propriety of player restraints among professional team owners are management and labor.*

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<sup>43</sup> An interaction dummy variation is the product of the dummy variable Free and the team winning percentage for the lag year. For example, PCTFree(-1) = WinPCT(-1) x Free, for each team year.

<sup>44</sup> We also performed an F-test for structural change over time. The hypothesis that the periods are the same can be rejected at a level of confidence between 80-85%. Although this is below the 95 percent level that is typically required for statistical certainty, the test is highly suggestive. See note 51 *infra*.

Table 1. Regression results over 1961-1992.

	Coefficien t	Standard Error	T- Statistic	Confidence %
WinPCT(-1)	.381	.037	10.4	> 95%
WinPCT(-2)	.146	.039	3.7	> 95
WinPCT(-3)	.064	.036	1.8	92.4
Constant	.207	.019	11.0	> 95

$$R^2 = .27$$

Table 2. Regression results over 1961-1976.

	Coefficien t	Standard Error	T- Statistic	Confidence %
WinPCT(-1)	.444	.055	8.12	> 95%
WinPCT(-2)	.124	.059	2.09	> 95
WinPCT(-3)	.102	.053	1.91	94.6
Constant	.169	.025	6.66	> 95

$$R^2 = .37$$

Table 3. Regression results over 1977-1992.

	Coefficien t	Standard Error	T- Statistic	Confidence %
WinPCT(-1)	.327	.050	6.56	> 95%
WinPCT(-2)	.152	.052	2.93	> 95
WinPCT(-3)	.028	.049	0.58	43.6
Constant	.248	.027	9.00	> 95

$$R^2 = .20$$

Table 4. Regression results over 1961-1992.

	Coefficien t	Standard Error	T- Statistic	Confidence %
WinPCT(-1)	0.444	.0057	7.84	> 95%
WinPCT(-2)	0.124	0.062	2.01	> 95
WinPCT(-3)	0.102	0.055	1.85	93.5
PCTFree(- 1)	-0.118	0.075	-1.58	88.5
PCTFree(- 2)	0.028	0.080	0.36	28.8
PCTFree(- 3)	-0.074	0.073	-1.01	58.8
Free	0.078	0.038	2.07	> 95
Constant	0.248	0.027	9.00	> 95

$$R^2 = .27$$

We performed a second test of how competitive balance has changed over time by tabulating the incidence that teams were competitive in the pre-free agency era versus the post-free agency era. For the purpose of this test we defined a team as being competitive if it finished within five or fewer games out of first place. In a perfectly competitive world, we would expect each team to have the same incidence of finishing within five games of first place.<sup>45</sup> Against this standard, we can compare the actual incidence and measure how far away from perfect competition the actual standings were in each period. The statistical measure we use is the coefficient of variation which is computed as the ratio of the standard deviation to the mean. A coefficient of zero would indicate perfect competitive balance. The greater the coefficient of variation, the more dispersed is the actual distribution of teams from perfect competition. Moreover, the coefficient of variation can be compared across eras to assess which era was closer to competitive balance.

We selected the discrete variable of five games behind, rather than a more continuous variable, because of our belief that what fans want is for their teams to be in contention for the championship. Thus, a reallocation of pitching talent that

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<sup>45</sup> Certainly, we would not expect this condition to hold each and every year, but over along period of time, the incidence across teams should tend toward equality under perfect competition.

permitted teams to move from 11 games out to 5 games out is qualitatively more significant than a reallocation allowing a team to move from 26 games out to 20 games behind.

In Table 5, we report the average, standard deviation, and coefficient of variation for four periods: 1961-1968; 1969-1976; 1961-1976 and 1977-1992. We divided the pre-free agency era into two sub-periods, as delineated by expansion (Expos, Padres, Royals and Pilots) and the adoption of divisional play. (One would expect the number of teams finishing within five games to increase along with the adoption of four divisions and twice the number of divisional winners.) For the 1961-68 period, the 20 teams finished within five games an average of 1.60 times, ranging from zero (Angels, Cubs, Astros, Mets, Athletics, Senators, Indians) to five (Dodgers). The standard deviation is 1.6 and the coefficient of variation is 1.00. Divisional play did lead to a greater incidence of teams within five games (an average 2.13 times), but the standard deviation widened proportionately, leaving the coefficient of variation virtually unchanged (1.03). This period was dominated by the Orioles and Reds (7 times each) and the Pirates and A's (6 times each). Five teams the Angels (again), Astros (again), Indians (again), Pilots/Brewers and Padres failed to be competitive at any time during the 1969-76 time period. Over the whole pre-free agency period, the average incidence was 1.94, with a standard deviation of 1.89 and a coefficient of variation equal to 1.03. The leaders over the combined period were the Reds (10 times), Orioles (9 times), and Dodgers (8 times). At the risk of

offending their fans, we again mention that the Angels, Astros, Indians, Pilots/Brewers and Padres were pathetic over this time period.

The post-1976 period stands in stark contrast. On average, teams were competitive an average of 4.58 times, with a standard deviation of 2.42 and a coefficient of variation of 0.53 -- almost half of the coefficient of variation observed in the earlier period. By itself, this difference indicates a very large reduction in the dispersion across teams in being competitive. Although this later period was dominated by the Dodgers (10 times), Royals (8 times) and Blue Jays, Orioles, and Yankees (7 times each), only the Indians and Mariners failed to be competitive even once.<sup>46</sup> A look at the distribution of teams (Chart 1) shows that in the pre-1977 period the distribution has a bimodal pattern with teams stacked up at each end of the distribution. Chart 2 shows a much more normal distribution in the post-1976 period with most of the teams stacked up in the center of the distribution. Many more teams in the later period were competitive some of the time 14 out of 26 teams (54 percent) were competitive between four to six times.

## **[INSERT CHARTS HERE]**

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<sup>46</sup> Our study is current only through the 1992 season because of our access to computer-readable individual pitching data through that season. Since then, of course, both the Indians and Mariners have achieved great success in regular season and post-season play.

[listed on diskette in file CHARTS.XLS, in  
Microsoft Excel format]



The post-1976 data show an average of 7.4 teams being in contention each year. This compares to an average of 4 teams in the 1961-to-1968 period, and 6.4 teams in the 1969-to-1976 period. The increase in the 1969-to-1976 period can be safely attributed to the change to divisional play.

*Overall, these statistics tend to indicate that teams have cycled in and out of competition more frequently than in the pre-free agent period. This again is consistent with our hypothesis that free agency allows bad teams to acquire new talent more easily under a regime of player restraints, while, conversely, good teams may have found it more difficult to maintain all their good players for long periods of time.*

Table 5. Incidence of Competitive Teams

	Average	Standard Deviation	Coefficient of Variation
1961-1968	1.60	1.60	1.00
1969-1976	2.13	2.19	1.03
1961-1976	1.94	1.89	1.03
1977-1992	4.58	2.42	0.53

In an early antitrust case concerning player restraints, Judge Leon Higginbotham insightfully suggested that leagues are balanced when "each team has the opportunity of becoming a

contender over a reasonable cycle of years."<sup>47</sup> We next examined how often teams cycle in and out of competition. To answer this question, we tabulated teams and how often they went from being noncompetitive to being competitive and vice versa. In short hand, we say a team went from bad-to-good if it went from being more than five games out in one year to five or fewer games out in the subsequent year, and good-to-bad if it performed the cycle in reverse.<sup>48</sup>

In Table 6, we show how many times teams have cycled from good-to-bad over four time periods: 1961-1968; 1969-1976; 1961-1976 and 1977-1992. We also show the number of Team Years that equals the sum of all teams in each year across all years in a period. (For example, in a period of 10 years with 20 teams, there would be 200 Team Years.) To standardize the data across the periods of differing lengths and number of teams, we also computed the ratio of teams that cycled during a period versus the number of team years. In Table 6, we show that between 1961 and 1976, there were 42 occurrences of teams going from Good-to-Bad, for a ratio of 12.3 percent. This compares to 64 occurrences (15.5 percent) in the 1977 to 1992 period. Using a test for the equality of means, the latter figure is

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<sup>47</sup> Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 486 (E.D.Pa. 1972).

<sup>48</sup> As an extension of this analysis, we also performed tabulations using a 10 game instead of a 5 game standard.

significantly higher than the former, albeit only at about a 89 percent level of confidence.<sup>49</sup>

In Tables 8 and 9 we show the number of teams that went from Bad-to-Good. Under the five-game standard, we see 46 occurrences (13.5%) of teams moving from being out of competition in one year to being competitive the next year in the pre-free agency period. This compares to 63 occurrences (15.2%) in the era of free agency.<sup>50</sup> The equality of means test indicates that the balance-enhancing team moves did occur with greater frequency in the free agency period, although only at a 75% level of confidence.

Overall, this evidence is consistent with our earlier tabulations of the incidence of different teams being more often competitive in the era of free agency.<sup>51</sup> Moreover, it is

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<sup>49</sup> Using a 10-game standard (Table 6) we find that there were 56 occurrences (16.4 percent) of teams moving from Bad to Good in the pre-free agency period and 78

occurrences (18.8 percent) in the post-free agency period.

<sup>50</sup> Using a 10-game standard, the results are similar. There were 58 occurrences of teams moving from bad to good in the pre-free agency period and 80 teams in the post-free agency period.

<sup>51</sup> We readily acknowledge that the confidence levels of the data measured here do not prove our hypothesis to a statistical certainty. We suggest, however, that when a judge is asked in a civil case, where the plaintiff has the burden of proof by a preponderance of the evidence, to determine whether a particular trade restraint has an unreasonable economic effect on consumers, evidence that supports the claim of unreasonableness is probative even if there is a

consistent with the earlier regression results that indicated less persistence among teams in their winning percentages over time.<sup>52</sup>

Table 6. Count of Teams (Good-to-Bad), 5-Game Standard

	Count	Team Years	Percentage
1961-1968	20	154	12.99
1969-1976	22	188	11.7
1961-1976	42	342	12.28
1977-1992	64	414	15.46

Table 7. Count of Teams (Good-to-Bad), 10-Game Standard

	Count	Team Years	Percentage
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10-25% chance that the results are unreliable. See Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontiers of Knowledge*, 66 B.U. L. REV. 521, 521 (1986) ("'probability' as we use the term in law, particularly in the civil standard of proof, is not a hard-edged mathematical concept" but "a concept that incorporates less rigid ideas of justice and reflects the judicial function of resolving disputes in the real world, where values shift and knowledge is uncertain").

<sup>52</sup> One thing we have not yet tabulated is the distribution among teams that are cycling. That is, the tabulations we have shown here say nothing about whether it is the same teams cycling in and out (e.g. the Dodgers) or different teams moving in and out of contention.

1961-1968	28	154	18.18
1969-1976	28	188	14.89
1961-1976	56	342	16.37
1977-1992	78	414	18.84

Table 8. Count of Teams (Bad-to-Good), 5-Game Standard

	Count	Team Years	Percentage
1961-1968	20	154	12.99
1969-1976	26	188	13.83
1961-1976	46	342	13.45
1977-1992	63	414	15.22

Table 9. Count of Teams (Bad-to-Good), 10-Game Standard

	Count	Team Years	Percentage
1961-1968	25	154	16.23
1969-1976	33	188	17.55
1961-1976	58	342	16.96
1977-1992	80	414	19.32

In general, baseball teams move in and out of contention based on the quality of the personnel. The movement among teams reported above must, to some degree, be related to the acquisition or loss of talent. There are several avenues by which teams may acquire or lose talent. These include the development of players through farm systems, careful selection of prospects in the draft or from other teams, the loss of players through injury or retirement, the unexpected increase or decrease in skill levels of key players (George Foster or Steve Blass), skillful or unskillful trading of players<sup>53</sup>, or the signing or loss of free agents.

In order to study the impact of free agency, we are particularly interested in the players that switched teams, as

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<sup>53</sup> One of us is a long time Giants fan, who awaits history's verdict as to whether the exchange of Orlando Cepeda for St. Louis Cardinal Ray Sadecki will rival the Lou Brock for Ernie Broglio et al. trade as the worst in history, or whether last season's trade of Matt Williams will replace the Cepeda trade in infamy.

teams moved in and out of contention. We compare this player movement before and after free agency to test whether teams have acquired more or less talent via trades and/or free agent signings of players in the two periods. Because free agency makes it easier for teams to sign new talent, we would expect more player movement in the era of free agency. Moreover, free agency has often been a motivator for trades (often one-sided) that might otherwise not have occurred had the sword of free agency not been held over an owner's head. Thus, we look at all pitcher transactions, not just those limited to free agent signings.

As part of this study, we examined the movement of good pitchers between teams that moved from Bad-to-Good and from Good-to-Bad. These are the same teams that were reported in the tabulations presented in Tables 6 to 9. Defining a good pitcher is somewhat arbitrary, but we tentatively settled on a definition of a good pitcher as one who has at least 90 innings pitched and either has an ERA<sup>54</sup> of at least 90, or 10 wins. We wanted to select pitchers that had a significant number of innings and had either a relatively good ERA or a decent number of wins. We selected an ERA less than the league average in order to account for the fact that starting pitchers have ERAs relatively higher

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<sup>54</sup> The ERA+ variable is defined in one the leading baseball encyclopedias as a relative measure of ERA, adjusted by the league ERA average. The average ERA+ is 100 and increases with quality. See TOTAL BASEBALL 1357-58 (John Thorn & Pete Palmer 3d eds. 1993).

than relievers. We altered this definition in several ways, and while the overall number of good pitchers changing teams were different, the overall pattern reported below was not much affected.

In Table 10, we report the number of good pitchers that changed teams for those teams that moved from good-to-bad (these are the same teams as reported in Table 6). An example will help to clarify the results shown in the table. In 1979, the Dodgers finished 11.5 games out of first after winning the pennant in 1978. Thus, they qualified as a Good-to-Bad team. We looked at all the good pitchers (as defined by their 1978 statistics) on the 1978 Dodgers and counted those who were not on the team in 1979. For the Dodgers, these pitchers included Tommy John (free agent, signed by the Yankees) and Rick Rhoden (traded to the Pirates for Jerry Reuss). The two hurlers count as Pitchers Lost. For Pitchers Acquired, we looked at good pitchers on the current (bad) team, and counted the pitchers who had been acquired from another team. For the 1979 Dodgers, the only pitcher meeting this test was Jerry Reuss. Thus, on net the 1979 Dodgers lost two good pitchers and gained one, for a net loss of one. In general, we would expect teams moving from good to bad to be net exporters of talent, and vice versa.

In Table 10, we see that in the pre-free agency period (1961-1976), Good-to-Bad teams acquired 38 good pitchers and lost 42 - yielding a net loss of pitchers of four. In the free-



agency period, we see that Good-to-Bad teams acquired 58 pitchers, yet lost 83, yielding a net loss of 25. The difference in pitchers acquired is not unexpected, as we have already seen a difference in the absolute number of good teams, increasing from teams 42 (1961-76) to 64 (1977-92) (see Table 5). The large difference in pitchers lost (83 compared to 42), however, is proportionately much greater than the difference in the number of teams. In the final column of the table we report the total number of good pitchers on the teams that switched from good to bad. We use this to standardize the raw counts of pitchers and the percentages are reported next to the counts in the first two columns. Although there was a 52% increase in the number of good pitchers in the post-free agency area, this increase is dwarfed by the increase in net loss of good pitchers by good teams in that era (from -4 to -25). It appears that for teams moving out of contention, a much greater net loss of pitching talent (through free-agent signings and trades) has occurred in the period of free agency. Indeed, this loss of talent is a causal factor in teams moving out of contention.

Table 11 (showing teams moving from good to bad under a 10-game standard) shows the same pattern of results. The net loss of pitchers in the era before free agency was zero. The net loss of good pitchers in the post free-agency period was 14. Overall we see a greater net migration of pitching talent away from (and causing) teams falling out of contention.

In Tables 12 and 13, we report the number of pitchers who changed clubs for those teams that moved into contention (Bad-to-Good). Pitchers Acquired are those good pitchers (as defined by their current year statistics) in the current good year who were on another team in the previous season. An example of this type of pitcher is Jack Morris, who moved from the Tigers to the Twins in 1991 a year in which the Twins went from last place to World Champs. Pitchers Lost are those pitchers who were on the same team (and good) in the previous season, but who are on another team in the current year. We would expect teams that moved from bad to good would have a positive net acquisition of talent -- i.e., they are net importers of talent.

Table 12 shows the tabulations for teams moving into contention using a 5-game standard. On net, teams in the pre-agency period acquired 50 (18%) good pitchers and lost 33 (12%) pitchers for a net gain of 17 pitchers. In the period of free agency, bad-to-good teams acquired 79 (21%) good pitchers and lost 48 (13%), for a net gain of 31 pitchers. In Table 13, we report the results using the 10-game standard. In the pre-agency period, Bad-to-Good teams acquired 58 pitchers and lost 53, for a net gain of 5 in the pre-free agency period. In the 1977-1992 period, Bad-to-Good teams acquired 100 pitchers and lost 68 for a net gain of 32 good pitchers. In both tables we again see a greater net movement of talent toward (or actually causing) teams that are moving into contention.

Table 10. Good Pitchers: Lost and Found -- (Good-to-Bad), 5-Game Standard

- Pitchers Acquired

- Pitchers Lost

- Net Acquired

- Good Pitchers

- 

- 1961-1968

- 21 (16%)

- 17 (13%)

- 4

- 131

- 

- 1969-1976

- 17 (14%)

- 25 (21%)

- 8

- 119

- 

- 1961-1976

- 38 (15%)

- 42 (17%)

- 4

- 250

- 

- 1977-1992

- 58 (15%)

- 83 (22%)

- 25

- 380

- 

-

Table 11. Good Pitchers: Lost and Found -- (Good-to-Bad), 10-Game Standard

- Pitchers Acquired

- Pitchers Lost

- Net Acquired

- Good Pitchers

- 

- 1961-1968

- 30 (18%)

- 21 (13%)

- 9

- 168

- 

- 1969-1976

- 25 (17%)

- 34 (23%)

- 9

- 151

- 

- 1961-1976

- 55 (17%)

- 55 (17%)

- 0

- 319

-

- 1977-1992

- 71 (16%)

- 85 (19%)

- 14

- 445

- 

-

Table 12. Good Pitchers: Lost and Found -- (Bad-to-Good), 5-Game Standard

- Pitchers Acquired

- Pitchers Lost

- Net Acquired

- Good Pitchers

- 

- 1961-1968

- 21 (14%)

- 16 (10%)

- 5

- 154

- 

- 1969-1976

- 29 (24%)

- 17 (14%)

- 12

- 120

- 

- 1961-1976

- 50 (18%)

- 33 (12%)

- 17

- 274

-

- 1977-1992

- 79 (21%)

- 48 (13%)

- 31

- 368

- 

-



Table 13. Good Pitchers: Lost and Found -- (Bad-to-Good), 10-Game Standard

- Pitchers Acquired

- Pitchers Lost

- Net Acquired

- Good Pitchers

- 

- 1961-1968

- 26 (13%)

- 27 (14%)

- 1

- 194

- 

- 1969-1976

- 32 (23%)

- 26 (18%)

- 6

- 142

- 

- 1961-1976

- 58 (17%)

- 53 (16%)

- 5

- 336

-

- 1977-1992
- 100 (22%)
- 68 (15%)
- 32
- 450
- 
- 

*The analysis of the reallocation of pitchers from one season to the next further confirms our hypothesis that player restraints result in an inefficient allocation of players if a league's goal is to maximize consumer interest via exciting, competitively balanced seasons.*

In sum, employer agreements to restrain trade in the market for professional athletes is not simply a question of "socially or economically desirable collective-bargaining policy." It is a question of vital and direct interest to consumers.

### III

#### AN AGENDA FOR FURTHER RESEARCH AND ANALYSIS

This Article's purpose is somewhat narrow -- to demonstrate that objections to sports league player restraints reflect competition policy as well as labor policy concerns, and therefore that *Brown's* analysis is too simplistic. We do not attempt here to construct a complete, optimal, and coherent doctrine for applying the labor exemption to cases with labor and product market effects. We are content to raise some important questions that such a doctrine would answer. Our tentative conclusion is that, Justice Breyer's rhetorical sleight-of-hand to the contrary notwithstanding,<sup>55</sup> the same issues that perplexed the Court in *Jewel Tea* remain true today. We suggest that the resolution of this issue requires a reconciliation of competition and industrial relations policy, as Congress has expressed them in the antitrust and labor laws. Such a resolution suggests that *Jewel Tea* was a stronger case for an antitrust exemption than *Brown*, because an exemption protecting anti-consumer restraints sought by unions furthers congressional policies in ways that an exemption protecting restraints with similar competitive effects that are imposed by employers do not.

In *Jewel Tea*, a divided Court found that an agreement

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<sup>55</sup> See text accompanying notes 34-38 *supra*.

between unionized butchers and Chicagoland grocers to prohibit all sales of meat in the evening was protected under the labor exemption. Clearly, such an agreement had profound anti-consumer effects. For this reason, Justices Douglas, Black, and Clark found that the agreement was simply one where the union was aiding "non-labor groups to create business monopolies." In their view, "the unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing hours than to force them to sell at fixed prices."<sup>56</sup> Justice White, joined by Chief Justice Warren and Justice Brennan, distinguished a union's efforts to force firms to sell at fixed prices, noting that such a demand would not have been a mandatory subject of bargaining under labor laws.<sup>57</sup> However, the ban on nighttime meat sales was "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining *in pursuit of their own labor policies, and not at the behest of or in combination with non-labor groups*, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act."<sup>58</sup> Justice White's opinion did not adopt a bright-line rule that turned exclusively on whether the restraint related to matters that labor law considers to be mandatory subjects of bargaining. Rather, the plurality opinion explained

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<sup>56</sup> 381 U.S. at 737.

<sup>57</sup> *Id.* at 689.

<sup>58</sup> *Id.* at 689-90 (emphasis added).

that the "crucial determinant" was the agreement's "relative impact on the product market and the interest of union members."<sup>59</sup> In contrast, Justices Goldberg, Harlan, and Stewart concluded that the antitrust laws do not apply to any results of collective bargaining concerning subjects -- wages, hours, and working conditions -- about which labor law requires labor and management to bargain.<sup>60</sup>

In constructing a coherent theory of the labor exemption, a major question to answer is why competition policy concerns ought to give way, and what labor law policies are being effectuated, by the withdrawal of antitrust oversight. If, as many believe, public regarding statutes like the Sherman Act and the National Labor Relations Act should be construed in the public interest, we might ask what the public is gaining in return for enduring agreements that antitrust analysis would find to unreasonably harm consumers.

Consider the classic case that comes within the scope of the labor exemption:<sup>61</sup> employers and unions in an oligopolistic

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<sup>59</sup> *Id.* at 690 n.5.

<sup>60</sup> The opinion, explaining these Justices views on both *Jewel Tea* and a companion case, is found in *United Mine Workers v. Pennington*, 381 U.S. 676, 731 (1965).

<sup>61</sup> Cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1378 (William N. Eskridge, Jr. & Philip Frickey eds. 1994). In their landmark work, Hart and

industry agree to a new wage scale featuring significant wage increases for workers. Because of the union's ability to eliminate competition in the labor market, consumers are going to pay more for the product. Why would Congress want to protect this activity?

In enacting the National Labor Relations Act, Congress sought to achieve four goals: reducing industrial strife, restoring mass purchasing power by improving workers' economic condition, promoting fairer distribution of resources through equalizing bargaining power between employers and workers, and furthering self-government by employees.<sup>62</sup> Its chosen method of achieving those goals was to permit workers to join together to

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Sacks advocate interpreting statutes by considering "instances of unquestioned application of the statute." The purposes "necessarily implied in them illuminate facets of the general purpose" underlying the statutory scheme. Justice Breyer, in his own general analysis of statutory interpretation, has advocated an approach quite similar to that employed by Hart and Sacks, under whom he studied at Harvard. Stephen Breyer, *On Uses of Legislative History in Interpreting Statutes*, 65 So. CAL. L. REV. 845 (1992).

<sup>62</sup> See James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 No. CAR. L. REV. 939, 950 (1996). Cf. 29 U.S.C. § 151 (1994) (congressional finding that inequality of bargaining power burdens commerce, aggravates economic depressions, and actually prevents "the stabilization of competitive wage rates and working conditions within and between industries").

eliminate competition in the labor market. Although some recent economic work has suggested that harmonious collective bargaining actually produces efficiencies that might, in a competitive market, be passed on to consumers,<sup>63</sup> the NLRA reflects the obvious congressional judgment that Americans as a whole were better off paying a bit more for products in return for greater certainty that production would not be disrupted by strikes, in return for superior macroeconomic results, and that American voters-as-workers (workers who benefit either directly by union membership or indirectly through non-union wages set in the shadow of the union scale) were as important to members of Congress as American voters-as-consumers.

Now consider the classic case that would not come within the labor exemption: a multi-employer bargaining group agrees on a generous new wage scale with a union and incorporates in the collective bargaining agreement a provision that the new wages will be recouped by an across-the-board price increase to consumers. In his now-sanctified separate opinion in *Pennington/Jewel Tea*, Justice Goldberg explained why such an agreement would not be exempt. He distinguished an earlier case finding conduct non-exempt, noting that the precedent had reaffirmed the doctrine that the labor exemption should not turn on a judicial judgment concerning the legitimacy of the particular union activity

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<sup>63</sup> Kenneth Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419 (1992).

involved, but rather involved two key elements:

(1) union participating in price fixing and market allocation, with the only union interest being the indirect prospect that these anticompetitive devices might increase employers' profits which might then trickle down to the employees, (2) accomplished by the union's joining a combination or conspiracy of the employers.<sup>64</sup>

In other words, the *reconciliation* of antitrust and labor policies which are required by sound principles of interpretation required a recognition that congressional goals in the NLRA had limits. Despite the obvious benefits to reduced industrial strife if unions and employers could agree to collective bargains including cartel pricing, there is a consensus that improving workers conditions by allowing employers to exploit consumers and agree to share a sufficient amount of the monopoly profits with workers to gain their acquiescence in a collective bargaining agreement is not acceptable.

This consensus is eminently sensible. Given disparities in bargaining power that remain even after workers are allowed to

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<sup>64</sup> 381 U.S. at 707 (discussing *Allen Bradley Co. v. IBEW*, 325 U.S. 797 (1945)).



limit labor market competition among themselves, there are innumerable scenarios where anti-consumer schemes could be implemented with token concessions to workers that fail to provide any meaningful improvement in the economic conditions of ordinary workers. American voters-as-consumers would reasonably be unwilling to pay more or get less in the product market where so little was being provided to American voters-as-workers.<sup>65</sup>

The difficult question, then, is whether an anti-consumer, employer restraint, that has not been agreed to by a union, is more like the first or the second case. Some would argue that the critical distinction is whether the challenged employer agreement relates to mandatory subjects of bargaining under the labor law. We suggest this is not the right question, for several reasons.

Significantly, in Justice Goldberg's sound explanation for why antitrust liability was correctly imposed on unions and employers in the earlier *Allen Bradley* case, he did not mention the fact that the defendants were not obliged to negotiate about the challenged boycotts under the NLRA. His focus was rather more properly on how -- per the Court's earlier decision in

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<sup>65</sup> Cf. Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63-, 74-94 (1990) (democratic government with one person/ one vote and vote-selling prohibited presupposes that society's law will maximize wealth for the majority).

*United States v. Hutchinson*<sup>66</sup> -- the union was not acting in its self-interest other than by indirectly benefiting from monopoly profits. The ultimate question should be whether the trade restraint facilitates the purposes of the NLRA. In this regard, the NFL's restraint challenged in *Brown* falls on the non-exempt side of the line. It does not minimize industrial strife to deprive unions of an antitrust claim, leaving them the options of striking or decertifying. Obviously, allowing employers to impose a restraint over union objections does little to further workers' economic conditions, in either the micro- or macroeconomic sense, or to promote worker self-governance. In light of the harm to sports fans detailed in Part II of this Article, it is difficult to see what American voters-as-sports fan/consumers are receiving in return.

Although a balancing of sometime conflicting statutory policies may best effectuate congressional purposes, such a balancing can be difficult. Using the mandatory subject of bargaining line may appear to have the practical attraction of simplicity, notwithstanding its difficulties as a matter of purposive interpretation. These practical problems, however, are significantly less in the special arena of sports. A typical industrial employer is told (by the Antitrust Division) that it must not agree with rivals on wages, but then told (by the NLRB) that it may agree with rivals on wages in the context of multi-

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<sup>66</sup> 312 U.S. 219, 232 (1941).

employer collective bargaining, and must in any event discuss these wages with its workers' representatives. However, the employer is unambiguously instructed (by both the Antitrust Division and the NLRB) that it should not discuss prices with its rivals or the union. In contrast, sports team owners are told (by the Antitrust Division) that it may agree with rival owners on many things, including wages, as long as restraints can be justified as promoting a legitimate pro-consumer goal like competitive balance. Thus, the need to withdraw antitrust protection to avoid the possibility of conflicting mandates from different statutes does not apply in the sports context. As noted above,<sup>67</sup> the rule of reason treatment afforded to sports leagues provides a practical solution for team owners if an impasse is reached in bargaining with a players' union -- both labor and antitrust laws permit them to impose (without union consent) an agreement that is reasonable under the antitrust laws.

The significance and value of the distinctions drawn in labor law between mandatory and permissive subjects of bargaining is also open to question. The labor law doctrine applies equally to multi-employer and single employer bargaining. In the latter case, where competition policy concerns are not present, it is not clear why a firm should not be required in some instances to bargain with its union about prices. For example, if Boeing

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<sup>67</sup> See text accompanying notes 25-31 *supra*.

seeks to lower its machinists wages, it must negotiate with the union. If Boeing claims it is going broke, the obligation to bargain in good faith requires them to open their books to the union.<sup>68</sup> On the other hand, if Boeing instead seeks to make its wage concession offer more attractive by promising bonuses based on future firm profitability, it is under no obligation to provide the union with information to assure the union that management will prudently run the business so that profits will be realized. It is unclear why this should be so.

In addition to doctrinal difficulties with drawing the mandatory subject of bargaining line to include wages but exclude any product market decisions by management, it is clear that the practicalities of collective bargaining blur this line even further. Labor law permits parties to propose terms relating to nonmandatory subjects of bargaining, and indeed may use these proposals as a bargaining chip to be traded against concessions on mandatory subjects, so long as the party does not insist upon agreement on nonmandatory subjects as the sole price of an agreement.<sup>69</sup> Steelworkers Union officials often maintained that the distinction made little sense because the union could easily table a proposal concerning a nonmandatory subject and, when

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<sup>68</sup> N. L. R. B. v. Truitt Manufacturing Co., 351 U.S. 149 (1956); Silverman v. Major League Baseball Player Relations Comm., 516 F. Supp. 588 (S.D.N.Y. 1981).

<sup>69</sup> Oil, Chemical and Atomic Workers v. NLRB, 405 F.2d 1111 (D.C. Cir. 1968).

employer negotiators responded that they were not required to discuss the proposal, the union could respond by offering as an alternative a enormous and unattractive wage increase.<sup>70</sup>

The NFL provides another example of this blurred distinction. A key element in determining wages for NFL players under their current collective bargaining agreement is the amount of designated revenue earned by NFL owners. Although technically the owners did not have to negotiate about their television marketing plans, in fact the NFL players would never have agreed to base wages on a percentage of revenue without assurances that the league would maximize its revenue base.

As two leading labor law scholars have observed, the line between mandatory and non-mandatory subjects of bargaining is uncertain.<sup>71</sup> Even purely within the context of labor law, the distinction serves several purposes: to determine those subjects with regard to which the employer must (1) meet and discuss, (2) bargain with the union before acting, and (3) bargain to impasse with the union before implementing an offer. These scholars question the use of single test for these varying labor

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<sup>70</sup> See 11 N.Y.U. J. SOC. CHANGE 136 (1982-83) (response of David Feller in colloquium, "The Labor Movement at the Crossroads").

<sup>71</sup> David E. Feller & Matthew W. Finkin, *Legislative Issues in Faculty Collective Bargaining*, in FACULTY BARGAINING IN PUBLIC HIGHER EDUCATION 118 (Carnegie Council on Policy Studies in Higher Education 1977).

purposes.<sup>72</sup> It is even more difficult to imagine why a test devised for the distinctive purpose of determining obligations of employers vis-a-vis workers ought to serve as a bright-line rule for accomodating consumer interests in labor relations agreements that may result lower product quality.

Another view, drawn from Justice Goldberg's opinion in *Pennington/Jewel Tea*, is that antitrust liability ought not attach to unions or employers because antitrust courts have a shameful history of interference with legitimate collective bargaining activity based on a judges own notions of whether conduct was socially or economically objectionable.<sup>73</sup> However, this view is almost entirely drawn from cases imposing liability on unions. Justice Goldberg wrote that "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws," and explicitly noted that this rule "flows directly" from the settled rule that

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<sup>72</sup> *Id.*

<sup>73</sup> 381 U.S. at 700, 719.

A similar view, tentatively raised by Professor Gary Roberts at the symposium, is that the Norris-LaGuardia Act reflects a congressional policy decision to completely withdraw federal court jurisdiction over any labor dispute, for any reason other than the narrow violence-related exception provided for in that Act. The implication of this broad suggestion deserves serious further consideration.

"a union, in the interests of its members, and not acting to fix prices or allocate markets in aid of an employer conspiracy to accomplish these objects, with only indirect union benefits, is not subject to the antitrust laws.<sup>74</sup> Determining whether employer restraints of trade are reasonable, either in labor or other markets, has not raised the same sorts of problems.

These observations suggest that Justice Breyer was correct about one thing in *Brown*: there is no "obvious answer" to these problems.<sup>75</sup> Although an optimal answer is elusive, wrong answers are still apparent. Neither Congress' clear determination that labor law issues be resolved by the NLRB and not the courts, nor the fact that professional athletes may have more bargaining power than their industrial counterparts, provides the answer to consumers whose interest in having their favorite team have a reasonable chance of contending for the championship every few years has been sacrificed, for no articulated benefit to the public interest.

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<sup>74</sup> *Id.* at 710 (emphasis added) (citing *United States v. Hutchinson*, 312 U.S. at 232).

<sup>75</sup> 116 S.Ct. at 2123.