PennState Law

Penn State Law eLibrary

Journal Articles

Faculty Works

1997

# The Misunderstood Alliance between Sports Fans, Players, and the Antitrust Laws

Stephen F. Ross
*Penn State Law*

Follow this and additional works at: http://elibrary.law.psu.edu/fac_works

Part of the Antitrust and Trade Regulation Commons, and the Entertainment, Arts, and Sports Law Commons

Recommended Citation

Stephen F. Ross, *The Misunderstood Alliance between Sports Fans, Players, and the Antitrust Laws*, 1997 *U. Ill. L. Rev.* 519 (1997).

This Article is brought to you for free and open access by the Faculty Works at Penn State Law eLibrary. It has been accepted for inclusion in Journal Articles by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

# THE MISUNDERSTOOD ALLIANCE BETWEEN SPORTS FANS, PLAYERS, AND THE ANTITRUST LAWS

*Stephen F. Ross**

*The baseball strike and the ongoing hostilities between the players' association and owners have evoked criticism and frustration among fans and others. Although the players successfully defeated the owners' most recent attempts to reduce major league competition, the threat of future imposition of competitive restraints by the owners remains. In this article, Professor Stephen F. Ross argues that blanket restraints on the market for players affirmatively inhibit on-the-field competition and consequently offend the Sherman Act.*

*The article begins with the proposition that monopsony—price-fixing behavior by buyers', rather than sellers', cartels—implicates the Sherman Act. Restraints on competition for players' services are thus not exempt from the antitrust laws. As the author notes, restraints of trade imposed by sports leagues are subject to antitrust scrutiny under a rule of reason: under the standard set forth in* NCAA v. Board of Regents, *such restraints are permissible where reasonably tailored to promote competitive balance.*

*Professor Ross then applies the* NCAA *standard to blanket restraints imposed by sports leagues. He first demonstrates that the waiver rule employed by some leagues is tailored to promote league competition, because it allows inferior teams with large payrolls to rapidly improve in the standings by acquiring superior players. To counter the owners' arguments that restraints such as salary caps are necessary to maintain league competition, Professor Ross relies on empirical evidence of the effect of these restraints on competitive balance and demonstrates that, in addition to not promoting competition, blanket restraints affirmatively harm competitive balance. Salary caps, the author argues, not only transfer wealth from players to owners, but facilitate bland, uninteresting seasons in which the same teams have consistently good or bad win-loss records.*

---

* *Professor of Law, University of Illinois. B.A. 1976, J.D. 1979, University of California (Berkeley).* *Subject to the usual disclaimers, the author thanks Lee Goldman, Kit Kinports, Bob Lucke, Roger Noll, Tom Ross, Jack Sidorov, and Andrew Zimbalist for helpful comments.*

*The article includes a discussion of less restrictive means of promoting competitive balance, including revenue sharing and progressive salary caps, which might pass antitrust muster. Professor Ross concludes that free competition in the player market protects the interests of both fans and players, such that an alliance of consumers and players might be an effective way to combat the threat to baseball which blanket restraints may pose in the future.*

## I. INTRODUCTION

One of the ironies of modern sports law is that baseball—which has been held to be an "anomaly," uniquely exempt from the Sherman Act's prohibition on unreasonable restraints of trade[1]—has fewer restraints on competition for players than other major professional sports leagues. This anomaly is in turn the result of another irony—although unions are usually created in order to *reduce* competition in the labor market and thereby enhance the workers' bargaining power, the Major League Baseball Players' Association has been successful in forcing owners to *increase* competition. Last fall, a devastating labor dispute that caused the unprecedented cancellation of the 1994 World Series was resolved with an agreement that will sustain the union's demand for preserving effective competition in the labor market.[2]

This is not the first time the union had fought *against* labor market restraints. Over a century ago, baseball's owners created a completely restrictive system—the reserve clause—that prohibited any competition for players' services. After the Supreme Court reaffirmed baseball's antitrust exemption and thereby rejected the courageous effort of star outfielder Curt Flood—financed by the players' union—to invalidate the reserve clause under the Sherman Act, the union achieved the same result in a contract arbitration case that per-

1. *See* Flood v. Kuhn, 407 U.S. 258, 282 (1972). The Sherman Act, 15 U.S.C. § 1 (1988), makes unlawful every contract, combination, or conspiracy in restraint of trade.

2. The framework for significant competition for player services, where players with more than six years of major league service face no restrictions on competing offers, is retained. The tentative agreement implements a "luxury tax" on five teams with very high payrolls. Teams who spend more than designated amounts each year must pay a tax of approximately 35% on the excess ($51 million is the threshold for the first year). The tax would not be in effect for the last one or two years of the collective bargaining agreement. The agreement also would phase in significant revenue sharing. *See* Bob Nightengale, *Peace at Last*, L.A. TIMES, Nov. 27, 1996, at C1. The revenue-sharing plan would allocate proceeds from a modest tax (ranging from 2.5-5%) on all players' salaries to poorer teams, as well as a portion of local broadcast revenues currently retained exclusively by each club, to low-revenue teams. *See* Murray Chass, *Team Owners Approve Revenue-Sharing Plan*, N.Y. TIMES, Mar. 22, 1996, at B10.

Even before the plan was ratified, an example of its effect was the signing by the cash-poor Minnesota Twins of all-star second baseman Chuck Knoblauch to a multimillion-dollar long-term contract. The signing would not have been possible were the Twins not expecting to be the beneficiaries of the subsidies available in the new revenue-sharing plan. *See* Mark Maske, *Selig Has Votes for Deal*, WASH. POST, Aug. 25, 1996, at D10.

mitted a player to negotiate with other teams after a one-year option at the expiration of his contract.[3]

Baseball's most recent labor battle centered on the owners' attempts to join their football and basketball colleagues in establishing either a leaguewide "salary cap," a complex mechanism that limits the total amount each team can spend on players' salaries,[4] or a punitive "luxury tax" on teams with above average payrolls.[5] Both a salary cap and a luxury tax, like an outright ban on competition for players, inhibit a team from outbidding its rivals for a player even though the player will be more valuable to that team. A critical aspect of all these schemes (hereinafter referred to collectively as "blanket restraints") is that they apply to all teams, regardless of their past performance on the field, court, or ice. Although the recent tentative baseball agreement does contain a luxury tax, it is designed so as to affect only a handful of clubs each year.[6] Therefore, most teams—and importantly, almost all the clubs with inferior records[7]—will retain the ability to substantially increase their payrolls so as to improve the quality of their teams.

Baseball fans are obviously happy that labor peace finally has been achieved for the National Pastime. Too often, however, the public has equated a union's success with a complete disregard for the interests of fans—as if greedy players and owners were involved in a

3. *See* 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).

4. Although the details of each league's salary cap differ, for antitrust purposes the salient elements of these schemes can be briefly summarized. Each league commits to pay its players a specific percentage of "designated gross revenue," revenue that the league and its member teams receive from a variety of specified sources, including live gate, broadcast rights, and licensing rights. The commitment is intended to be both a floor and a cap on player personnel expenses. Based on the league's overall revenue figures for the prior year, the league sets the salary cap for the coming year. NFL rules require, and NBA rules encourage, clubs with low payrolls to increase their expenditures to ensure that the agreed-upon percentage of gross revenue is indeed spent on player salaries.

The National Hockey League (NHL) does not use a salary cap. Although the NHL has modified the restraint historically employed by sports leagues (a complete prohibition on any team's bidding for the services of a player who was previously employed by a rival club), unrestricted competition exists only for a minority of veteran players with extensive league service. Players with less seniority may receive competitive bids, but teams other than the one for whom the player previously contracted to play must "compensate" the prior employer with a player from its existing roster and/or a draft choice. This requirement substantially inhibits competitive bids for these players.

5. *See* Murray Chass, *Baseball Talks Are Collapsing as Impasse Nears*, N.Y. TIMES, Dec. 22, 1994, at B13, B17.

6. *See* Nightengale, *supra* note 2, at C1.

7. Next year, for example, the five teams subject to the luxury tax are the New York Yankees, Baltimore Orioles, Atlanta Braves, Cleveland Indians, and Chicago White Sox. *See* Andrew Brandt, *The Business of Sports* (last visited Apr. 1, 1997) <http://www.bizsports.com/mlb.html> (hard copy on file with the *University of Illinois Law Review*). The first four were playoff teams; the White Sox finished in second place in the American League's Central Division with an 85-77 record. *See* Mike Kiley, *New Faces Joining Old in Playoffs*, CHI. TRIB., Sept. 30, 1996, Sports at 1; Paul Sullivan, *Twins 5, White Sox 4 Ending Is Just a Beginning for Sox Personnel*, CHI. TRIB., Sept. 30, 1996, Sports at 3.

messy food fight over their respective slices of the pie, resulting in no dessert for the rest of us. This article offers an alternative view: that the owners' attempts to restrain trade not only increase their share of the pie, but also make the pie blander and less tasty. By contrast, the players' fight to preserve competition permits mediocre teams to improve and results in more exciting championship races. The recent unprecedented success of two expansion teams in the National Football League, who, given the opportunity to sign free agents never before offered to expansion teams, propelled themselves into the conference championship games in only their second year of play, represents another well-publicized example of why blanket restraints are bad for fans.[8] In short, the Justice Department's Antitrust Division should consider conferring its annual John Sherman award posthumously on Curt Flood, and concurrently on Donald Fehr, the head of the players' union, because the players' efforts closely resemble the outcome that should result from antitrust scrutiny of the owners' efforts to restrain trade.

Were rivals in most other industries to impose similar restraints, they would be harshly punished under the antitrust laws. However, because of the unique interdependence of the teams comprising a sports league, the law generally requires a more careful competitive inquiry in the sports context. Applying the relevant antitrust principles, such an inquiry should conclude that a blanket restraint is illegal, unless it is protected from antitrust scrutiny because of judicial precedents finding previously challenged baseball practices to be exempt from the antitrust laws[9] or because of the blanket restraint's relationship to collective bargaining with a players' union.[10] With these cave-

8. *See* John Helyar, *Free Agency Proves to Be the Cat's Meow for Jags and Panthers*, WALL ST. J., Jan. 10, 1997, at A1.

9. For a discussion of why these precedents would no longer preclude antitrust scrutiny of blanket player restraints, see Stephen F. Ross, *Reconsidering* Flood v. Kuhn, 12 U. MIAMI J. SPORTS & ENT. L. 169 (1995). That article suggests that *Flood*'s unwillingness to subject baseball to antitrust scrutiny was primarily based on the Court's opinion that antitrust doctrines were not sufficiently flexible to deal with baseball's unique needs and, specifically, that significant restraints on competition for players was absolutely essential for the National Pastime to survive. *See id.* at 174. Both of these two conceptual underpinnings are demonstrably untrue today, and thus current jurisprudence concerning the application of stare decisis to statutory interpretation cases, such as *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-75 (1989), suggests that *Flood* warrants overruling.

10. Section 6 of the Clayton Act, 15 U.S.C. § 17 (1994), exempts labor union activity from antitrust scrutiny. In *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965), the Supreme Court implied a "nonstatutory" antitrust exemption for employers whose collective bargaining agreement with a labor union was challenged under the antitrust laws. In the sports context, *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), and *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-98 (6th Cir. 1979), established the proposition that restraints among rival teams incorporated into a collective bargaining agreement that resulted from bona fide arms' length negotiation with the players was exempt from antitrust scrutiny. Last Term, in *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2123-24 (1996), the Supreme Court held that the nonstatutory exemption also protected agreements among owners that had *not* been agreed to by the union, so long as the owners' agreement took place in the context of lawful collective bargaining.

ats, blanket restraints run afoul of the antitrust doctrine that governs restrictions on competition imposed in any industry where rivals have a legitimate reason to combine forces for some economic purpose: they are more restrictive than reasonably necessary to accomplish a sports league's legitimate goals.

Specifically, this article suggests that blanket restraints have a fundamental flaw that puts them in violation of the Sherman Act's prohibition on unreasonable restraints of trade. Their justification—indeed, the only justification courts have found to support the unique sort of trade restraints agreed to by sports league owners—is that they promote competitive balance among the league's teams and thereby increase consumer demand for, and enjoyment of, the product. However, because these restraints apply indistinguishably to good and bad teams, they do not improve competitive balance, certainly not when compared to an obvious alternative that would limit the restraint to franchises with superior rosters, as measured by previous records.[11] Indeed, by restraining teams with inferior rosters, blanket restraints affirmatively *harm* competitive balance.

Although the new baseball agreement does not, as suggested here, directly tailor the luxury tax to promote competitive balance, it achieves a decent second best. By increasing the ability and incentive of financially poorer teams to improve through revenue sharing and rules designed to encourage low-payroll clubs to spend more, and by limiting only a few of the teams with the highest payrolls (most, but not necessarily all, of whom have superior players), the players' union has preserved a market that at least resembles the sort of market that would exist if the owners' efforts had been challenged by the Federal Trade Commission rather than the players.

Public and judicial acceptance of this player-fan-antitrust alliance remains important in the wake of baseball's labor controversy. Judicial recognition that a salary cap would violate the Sherman Act will give all professional athletes an incentive to counter owner demands that blanket restraints be included in the collective bargaining agreements with threats to decertify their union and their collective bargaining relationship in the future, thus depriving owners of a claim for exemption from antitrust scrutiny.[12] In addition, a conclusion that

11. Under the analysis used in this article, the amateur drafts used by each major sports league are *not* "blanket restraints," but are tailored restrictions that allow teams to obtain exclusive negotiating rights to amateurs using a selection process that advantages teams with inferior win-loss records. The legality of these drafts is complicated, because the competition-balancing effect of a draft applied to the top 30 rookies each year may be quite different than the effect of a multiple round draft, and requires a sufficiently detailed and distinct analysis from that appropriate for salary caps and other blanket restraints as to be beyond the scope of this article.

12. Indeed, this is precisely what NFL players did a few years ago. *Compare* Powell v. NFL, 888 F.2d 559, 568, *superseded by* 930 F.2d 1293, 1303-04 (8th Cir. 1989) (holding that NFL restraint is exempt from antitrust attack, even though not part of a collective bargaining agreement, because an ongoing collective bargaining relationship existed between owners and players'

blanket restraints are illegal will influence how courts respond to antitrust challenges to future owner conduct that harms competition and jeopardizes the sport, if the plaintiffs were consumers or the government rather than organized players.[13]

Part II of this article first develops the argument that the Sherman Act permits owners to agree with each other, even to the point of restraining competition, but only to the extent that they can justify their restraints as reasonably necessary to achieve legitimate, procompetitive goals.[14] Part II then demonstrates that the only legitimate goal that can justify restraining competition for players' services is the need to increase on-the-field balance between competing teams.[15] Part III applies this legal standard to the blanket restraints currently imposed by the major North American sports leagues.[16] First, the waiver rule, a restraint that is used in some form by each league and that *is* tailored to promote competitive balance, is discussed briefly and contrasted with blanket restraints. Next, empirical evidence concerning restraints and competitive balance is marshalled to demonstrate not only that blanket restraints do not increase competitive balance but, indeed, that these restraints affirmatively *reduce* competitive balance. Finally, reasonable alternatives to improve competitive balance are analyzed.[17]

## II. The Relevant Antitrust Constraints on Sports Leagues

Both sports fans and players must look to the Sherman Act as the principal source of competition law[18] relevant to restraints of trade

union), *with* Powell v. NFL, 764 F. Supp. 1351, 1358-59 (D. Minn. 1991) (holding that decertification of NFL Players Association stripped owners of labor exemption and permitted antitrust challenge), *and* White v. NFL, 822 F. Supp. 1389, 1412-16, 1435-36 (D. Minn. 1993) (describing settlement of antitrust litigation after jury verdict against NFL and noting resumption of collective bargaining between NFL and players' union), *aff'd*, 41 F.3d 402 (8th Cir. 1994). Although the NBA players recently ratified a new collective bargaining agreement with the league, they did so only after an unsuccessful effort to decertify the union and challenge the NBA's salary cap under the antitrust laws, which led to further management concessions. *See* Clifton Brown, *N.B.A. and Players Union Reach Agreement*, N.Y. Times, June 29, 1996, at A27.

13. Every recent challenge to a sports league's player restraint has come from a player represented by a union and has alleged that the unreasonable restraint occurred in the labor market. In *Jewel Tea*, 381 U.S. at 690 n.5, the Court held that antitrust liability depends on consideration of a restraint's "relative impact on the product market and the interests of union members." A consumer challenge to a restraint that had a significant effect on the product market, no benefits for union members, and no general benefits derived from the industrial peace that comes with a collective bargaining agreement seems to raise significantly different issues than those raised in *Brown*, where the alleged anticompetitive effect was in the labor market.

14. *See infra* notes 29-71 and accompanying text.

15. *See infra* notes 72-135 and accompanying text.

16. *See infra* notes 171-80 and accompanying text.

17. *See infra* notes 181-275 and accompanying text.

18. This article examines only the substantive legal constraints on sports owners' ability to agree to restrain competition among themselves for players' services. The procedures the own-

among rival teams.[19] Despite the Sherman Act's broad prohibition of all contracts, combinations, or conspiracies in restraint of trade, the Supreme Court has construed the statute to prohibit only unreasonable restraints of trade.[20] In *National Collegiate Athletic Ass'n v. Board of Regents* (*NCAA*),[21] the Supreme Court set forth the standard that governs sports league trade restraints. The Court noted that the antitrust laws have traditionally presumed that certain types of agreements among competitors are unreasonable, yet have recognized that competing sports teams must agree among themselves on a host of issues in order for the product to exist at all. Thus, sports league rules are not "per se illegal," but are subject to antitrust scrutiny under a "rule of reason."[22] According to *NCAA*, the "essential inquiry" is "whether or not the challenged restraint enhances competition."[23]

Where the plaintiff establishes that the defendant has significantly restrained competition—where individual competitors have lost their freedom to compete, the restraint has had a clear effect on price, and, most significantly, where price has not been responsive to consumer preferences—the defendant then has the "heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market."[24] *NCAA* therefore requires that sports leagues present a procompetitive justification for their agreements. As detailed below, the only such rationale that can properly justify significant restraints on competition in the player market is the need to maintain competitive balance among the league's teams.

*NCAA* also reflects the long tradition in antitrust law that proscribes overly restrictive agreements among rivals, even when they have legitimate reasons to combine their economic activities. Players

---

ers use to implement their agreement could give rise to liability under labor law. *See, e.g.*, Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 250 (S.D.N.Y.), *aff'd*, 67 F.3d 1054 (2d. Cir. 1995). But American labor law generally does not constrain the substance of the restrictions imposed by owners. *Cf.* Sulkowicz v. Parramatta Dist. Rugby League Club (Indus. Comm'n of New South Wales) (May 31, 1983) (applying the Industrial Arbitration Act 1940 (N.S.W.) § 88f(1), which gives the Industrial Court wide powers to set aside a contract judged to be "unfair, harsh, or unconscionable," to void an overly restrictive player contract), *cited in* G.M. KELLY, SPORT AND THE LAW: AN AUSTRALIAN PERSPECTIVE 291-92 (1987).

19. Because the rules of interstate sports leagues must necessarily be uniform, courts have precluded application of state antitrust law or common law to sports league restraints. *See* Flood v. Kuhn, 407 U.S. 258, 284-85 (1972); Partee v. San Diego Chargers Football Co., 668 P.2d 674, 679 (Cal. 1983); State v. Milwaukee Braves, Inc., 144 N.W.2d 1, 17 (Wis. 1996). The common law of restraint of trade is a creation of state law, and there is no mechanism for uniform federal review of common-law decisions. *See* Murdock v. City of Memphis, 87 U.S. 590, 626 (1875) (stating that "[s]tate courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise").

20. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

21. 468 U.S. 85 (1984).

22. *Id.* at 100-03.

23. *Id.* at 104.

24. *Id.* at 107-13, 110.

and fans are allies in enforcing this antitrust tradition. As a whole, players benefit if reasonable restrictions result in a better product that produces more revenue, especially where the labor market is sufficiently unrestrained so that owners will devote much of the increased revenue to higher salaries. Fans benefit because overly broad restrictions diminish the quality of the product. These restraints frustrate supporters of teams with inferior talent, who want their teams to improve quickly, and sports fans generally respond more favorably to exciting seasons where teams are balanced competitively.[25]

Before turning to the substantive antitrust doctrine applicable to sports leagues, subpart A below first considers and rejects the contention made by sports leagues and their academic sympathizers that the Sherman Act has no application to player restraints because the federal antitrust laws are concerned solely with restraints on the supply of goods and services to consumers.[26] Not only is such an argument contrary to precedent, but it is factually flawed because, as will be more fully developed in part III, blanket restraints on player competition do, in fact, reduce the quality of the game viewed by sports fans. Subpart B then proceeds to explain how the Supreme Court's antitrust standard for sports leagues, established in the *NCAA* case, applies to player restraints.[27] Specifically, I conclude that sports leagues imposing significant restraints on competition must demonstrate that their restraints are reasonably necessary to enhance competitive balance on the field, and I explain why other plausible justifications for such restraints are not entitled to recognition under the antitrust laws. Finally, subpart C briefly weighs in on the long-running academic dispute as to whether sports leagues are economically integrated "single entities," like corporations or partnerships, that are not even subject to section 1 of the Sherman Act.[28]

---

25. *See infra* note 81. In contrast, the luxury tax agreed to by baseball owners last fall is set at a level so that it affects only a handful of teams. In fact, it is unlikely to result in a significant restraint on rival clubs' willingness and ability to compete for player services and thus would not appear to pose antitrust problems. Similarly, if the detailed rules adopted by a league to implement its cap/tax were so riddled with loopholes that they did not substantially limit teams with high payrolls from competing aggressively for veteran star players, an antitrust plaintiff would fail to establish a prima facie case and the league would not be required to provide any justification.

There has been early speculation that the current NBA salary cap may fall within the latter category, but the substantial number of free agents who were signed by new teams this summer does not necessarily support that conclusion. Although veteran players usually sign multiyear contracts, a record number of basketball stars saw their contracts expire at the conclusion of the 1995-96 season. The new collective bargaining agreement tightened some previously discovered loopholes in the salary cap, but in return the owners agreed to a more generous formula for computing the cap, so that each team was permitted to spend significantly more money in 1996 than in 1995. Thus, it would be premature to conclude that the NBA salary cap will not work as a significant limitation on a team's ability to pursue needed free agents in future years.

26. *See infra* notes 29-71 and accompanying text.

27. *See infra* notes 72-135 and accompanying text.

28. *See infra* notes 136-70 and accompanying text.

### A. *The Sherman Act's Applicability to Restraints in the Labor Market*

*NCAA* dealt with an agreement among college football teams that restrained competition in the sale of television rights. The blanket restraints addressed in this article involve agreements restraining competition in the purchase of players' services. Some defenders of anticompetitive sports league practices have suggested that the *NCAA* formulation is inapplicable to these blanket restraints, because the Sherman Act is limited to restraints harming consumers, and blanket restraints restrain trade solely in labor markets.[29] This argument is unpersuasive for a number of reasons. First, the premise is flawed because blanket restraints *do* harm consumers. As precedent and economic theory suggest, any salary restraint will necessarily have a long-run effect on the quantity, quality, and distribution of athletes offering their services in a particular sport. As detailed in part III below, the particular restraints that have been adopted or sought by the major professional sports leagues owners all contain objectionable features that directly diminish the fans' enjoyment of their chosen spectator sport. Second, the argument is legally incorrect, for the Sherman Act has a broad scope that covers any unjustified restraint on competition, even if the restraint does not demonstrably harm consumers or reduce output. Narrowing the Sherman Act's scope to output-reducing restraints that directly affect consumers is inconsistent with the Act's legislative history and a sound interpretation of Congress's intent.

The argument that the Sherman Act does not apply to restraints on competition for players' services is premised on the notion that, unlike most goods and services in our economy, teams that together possess monopsony power[30] may drive down the wages paid, but not the number of players who will participate in major league sports. In their book *Monopsony*, Professors Roger Blair and Jeffrey Harrison concede that, because "[l]abor is an extremely perishable commodity—an hour not worked today can never be recovered"—and because "high-quality professional athletes are so scarce that their wages as athletes generally are well above their next most lucrative endeavor," restraints in the labor market are unlikely to significantly affect the supply of players (or, in economic terms, the "supply curve"

---

29. *See, e.g.*, Brief for Respondents, Brown v. Pro Football, Inc., 116 S. Ct. 2116 (1996) (No. 95-388); Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 26 (1971); Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 34-58 (1986).

30. Monopsony occurs when there is a single buyer of a specified good or service. *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY 3 (1993).

for athletes is highly "inelastic").[31] Nevertheless, Blair and Harrison conclude that "collusion creates expectations that have long-run significance."[32] In fact, economic theory, common sense, and a comparison of current players with their counterparts from earlier years suggest that the higher salaries commanded in today's less restrained market affect players' training (especially in the off-season), their longevity in the game, and, over time, the decisions gifted athletes make in choosing the sport in which to concentrate their efforts.[33]

Moreover, collusion among buyers that disturbs the operation of a free market in nonfungible goods and services is likely to have another effect on consumers: the objects of the cartel (in this case, the players) will probably not be allocated efficiently among the buyers (the teams). If the market is not allocating input, someone else is doing so, likely in an inefficient way. For a nonsports example, consider the cases involving motion picture "splits," a practice whereby competing theater operators agree among themselves to grant exclusive negotiation rights for the licensing of particular movies and which the courts often condemn as per se violations of the Sherman Act.[34] Whatever the short- or long-term effects on the production of movies, another effect is that the theater best-suited to feature a particular movie will not necessarily be the one receiving the license from the

31. *Id.* at 72. Because there are no realistic alternatives for skilled baseball, football, basketball, and hockey players other than Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League, respectively, these leagues are monopsonists where the owners agree among themselves to limit competition for player services.

32. *Id.*

33. A typical athlete's reservation price, the minimum salary he will accept with no costly effort, is probably lower than an artificially reduced salary paid under a blanket restraint, because his marketability in a nonsports job is usually much lower than as a professional athlete. This fact explains the conventional wisdom underlying the argument that player restraints do not affect output—that a wage significantly less than one available in a free market will attract the same number of players. This "wisdom" fails to recognize that a professional athlete's performance on the field, court, or ice is a function of both ability and effort. Players with below-average natural ability who are capable of significant improvement if they expend sufficient effort have less reason to do so if the economic incentives are artificially reduced. I thank Roger Noll for these insights.

The converse of this insight, of course, is that the high salaries provided by unrestricted competition for player services will lead some young men with insufficient natural ability to waste incredible effort in an unsuccessful attempt to play major league sports, a result with profound and adverse social implications. The antitrust laws, however, do not permit private institutions like sports leagues to justify restraints of trade on the ground that competition leads to socially undesirable results. *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695-96 (1978). In any event, it is not clear that the public policy that best inhibits an overemphasis on athletics among teenage boys is one that simply allows incredibly wealthy team owners to exploit the few boys who develop into men with the talent to actually play at the professional level.

34. *See, e.g.*, Harkins Amusement Enters. v. General Cinema Corp., 850 F.2d 477, 486 (9th Cir. 1988); United States v. Capitol Serv., Inc., 568 F. Supp. 134, 148-55 (E.D. Wis. 1983), *aff'd*, 756 F.2d 502 (7th Cir. 1985). One contrary precedent is *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 316-17 (6th Cir. 1989), where the court was more tolerant of split agreements because it perceived that they might result in lower prices for consumers. Professors Blair and Harrison demonstrate why this is false. *See infra* note 42 and accompanying text.

distributor, because "rights" have been given to another theater (usually following a "draft").[35] As detailed in part III, blanket restraints in the sports context have this same feature—players are not necessarily distributed among teams to reach the result preferred by sports fans as a whole.[36]

Even if blanket restraints had no effect whatsoever on the number and quality of athletes participating in a sport or on the allocation of players among teams, the Sherman Act ought to be interpreted to proscribe unjustified collusion among team owners that restrains trade significantly. The only way to reach a contrary conclusion would be to find that the framers of the Sherman Act were unconcerned with the distributive effects of cartels in general or that the Sherman Act contains an implicit exemption for labor markets. Neither theory is supportable.

---

35. Theater operators could achieve an efficient allocation of films by using an internal auction to determine which theater would be allocated the exclusive negotiation rights to a particular film. *Cf.* United States v. Addyston Pipe & Steel Co., 85 F. 271, 274 (6th Cir. 1898) (describing such a system among iron pipe manufacturers), *aff'd*, 175 U.S. 211 (1899). Of course, where operators or motion picture distributors perceived that an allocation was inefficient, side payments could be made to reallocate the films. However, such side payments involve significant transaction costs. *See, e.g.*, *General Cinema*, 850 F.2d at 485 (discussing procedures for reallocating a film following a split). Indeed, the theaters' choice of a rotational "draft," as opposed to an internal auction, may itself be evidence that the transaction costs of an internal market system were significant. This inference is even stronger where it appears that the parties to the agreement are not seeking, for noneconomic reasons, to supplant a marketplace allocation with an allocation that serves goals other than efficiency, and where the defendants are not presenting an affirmative defense that seeks to justify their allocation as an efficient means of avoiding marketplace imperfections (such as the need for sports leagues to maintain competitive balance). I thank my colleagues Tom Ulen and Peter Maggs for these insights.

36. One commentator who opposes the Sherman Act's application to player restraints on the ground that they are not output-reducing argues that the only relevant output for a sports league is the number of games it plays—a variable which is virtually never reduced. *See* Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 53-54 (1991). This argument has no support in judicial precedents, and for good reason.

From the perspective of consumers, on whose behalf the Sherman Act was enacted, games played are simply not the only measure of output. Jacobs seems to acknowledge that leagues might artificially reduce the viewership of games on television, but simply dismisses this possibility without discussion. Indeed, such a move would significantly injure consumers. *See* Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 486-88 (1990) [hereinafter Ross I]. Moreover, contrary to Professor Jacobs's assertion, *supra*, at 54, 57, agreements by rivals to harm consumers by reducing the *quality* of a product are illegal under the antitrust laws. *See, e.g.*, National Macaroni Mfrs. v. FTC, 345 F.2d 421, 427 (7th Cir. 1965) (invalidating agreement among rival pasta producers who were faced with a shortage of high-quality wheat and agreed to use 50% low-quality grain). Thus, Jacobs incorrectly concludes that sports leagues do not violate the antitrust laws when they choose an inefficient system of player allocation because the money they save as the result of an inefficient monopsony labor market outweighs the modest increases in revenue they would gain from the more exciting championship races that accompany efficient player allocations. *Cf.* Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 676 (1989) [hereinafter Ross II] (suggesting that this was the case with baseball's previous complete prohibition of free agency). Illegal quality reduction, for these purposes, focuses on overall consumer welfare. Thus, agreements that effectively reduce the absolute quality of a product based on an abstract standard but make the product available to more consumers (such as expansion of a sports league) would be considered to be pro- rather than anticompetitive.

I have suggested elsewhere that the Sherman Act should be interpreted in a democratic fashion, to reflect the views of the voters who elected the legislators who passed the statute.[37] Voters in 1890 and a century later are vitally concerned with distributive issues—whether a restraint is likely to affect *them* as workers or consumers (only a minority of voters significantly benefit from cartels as stockholders). These voters would have every reason to proscribe, and no reason to tolerate, unjustified cartels that artificially increased the prices of goods sold, or decreased the price of goods bought or wages paid, regardless of allocative efficiency.

My argument for a populist interpretation of the antitrust laws is supported by the actual legislative history of the Sherman Act. The argument that the Sherman Act is concerned solely with cartels that result in allocatively inefficient reductions in output has been thoroughly canvassed and rejected; the scholarship demonstrating that the antitrust laws are generally intended to proscribe concerted efforts to transfer wealth to "carteleers" from those with whom they do business need not be repeated here.[38] In an excellent survey of the legislative history of the Sherman Act as it relates to labor markets, Professor Lee Goldman has demonstrated that, rather than intending to exempt these markets from the Act's coverage, the law's sponsors desired "to protect the rights of the individual from the evils of accumulated corporate wealth and power in *all* markets."[39] For example, Senator Sherman commended a state court decision that in his view set out "the general principle" defining unlawful combinations: those combinations that have "a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates."[40] This broad concern with economic oppression stands

37. *See* STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 10 (1993); *cf.* Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 74-94 (1990) (arguing that a system of democratic government where votes may not be sold presupposes that laws will maximize wealth for the majority rather than for society as a whole). Interpreting a statute to effectuate the public interest that led to the legislation's enactment has a venerable history. *See generally* Heydon's Case, 76 Eng. Rep. 637 (Exch. 1584), *reprinted in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1111 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Even those who criticize this theory, on the ground that legislatures do not usually pass laws to serve the public interest but rather to accommodate the demands of powerful special interests, concede that the Sherman Act is indeed a statute passed to further the public interest. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

38. *See, e.g.*, Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 16-27 (1982); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 69-71 (1982).

39. 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, 623 (emphasis added).

40. 21 CONG. REC. 2460 (1890), *reprinted in* 1 EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 121-22 (1978) (quoting Commonwealth *ex rel.* Chew v. Carlisle, Brightly's N.P. 36, 40 (Ct. of Nisi Prius 1821)).

in stark contrast to the argument that the Sherman Act tolerates cartelization of markets simply because of the absence of direct consumer effect.[41]

Professors Blair and Harrison also have demonstrated why the Sherman Act should be democratically interpreted to proscribe restraints in the labor market: any savings are unlikely to be passed on to the consumer majority who sent the Sherman Act's framers to Congress. Their economic analysis shows what Senator Sherman recognized in 1890—that firms conspiring to reduce costs simply pocket the savings, and the price charged to consumers depends on the "confederates'" own decisions as to how much of their product to sell.[42] Senator Sherman's condemnation of agreements that do not lead to price increases is a major reason why scholars have concluded that allocative efficiency in product markets is *not* the principal goal of the Sherman Act.[43]

Further support for this reading of the statute is provided by the venerable canon of statutory interpretation that rejects any proffered construction which produces an absurd result.[44] In light of the Sherman Act's legislative history, it is inconceivable that Congress could have intended to impose liability in those cases where farmers, workers, or small firms victimized by a trust could mitigate (but not eliminate) their damages by turning to other crops, employers, or buyers, but to exonerate trusts with such a monopsonistic control over their victims as to leave the victims no alternative but to provide the same harvest, labor, or goods at an artificially reduced price. Rather, this type of agreement, analogous to unjustified sports league restraints, appears to lead to the very unjust subjugation of individuals to the conspiracy that Senator Sherman sought to prohibit.[45] A statutory interpretation that seeks to excuse an otherwise illegal restraint because professional athletes are *so* subject to exploitation that a competition-lessening agreement has no effect on supply would create such an absurd result: a blanket restraint imposed by a monopoly league in a major sport where there are no alternatives for players or fans (such as the National Football League) would be legal, but the same (or a lesser) restraint in a league that faced competition (in Major League Soccer, for example, where an artificial reduction in salaries would probably drive players overseas) would be unlawful.

41. Goldman notes that even a proposed amendment to the bill (successfully rejected by Senator Sherman and his cosponsors), which would have weakened the Act by allowing conspiracies that reduce prices to consumers, contained a proviso excluding from its exemption lower costs associated with reduced wages. Goldman, *supra* note 39, at 624.

42. *See* BLAIR & HARRISON, *supra* note 30, at 40-43; *cf.* 21 CONG. REC. 2461 (1890) (statement of Sen. Sherman) (quoting Sen. George: "'They aggregate to themselves great, enormous wealth by extortion which makes the people poor.'").

43. *See* Lande, *supra* note 38, at 86-87.

44. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509-11 (1989).

45. *See supra* note 40 and accompanying text.

Judicial precedent also undermines the argument that the Sherman Act covers only output-limiting restraints. The leading case is *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,[46] where the Supreme Court reversed the dismissal of an antitrust complaint brought by sugar beet farmers against colluding sugar refiners. Neither the Court's broad language nor the facts alleged in the complaint imply that antitrust plaintiffs must prove specifically that output or consumer welfare has been harmed by collusive buying. The Court unequivocally held that 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."[47] Thus, conspiracies that simply result in a wealth transfer from sellers or buyers to the carteleers are illegal, even without evidence of an effect on output.

Moreover, both the employees in an earlier case, *Anderson v. Shipowners Ass'n*,[48] and the beet farmers in *Mandeville* prevailed even though their complaints did not allege that the monopsony cartels they faced reduced output. *Anderson* reinstated a complaint filed by a seaman who was challenging the cartel system of registration for employment agreed to by virtually all shipowners on the Pacific Coast. The complaint detailed the pervasive control the shipowners' association exercised over employment, although the Court's description of the complaint contained nary a word concerning the restraint's effect on output or resource allocation.[49] The Court then held:

> From these averments, the conclusion results that each of the shipowners and operators, by entering into this combination, has, in respect of the employment of seamen, surrendered himself completely to the control of the associations. If the restraint thus imposed had related to the carriage of goods in interstate and foreign commerce . . . the unlawful restraint would be clear. But ships and those who operate them are instrumentalities of commerce . . . no less than cargoes.[50]

The Court concluded its analysis by identifying what it perceived as the harm that warranted antitrust sanction: "[I]t appears that each shipowner and operator in this widespread combination has surrendered his freedom of action . . . ."[51]

46. 334 U.S. 219, 246 (1947).
47. *Id.* at 236.
48. 272 U.S. 359 (1926).
49. *See id.* at 361-62.
50. *Id.* at 362-63.
51. *Id.* at 364.

In their brief to the Supreme Court, the plaintiffs in *Anderson* did in fact allege an effect on product market competition, arguing that collusive monopsony in the labor market "would eventually lessen the standard of efficiency" of employers. Brief for Petitioners at 79, *Anderson* (No. 306). But they provided no special facts to support this allegation, which simply appears to

In holding that the Sherman Act's prohibition on restraints in interstate commerce extended to a cartel of California refiners accused of artificially lowering the price paid to California sugar beet growers, the *Mandeville* Court explained that "Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare may be exercised in individual cases without showing any specific effect upon interstate commerce."[52] This passage underscores the Court's accurate assessment that the Sherman Act reflects the collective judgment of Americans across the country that they did not wish to tolerate the interstate sale of refined sugar if that sugar was produced by collusive methods that exploited California farmers. These sales were intolerable because of the oppressive or unfair nature of the collusion, regardless of any ultimate effect on the price of sugar in the grocery store.[53]

The economic effects of the collusion challenged in *Mandeville* appear similar in several important respects to the effects of blanket restraints in sports. It is certainly true that the agreement in *Mandeville* involved naked collusion, whereas blanket restraints are simply among a host of agreements among sports team owners, many of them necessary for the sports to exist. But this distinction justifies consideration of the owners' justifications for their agreements under the rule of reason, not a finding that the agreements are beyond the scope of the Sherman Act.[54] Both involve collusion by buyers; both involve sellers who have few alternatives and an "inelastic supply curve";[55] and the salary caps and luxury taxes, as well as the beet cartel, use somewhat complex means of price setting, including a formula based on the conspirators' joint profits.[56] Nevertheless, nothing in the Court's opinion in *Mandeville* suggests that the specific characteristics

---

presage the Court's observation in *Mandeville*, 334 U.S. at 242, that monopsony inherently leads to inefficiency. *See also supra* note 34 and accompanying text.

52. *Mandeville*, 334 U.S. at 236 (citing United States v. Darby, 312 U.S. 100, 115 (1941) (upholding congressional power to keep goods made wholly within one state under objectionable labor conditions out of the stream of interstate commerce)).

53. *Cf.* Allied Corp., 101 F.T.C. 721, 724-25 (1983) (over lone dissent by Chairman Miller, FTC refused to approve a merger, despite the Bureau of Economics's objection that demand for the product was so great among immediate purchasers that even a 10% increase in price resulting from the merger would not reduce the number of purchases).

54. *Cf.* NCAA v. Board of Regents, 468 U.S. 85, 101, 103 (1984).

55. Sugar beets have one single use (refining into sugar); they must be marketed immediately after harvesting to a geographically proximate employer; they are grown only in widely scattered regions specially suited to the crop's soil, climate, and water needs; and economies of scale effectively precluded forward economic integration by farmers through cooperatives. *See Mandeville*, 334 U.S. at 239 nn.20-21.

56. In *Mandeville*, a key factor in the formula determining the price of beets was the joint average net return from beets sold from the defendants' California factories. *See* American Crystal Sugar Co. v. Mandeville Island Farms, 195 F.2d 622, 623-24 (9th Cir. 1952). Likewise, the schemes employed by all major sports except the NHL prohibit or discourage teams from paying salaries that exceed a dollar amount calculated as a percentage of the league's gross revenues from designated sources of income. *See supra* note 4.

of the agreement challenged there distinguishes it from any other buyer cartel.

In *Mandeville*, the Court did declare that it was "inconceivable that the monopoly . . . will have no effects for the lessening of competition in the later interstate phases of the over-all activity,"[57] and that the "idea that stabilization of prices paid for the only raw material consumed in an industry has no influence toward reducing competition in the distribution of the finished product, in an integrated industry such as this, is impossible to accept."[58] But the only specific example of downstream economic impact offered by the Court was that the pricing formula deprived the grower of the "advantage of the individual efficiency of the refiner with which he deals."[59] The Court also noted that the complaint (taken as true at this stage of the proceedings) alleged "upon information and belief" that, as a result of the collusive pricing formula, the defendant "did not conduct its interstate operations as carefully and efficiently as previously."[60] Such inefficiencies are likely, however, in almost all cases where firms are relieved of the competitive pressure to compete in the purchase of inputs. Rather than suggesting that *Mandeville* is a special case of buyer collusion that was output- or welfare-reducing, the Court's discussion and the facts of the case suggest that harm in downstream markets is either something that antitrust plaintiffs need not prove or is a necessary tendency of all buyer cartels and thus can be assumed.

In several more recent appellate court cases, buyer cartels were held per se illegal even though facts suggested an inelastic supply curve and there was no evidence that the cartel had affected output. For example, in *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*,[61] the defendants divided geographic areas within the Tongass National Forest for purposes of bidding for timber-logging rights. Because the federal government set a minimum bid, the amount of timber logged was unaffected by the scheme; the sole result of the agreement was to lower the rights fees paid to the U.S. Treasury. The Ninth Circuit had little difficulty finding an antitrust violation, yet under the crabbed view of the Sherman Act urged by sports league defenders, this practice would not be covered by the antitrust laws.[62]

57. *Mandeville*, 334 U.S. at 240.

58. *Id.* at 241.

59. *Id.* at 242. The plaintiffs in this case all had contracts with the most efficient of the three conspirators, so they would have made more money if the pricing formula depended on their own purchaser's net return, rather than a joint net return.

60. *Id.* at 226.

61. 699 F.2d 1292, 1296 (9th Cir. 1983).

62. *See also* United States v. Champion Int'l Corp., 557 F.2d 1270, 1273-74 (9th Cir. 1977) (holding that logging cartel violated Sherman Act even absent evidence of specific intent to fix prices, as "measured by the substantiality of the interstate commerce which is touched by the restraint").

If, therefore, collusive monopsony is generally illegal even when the supply of goods or services is sufficiently inelastic that there is no short-run effect on output, there remains the argument that restraints in the labor market are peculiarly beyond Sherman Act purview. Advocates of this position[63] rely on language in the Supreme Court's opinion in *Apex Hosiery Co. v. Leader*.[64] In rejecting a claim that unionized workers had conspired to restrain trade, Justice Stone's majority opinion observed that the Court had never applied the Sherman Act absent "some form of restraint upon commercial competition in the marketing of goods or services."[65] As Professor Goldman observes, if this phrase were followed literally, court decisions proscribing a host of unreasonable restraints that do not involve the marketing of goods and services would be in jeopardy.[66] Goldman persuasively argues that this language "merely limit[s] section 1 coverage to restraints on competition among business competitors, whether in input or output markets and exclud[es] restraints among or by labor unless labor's restraint was intended to or did affect competition (not merely prices) in the product market."[67]

---

63. The argument discussed in the text is different from one detailed in Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19 (1986). In that article, Roberts makes two principal points in support of his conclusion that sports league restraints that reduce competition in the labor market are not subject to attack under § 1 of the Sherman Act. *See id.* at 96-98. First, he argues that the text and legislative history of § 6 of the Clayton Act, 15 U.S.C. § 17 (1988), precludes Sherman Act coverage of any labor restraint because labor is declared not to be a "commodity or article of commerce." *Id.* at 26. Second, he argues that the judicially implied "nonstatutory" labor exemption should completely preclude Sherman Act coverage. *See id.* at 58. Both these arguments are sharply contested. *See* Goldman, *supra* note 39, at 635-79.

The existence of a collective bargaining relationship between players and a league does affect the owners' antitrust liability for labor market restraints. *See supra* note 10. The application of this "labor exemption" doctrine to sports leagues is a complex and controversial issue that deserves separate treatment and is beyond the scope of this article. Although Roberts raises the separate point that the Clayton Act's enactment in 1914 created an exemption for labor market restraints irrespective of the existence of collective bargaining, *see* Roberts, *supra*, at 86-88, that argument is so related to the collective bargaining issue that it is best considered within that context.

64. 310 U.S. 469 (1940).

65. *Id.* at 495.

66. *See* Goldman, *supra* note 39, at 631 & n.72 (citing cases).

In *Radovich v. NFL*, 352 U.S. 445, 454 (1957), the Supreme Court reinstated an antitrust complaint filed by a player subject to an NFL boycott because he had played in a rival league. The Court remanded for further proceedings, reversing the lower court's judgment that football was exempt from antitrust scrutiny by analogy to the Court's baseball rulings. *See id.* at 450-52. Among the arguments raised by the NFL in its defense was the claim, citing *Apex Hosiery*, that restraints on employee services were not subject to the Sherman Act. *See* Brief for Respondents at 61, *Radovich* (No. 56-94). This argument was presumably among those covered by the Court's observation that the NFL's "remaining contentions we believe to be lacking in merit." 352 U.S. at 454.

67. Goldman, *supra* note 39, at 631.

The fact that *Anderson* was decided prior to *Apex Hosiery*, and reinstated a complaint filed by a seaman that did not allege any direct harm in a product market, *see supra* text accompanying notes 47-49, would seem to support Professor Goldman's interpretation of Justice Stone's comment that the Court had never applied the Sherman Act absent a "restraint on commercial competition."

Indeed, the court of appeals in *Mackey v. NFL*[68] expressly distinguished *Apex Hosiery* as condoning restrictions on competition for employee services imposed by employees themselves, not employers. The lower courts have consistently recognized that labor market restraints are within the reach of the antitrust laws without any proof of a direct effect on some downstream product market.[69] Thus, there is no basis to exclude labor markets from the "Magna Carta of free enterprise."[70] Indeed, in light of the social policy expressed in the National Labor Relations Act, which acknowledges the unfair and unequal distribution of bargaining power between workers and employers, it can hardly be thought that federal policy would permit employer conspiracies that restrain competition and exacerbate this disadvantage.[71] In sum, there is no basis for failing to apply the gen-

---

Courts and commentators who have focused on the issue of *unions'* antitrust liability have occasionally used broad language that might seem to support the argument that the Sherman Act ought not be applied to *employer* restraints in labor markets. For example, Archibald Cox wrote in *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 254 (1955), that "[n]o one seriously suggests that antitrust policy should be concerned with the labor market per se." However, the remainder of Cox's article never discusses *employer* antitrust liability. Indeed, Cox's proposal for a statutory amendment to deal with some of the problems he discusses is couched entirely in terms of liability and protection for unions. *See id.* at 284 n.117.

Some courts have exempted from antitrust scrutiny behavior by unions or a multiemployer bargaining group in the context of collective bargaining, under an interpretation of § 6 of the Clayton Act necessitated by the desire to harmonize the antitrust laws and the National Labor Relations Act. *See, e.g.*, Amalgamated Meat Cutters v. Wetterau Foods, Inc., 597 F.2d 133, 136 (8th Cir. 1979) (stating that courts must balance interference with labor policy and magnitude of restraint of trade and effect on consuming public). Other cases have rejected antitrust challenges to multiemployer agreements concerning tactics used in labor disputes, as distinct from agreements that reduced competition in the labor market itself. *See, e.g.*, Kennedy v. Long Island R.R. Co., 319 F.2d 366, 372-73 (2d Cir. 1963). The requisite accommodation of the federal antitrust and labor policies is beyond the scope of this article. Suffice it to say that the mere fact that the Sherman Act's policies have to be accommodated assumes that the scope of the antitrust laws is broad enough to encompass labor restraints.

68. 543 F.2d 606, 617 (8th Cir. 1976).

69. *See, e.g.*, Roman v. Cessna Aircraft Co., 55 F.3d 542, 544 (10th Cir. 1995); Powell v. NFL, 930 F.2d 1293, 1298 & n.4 (8th Cir. 1989); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183-89 (D.C. Cir. 1978); Mackey v. NFL, 543 F.2d 606, 616-18 (8th Cir. 1976); Gardella v. Chandler, 172 F.2d 402, 407-08 (2d Cir. 1949) (L. Hand, J., concurring); *see also* Law v. NCAA, 902 F. Supp. 1394, 1402, 1405 & n.11 (D. Kan. 1995) (holding that collegiate athletic association rule fixing salaries for coaches violates § 1 of the Sherman Act).

70. United States v. Topco Assoc., 405 U.S. 596, 610 (1972).

71. *See* Goldman, *supra* note 39, at 625-26. For related arguments as to why the common law should treat employer conspiracies to restrain trade more harshly than worker restraints in the labor market, see Stephen F. Ross, *The Evolving Tort of Conspiracy to Restrain Trade Under Canadian Common Law*, 75 CAN. BAR REV. 193 (1996).

There is a very early American case, *The Master Stevedores' Ass'n v. Walsh*, 2 Daly 1, 13, (N.Y. Ct. Com. Pls. 1867), where the court in dicta wrote that the common law of restraint of trade did not preclude employers from agreeing on wages. The court's actual holding, however, concerned the ability of *workers* to jointly agree not to work except at agreed-upon wages, and the court cited no authority expressly holding that employers were permitted to cartelize the labor market. *See id.* Moreover, the common law of restraint of trade, as far as it is relevant for Sherman Act purposes, continues to evolve. *See generally* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731-32 (1988) (refusing to adopt pre-1890 precedent in holding that vertical restraint of trade is not per se illegal under Sherman Act § 1). By 1887 it was clear that the eral rule established in *NCAA* for sports leagues to the specific labor market restraints implicated by a league's adoption of a blanket restraint.

### B. *The Exclusive Legitimacy of Competitive Balance as a Justification for Blanket Restraints of Trade Among Professional Sports Leagues*[72]

In *NCAA*, the Supreme Court set out the analytical framework for sports league agreements, establishing a two-part test to examine the league's justifications once the plaintiff had established the existence of a significant restraint on competition. The Court's test inquires, first, whether the league's purported justifications are legitimate and, second, whether the restraint is reasonably necessary to achieve the league's goals.[73] In applying that test to the facts of the *NCAA* case, the Court wrote: "Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree with the first part of the argument but not the second."[74] The Court therefore concluded that the NCAA's imposition of significant restrictions on the sale of television rights was not reasonably tailored to promote equalized competition and was thus unreasonable.[75] The Court's opinion correctly suggests that the rule of reason allows owners to enter into agreements having the effect of significantly restricting competition in the player market in order to promote competitive balance.[76] In so doing, the Court endorsed the better-reasoned approach to competitive balance adopted by some lower courts. In *Mackey v. NFL*, for example, the Eighth Circuit held that "the NFL has a strong and unique interest in main-

---

common law barred employers from setting wages. *Cf., e.g.*, Mineral Water Bottle Exch. & Trade Protection Soc'y v. Booth, 36 Ch. D. 465, 469 (C.A. 1887) (holding that common law proscribed trade association rule barring members from hiring employees of other members). In light of the legislative history demonstrating that the Sherman Act was broadly intended to proscribe all oppressive economic combinations, *see supra* notes 39-41, there is no justification for relying on a case from more than a century and a half ago that appears to have been outdated by the time the Sherman Act was enacted in 1890.

72. The blanket restraints on which this article focuses involve completely separate issues from those raised by league agreements designed to preserve the integrity of the sport. Even in the Warren Court era, the heyday of rules of per se illegality, courts permitted leagues to completely refuse to deal with players guilty of gambling or similar misconduct. *See, e.g.*, Molinas v. NBA, 190 F. Supp. 241, 244 (S.D.N.Y. 1961). Maintaining the integrity of the game is, of course, a valid justification for tailored trade restraints, but the owners have never suggested it as an argument for blanket restraints.

73. *See* NCAA v. Board of Regents, 468 U.S. 85, 102-03 (1984).

74. *Id.* at 117.

75. *See id.* at 117-19.

76. *See also* Powell v. NFL, 690 F. Supp. 812, 818 (D. Minn. 1988) (Doty, J.) (concluding that "[t]he danger that destruction of the competitive balance could ultimately lead to diminished spectator interest and franchise failures itself constitutes a sufficient basis" for denying preliminary relief that would have created complete free agency in football).

taining competitive balance among its teams,"[77] although it then sustained the district court's finding that the free agency restrictions challenged in that case were unreasonable because they were overly restrictive and thus not essential to maintaining that balance. Following *NCAA* and *Mackey*, District Judge David Doty instructed the jury in *McNeil v. NFL*[78] that, if they found that the free agency restraints at issue there substantially harmed competition in the bidding for player services, the burden would then shift to the league to show that the restraints were "reasonably necessary" to achieve competitive balance.[79]

This approach is sound for, as Judge Doty explained to the *McNeil* jury, NFL teams must have "sufficiently comparable playing strength that football fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching the games."[80] In other words, competitive balance is procompetitive and thus a legitimate justification for a trade restraint because it actually increases output: additional fans will attend games or watch them on television, and existing fans will get more enjoyment from the games, if they take place within the context of a close championship race.[81]

---

77. 543 F.2d 606, 621 (8th Cir. 1976).

78. McNeil v. NFL, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,768 (D. Minn. 1992).

79. *Id.* at 68,771-772.

A Michigan district court reviewing an earlier challenge to a National Hockey League restriction also followed *Mackey*, accepting competitive balance as a legitimate justification, but finding the restraint at issue to be overbroad and thus unreasonable. *See* McCourt v. California Sports, Inc., 460 F. Supp. 904, 909-10 (E.D. Mich. 1978), *vacated on other grounds*, 600 F.2d 1193 (6th Cir. 1979). The court of appeals reversed the district court's finding that the restraint had been unilaterally imposed by the NHL, finding instead that it had been agreed to by the NHL Players Association and was thus protected by the labor exemption. *See supra* note 10. Thus, the Sixth Circuit did not have the opportunity to consider the merits of the antitrust analysis.

*Mackey* was presaged by several insightful district court opinions. One, written by Judge Leon Higginbotham (formerly a member of the Federal Trade Commission), found that player restraints could be justified by the "need for competitive balance within the league." Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 486 (E.D. Pa. 1972); *see also* Boris v. USFL, 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,462 (C.D. Cal. 1984) (finding that USFL's myriad justifications for refusing to sign college football players with remaining years of collegiate eligibility, one of which was competitive balance, had "varying degrees of merit," but concluding that the practice was unreasonable because it was principally based on a desire to comply with the demands of college football coaches).

An even earlier decision, *United States v. NFL*, 116 F. Supp. 319, 323 (E.D. Pa. 1953), recognized that sports leagues are legitimately concerned with competitive balance, especially newer leagues, like the NFL at the time, whose teams are frequently close to financial failure. The court concluded that this concern was sufficient to justify an agreement that prevented a team from televising its games in another geographical area when to do so would compete with the home games of the local team in that area. *See id.* at 325. However, the court found that competitive balance concerns did not justify a restraint on competing telecasts when the local team was playing an away game. *See id.* at 326.

80. *McNeil*, 1992-2 Trade Cas. at 68,771.

81. Economists Henry Demmert and Roger Noll have independently demonstrated empirically that attendance increases when championship races are closely contested. *See* HENRY G. DEMMERT, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS 10-11 (1973); Roger G. Noll, *At-*

The approach followed in these cases compares favorably to that taken by the District of Columbia Circuit in *Smith v. Pro Football, Inc.*,[82] in rejecting competitive balance as a legitimate defense under the rule of reason because balance-promoting rules did not encourage new firms to enter the market or existing firms to offer their product at a lower price.[83] Although market entry and cost reduction are certainly desirable from a consumer perspective, the court's view is too restrictive, for it ignores the real possibility that a restriction that is reasonably necessary to achieve competitive balance will enable existing firms to offer a superior product (exciting games and division races) at the *same* cost. Indeed, the television restrictions at issue in *NCAA* did not encourage new schools to field college football teams and did not lower the costs of operation for member schools. Nevertheless, the Supreme Court suggested that the restrictions would have been found reasonable under the antitrust laws if they had been shown to promote competitive balance.[84]

Another objection to permitting sports leagues to impose player restraints in the interest of promoting competitive balance is that it

---

*tendance and Price Setting*, *in* GOVERNMENT AND THE SPORTS BUSINESS 115, 156-57 (Roger G. Noll ed., 1974).

Others have correctly pointed out that competitive balance is only one feature that makes a professional league sport attractive to fans. For example, minor leagues with high rates of player turnover enjoy more long-term competitive balance than the major leagues but have less spectator appeal. *See* MICHAEL J. TREBILCOCK, THE COMMON LAW OF RESTRAINT OF TRADE 226 (1986). Amenities, ease of access to stadia, the availability of substitute forms of sporting or other entertainment, weather, and income also affect attendance. *See* Noll, *supra*, at 115-20.

82. 593 F.2d 1173 (D.C. Cir. 1978).

83. Although the court of appeals affirmed the district court's finding that the NFL draft was overly restrictive and did not seem to have achieved the goal of competitive balance, *see id.* at 1183, it went on to note: "[T]he draft, while it may heighten athletic competition and thus improve the entertainment product offered to the public, does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost." *Id.* at 1186.

84. In *Brown v. Pro Football, Inc.*, 812 F. Supp. 237, 238 (D.D.C. 1992), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 2116 (1996), the court considered and rejected the argument that *NCAA* "undermined, if not vitiated" *Smith*, but its attempt to distinguish *NCAA* is unpersuasive. The court noted that amateur college football would cease to exist without restrictions on player eligibility and academic requirements, whereas the salary restraints on certain football players challenged in *Brown* "cannot be said to be vital to the preservation of professional football." *Id.* at 239. The problem with this analysis was that the NCAA's academic and eligibility restrictions were not at issue in the case; it was about television broadcasting. No one contended that the television restrictions were vital to the preservation of the sport; rather, the NCAA's claim was that they made the sport a better product. This claim, which was credited by the Supreme Court in theory but rejected on the facts of the *NCAA* case, is the same as the one the NFL made in *Smith*.

The Supreme Court's unequivocal statement in *NCAA v. Board of Regents*, 468 U.S. 85, 117 (1984), that "maintaining a competitive balance among amateur athletic teams is legitimate" must also be read in the context of the lower court decisions in that case. Both the district judge and a majority of the court of appeals had held, similar to *Smith*, that restrictions necessary to promote balanced competition were not permitted under the antitrust laws because competitive balance was a "noneconomic justification" that "shades into the argument that competition will destroy the market." Board of Regents v. NCAA, 707 F.2d 1147, 1154 (10th Cir. 1983), *aff'g* 546 F. Supp. 1276, 1310 (W.D. Okla. 1982), *aff'd*, 468 U.S. 85 (1984).

allows courts to prefer benefits to consumers over harm to workers.[85] Notwithstanding language in some Supreme Court opinions that could be read to proscribe restraints in one "market" even if they make the sport more attractive to fans, the *NCAA* standard, as applied to professional sports in *Mackey*, correctly considers competitive balance as a legitimate defense for a host of reasons.

As an initial matter, almost any restraint of trade, no matter how reasonable, is bound to harm *some* consumers and benefit others; the essence of the common-law doctrine of ancillary restraints, which has been incorporated into Sherman Act analysis since *Addyston Pipe*,[86] requires judges to weigh the interests of both parties as well as the interests of the public. Suppose, to use a hypothetical, that Sally Starbuck developed a great blend of coffee and a patented espresso machine and opened a coffee house with a likeable, yuppie atmosphere in Seattle. Suppose that Sally then sold her operation to a publicly traded corporation, and, ancillary thereto, agreed not to compete with them for five years. Suppose further that, as often happens, the quality of the product was maintained, at a lower price, but that the atmosphere became a bit more "corporate" and thus less attractive to the original patrons in Seattle. They would prefer that Sally open a new coffee house and therefore are injured by the agreement not to compete. Nevertheless, if the noncompete agreement is reasonably necessary to effectuate the sale to Starbucks, Inc., and if the publicly traded company has the capital to allow for a nationwide expansion, millions more consumers will benefit. Accordingly, the common law (and the Sherman Act) would consider the arrangement reasonable.

Although the Supreme Court has occasionally used language that may seem to suggest a contrary conclusion, a review of the Court's antitrust jurisprudence shows that quality-enhancing agreements are reasonable even if they make some parties worse off. For example, in *United States v. Topco Associates*,[87] the Supreme Court wrote that only Congress, through a statutory exemption to the antitrust laws, could decide "to sacrifice competition in one portion of the economy for greater competition in another portion."[88] Yet in that case, which challenged unnecessary[89] restraints on membership in a grocery cooperative, neither the Court nor the government questioned the legiti-

85. Because Senator Sherman, like subsequent courts and economists, was skeptical that savings from labor costs would be passed on to consumers, sports leagues may *not* use the *NCAA* standard to justify paying lower salaries on the grounds that to do so will result in lower ticket prices. *See supra* note 41. A comprehensive review of the economics of baseball argues that baseball owners will set prices in order to maximize revenue and their costs—such as salaries—are ignored in this calculation. *See* ANDREW ZIMBALIST, BASEBALL AND BILLIONS 53 (1992).

86. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

87. 405 U.S. 596 (1972).

88. *Id.* at 611.

89. *See* Ross, *supra* note 37, at 154.

macy of cooperative buying by the grocers participating in the Topco organization. Cooperative buying produces efficiencies for consumers by lowering the marginal cost of the retailers' products,[90] even though there are always some "victims" in another market—the firms who previously had sold to one or more of the cooperatives' participants, who suffer as a result of the increased buying power that the retailers are able to exercise by making joint purchases.

Similarly, in *Broadcast Music, Inc. v. Columbia Broadcasting System*,[91] the Supreme Court used the rule of reason analysis to determine the reasonableness of a blanket license "discriminatorily" priced based on ability to pay that was offered by BMI, a joint venture of copyrighted music owners. Some consumers, most notably, CBS and the others who were willing to spend a fortune in legal fees to challenge BMI's practices, would have been better off if the blanket license had been disallowed, but the Court rejected their arguments, relying on the significant efficiencies and benefits to taverns, small radio stations, and others who prefer to purchase a single blanket license.[92]

Here again, the need to democratically interpret the Sherman Act becomes apparent. The argument against the *NCAA* standard is that an agreement necessary to enable a sports league to offer exciting championship races should nonetheless be invalidated because it has an adverse effect on some players, whose fortunes would be better served in a completely unrestrained market. But it is highly doubtful that the voters who elected the 51st Congress in 1890, or the 105th Congress in 1997, would prefer such an anticonsumer result. Absent strong evidence that the Sherman Act represented a victory for labor's raw political power over the interests of the consumer/majority,

90. For an illustration, see Blair & Harrison, *supra* note 30, at 95.

91. 441 U.S. 1, 23-25 (1979).

92. *See id.* at 21-22. The Court in *United States v. Philadelphia National Bank*, 374 U.S. 321, 370-71 (1963), rejected the defendants' contention that they should be allowed to merge in order to enhance the competition for large business accounts between themselves and banks in New York, even though their merger would reduce competition in the Philadelphia market. This case is distinguishable from the proposition discussed in text for several reasons. First, the Court noted that those consumers most likely to benefit from the merger (large Philadelphia firms who found the banks' pre-merger lending limits to be inadequate) could "readily" obtain loans elsewhere. *Id.* at 371. Thus, there was no real benefit to any group of consumers. Second, the Court indicated that it was rejecting the concept of "countervailing power," *id.* at 370 (citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213-14 (1951) (rejecting price fixing by sellers based on need to defend selves against buyer cartel)), and therefore it is not clear that the Court was contemplating a practice like cooperative buying. Third, the Court expressly indicated that two small firms in a market should be allowed to merge in order to compete more successfully with the leading firms, *see id.* at 370-71, even though it is likely that *some* consumers (i.e., those who preferred the services of the acquired firm or who considered the two merging firms close substitutes for each other) might be injured. Finally, *Philadelphia National Bank* was a merger case governed by § 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits mergers that substantially lessen competition in *any* line of commerce. *See Philadelphia Nat'l Bank*, 374 U.S. at 355 (emphasis added). In contrast, sports litigation takes place under the Sherman Act's more general prohibition of unreasonable "restraints of trade."

courts should adhere to a standard that weighs the public interest against the interest of affected parties. The best way to do this is via the test set out in the *NCAA* case, which permits joint agreements among buyers with monopsony power, but only when the benefits of their agreement are "unobtainable in the absence of monopsony power."[93]

Although improving competitive balance is therefore a goal that should be recognized as a valid reason for imposing player restraints, other justifications have not met with judicial favor. Thus, courts have refused to allow owners to justify player restrictions on the grounds that requiring teams to compete with each other would lead to "ruinous competition" or that a team needs to exercise monopsony power over a player for a certain period of time in order to recoup its investment in developing the player's skills. Courts have held that there is nothing unique about sports leagues—comparable to the leagues' specialized need for competitive balance—that would justify permitting them to raise these defenses.[94]

Raising the specter of ruinous competition, some economists have suggested that salary caps may be necessary to preserve the "maximum number of teams" in a league, because higher salaries may cause marginal franchises to fail.[95] However, almost every cartel can plausibly claim that setting a fixed monopsony/monopoly price enables marginal firms to remain in business. The Sherman Act no more permits a league to ensure a high number of viable franchises through collusion to hold down salaries than it would permit the steel companies to fix the price of wages or coal in order to permit failing rivals to stay in business.[96] Similarly, league officials have suggested that providing potential investors with "cost certainty" justifies the practice of jointly setting salaries.[97] In *Catalano, Inc. v. Target Sales, Inc.*,[98] the

93. Roger D. Blair & Jeffrey L. Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 Nw. U. L. Rev. 331, 340 (1992).

94. *See* Mackey v. NFL, 543 F.2d 606, 621 (8th Cir. 1976). *See generally* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (holding that fear of "[r]uinous competition" is not a justification for price fixing).

95. Glen Seredynski et al., *On Team Relocation, League Expansion, and Public Policy: Or, Where Do We Put This Hockey Franchise and Why Would You Care?*, 4 Seton Hall J. Sport L. 663, 698 (1994).

96. Significantly, the economists cited in note 95, *supra*, suggest that leagues agree with their players on a salary cap in order to increase the number of teams and thus jobs for players. *See id.* at 698. Unions often face a trade-off between more jobs and higher wages, and players' unions are free to opt for the former. If they reach a collective bargain with the owners to this effect, the salary cap would be insulated from antitrust attack. *See* Wood v. NBA, 809 F.2d 954, 958-59 (2d Cir. 1987); McCourt v. California Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979); *see also supra* note 10. Absent such an agreement, however, the general principles discussed in the text apply.

97. Declaration of Russell T. Granik ¶ 42, NBA v. Williams, 94 Civ. 4488 (KTD) (S.D.N.Y. 1994).

The claim that courts should recognize a special antitrust defense because sports leagues need to attract investors who require "cost certainty" is particularly inappropriate when used to justify restraints in the labor market. If, in fact, a sports league can make a persuasive case that

Supreme Court rejected the argument that rival beer wholesalers should be able to agree to offer uniform terms of credit to retailers on the grounds that these terms tended to facilitate entry of smaller firms. The Court concluded that every cartel can claim that its activities make entry or investment more attractive.[99]

The district court's analysis in *Linseman v. World Hockey Ass'n*[100] provides a good illustration of the principle that sports leagues may justify restraints only with arguments based on the special aspects of the sport that demand coordinated behavior. In finding that the WHA's rule barring teams from signing players under twenty years of age violated the Sherman Act, the court initially noted that "there is no reason to believe that collective action is required by the industry structure in order to determine who should be permitted to play professional hockey," as opposed to leaving those decisions to each individual team "under our free market system."[101] The court contrasted hockey's structure with that of professional golf, where collective action to limit participation in the principal men's tour is necessary because of the limited time available to play tournaments.[102] Next, the court found that there was no valid purpose for the age ban. The court noted that the WHA's "major thrust" was that it had been coerced into adopting the rule because of a blacklist by Canadian national hockey authorities that would result in a boycott by foreign teams of planned international competition. The court concluded that acquiescence of this sort was not a defense.[103] Finally, the court rejected the argument that the ban was necessary to preserve Canadian junior league teams, who allegedly would fail if the most talented teenagers were signed by professional teams. If the Canadian junior leagues provided essential training for prospective players, the court observed, the WHA could devise a means, at its own cost, for setting up that training.[104] Although the court did not expound upon this point, if the Canadian junior league teams would not be financially

overall league output and profitability will increase with an infusion of capital from investors requiring cost certainty, the league can enter into a collective bargaining agreement with its players to provide such certainty. Such an agreement would, as noted previously, be exempt from antitrust scrutiny because of the labor exemption. Indeed, this seems to be precisely what the National Basketball Association was able to do in 1982 when it first persuaded its players to accept a salary cap as part of its collective bargaining agreement. *See Interview with David Stern, NBA Commissioner*, ANTITRUST, Summer 1987, at 27.

98. 446 U.S. 643, 650 (1980).

99. *See id.* at 649.

100. 439 F. Supp. 1315 (D. Conn. 1977).

101. *Id.* at 1321.

102. *See id.* (distinguishing Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1996)).

103. *See id.* at 1321-22 (citing United States v. Paramount Pictures, 334 U.S. 131, 161 (1948)); *see also* Boris v. USFL, 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,461 (C.D. Cal. 1984) (finding agreement not to sign players with remaining collegiate eligibility unjustified because based on desire to appease college football coaches).

104. *See Linseman*, 439 F. Supp. at 1322.

viable without teenagers talented enough to play major professional hockey, then the WHA and its rival, the NHL, could provide financial subsidies to keep the junior leagues afloat. But, as the court noted, "the Sherman Act does not permit a failing enterprise to be buoyed up with an illegal agreement to restrain trade."[105]

*Linseman*'s sound analysis contrasts with the district court's opinion in *Nassau Sports v. Peters*,[106] the one anomalous reported decision suggesting that sports leagues may justify substantial player restraints based on the "need for some form of protective system to insure the recoupment of investments—often large—made both to develop and to acquire talented players."[107] The holding that rivals can agree to reduce competition in order to recoup their individual investments (which, to be fair to the judge, was rendered hastily in the context of a motion for a preliminary injunction) is inconsistent with the general tradition of the antitrust laws. Consider, for example, *Fashion Originators' Guild of America v. FTC*.[108] In that case, the Supreme Court upheld the FTC's order barring fashion designers from implementing a host of procedures designed to prevent "style pirates" from copying original dress designs (which, for technical reasons, could not be patented or copyrighted).[109] If dress designers cannot act collusively to ensure that their investment in original clothing designs can be "recouped," there is little justification for allowing employers, even of talented players, to do so. As the court observed in *Mackey v. NFL*, these expenses are ordinary costs of doing business and, unlike the need to foster competitive balance, are not peculiar to professional sports leagues.[110]

Ultimately, the judicial rejection of an investment recoupment defense rests on the empirical judgment that horizontal restraints are unnecessary to ensure adequate training and development of skilled personnel. Many industries (law is one) invest heavily in talented personnel without any guarantee that they will not leave after a short period of time.[111] Where a player is truly unique, and a team needs to create a long-term relationship in order to make desired investments,

105. *Id.* at 1322.
106. 352 F. Supp. 870 (E.D.N.Y. 1972).
107. *Id.* at 879.
108. 312 U.S. 457 (1941).
109. *See id.* at 457.
110. *See* 543 F.2d 606, 621 (8th Cir. 1976).
111. *See Inquiry into Professional Sports: Hearings Before the House Select Comm. on Prof'l Sports*, 94th Cong. 356 (1976) (testimony of Major League Baseball Players' Association executive director Marvin Miller).

it is free to negotiate a long-term contract with that player.[112] Collusive monopsony is not required.[113]

Yet another theoretically plausible justification for blanket restraints is that sports leagues maximize fan interest not by achieving competitive balance but by ensuring that teams in the most popular markets are always contending for the championship. As Professor Roger Noll explains, parity

> is not in the financial interest of a league. Instead, leagues want sufficient uncertainty of outcomes to keep all fans interested—a far cry from having every team have an equal chance of winning a league championship. A good team will do better financially and contribute more to the value of a league's national broadcast package if it is in a big city.[114]

It is true that economic welfare "will be enhanced by having the Yankees and the Mets dominate baseball even if it makes the (fewer) people in Milwaukee or Seattle worse off,"[115] but economic welfare will be enhanced even more if the Yankees and Mets participate disproportionately in the World Series while, over the same period, the Brewers and Mariners appear to have a reasonable chance to contend for the championship within a few years. The precise level of competitive balance that optimizes consumer welfare, however, is a complex determination that is beyond the scope of this article.

In any event, blanket restraints are not arguably tailored to achieve this goal. The Chicago Bulls, for example, do not need the salary cap to maintain their talent because NBA salary cap rules allow them to re-sign their current players. On the other hand, the once-popular Los Angeles Lakers are restricted in their efforts to return to prominence by the limits on their ability to acquire top veteran players. Indeed, blanket restraints are a perverse way of ensuring that

---

112. *Cf.* Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 243 (Cal. Ct. App. 1969) (enjoining basketball star Rick Barry from joining team in rival basketball league until he had discharged contract responsibilities with plaintiff Golden State Warriors). For an analysis rejecting arguments that horizontal agreements are necessary to develop baseball players through the minor leagues, see Ross II, *supra* note 36, at 693-95 (arguing that in a free market most players will sign multiyear contracts to allow recoupment of development costs).

113. It is important to recall that *Nassau Sports* was decided in 1972, shortly after Major League Baseball had persuaded the Supreme Court that the reserve clause was so essential to its game that an incorrect and anomalous antitrust exemption was extended. *See* Flood v. Kuhn, 407 U.S. 258 (1972). For an analysis of how *Flood*'s underlying precepts, especially the notion that reserve clauses were essential to the game, have been disproved by subsequent events (most notably, baseball's huge success since 1976 despite vigorous free agency), see Ross, *supra* note 9.

114. Roger G. Noll, *Professional Basketball: Economic and Business Perspectives*, *in* THE BUSINESS OF PROFESSIONAL SPORTS 18, 33-34 (Paul D. Staudohar & James A. Mangan eds., 1991); *see also* Rodney Fort & James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. ECON. LITERATURE 1265, 1291 (1995) (stating that the "fact that TV audiences (and advertising income) are larger when big city teams participate in playoffs and championship series provides profit incentives for a league to adopt policies that promote less competitive balance").

115. John J. Siegfried, Book Review, 57 S. ECON. J. 580 (1990) (reviewing GERALD W. SCULLY, THE BUSINESS OF MAJOR LEAGUE BASEBALL (1989)).

teams in large markets predominate. Regardless of their locale, superior teams do not need the free agent market in order to succeed; their rosters already have the requisite talent. Franchises from markets where consumers do not respond to wins significantly enough to justify substantial free agent spending will not spend the money, irrespective of the existence of blanket restraints. Thus, the only clubs that are effectively limited by a blanket restraint are inferior teams from large or demand-sensitive markets—the New York Mets, for example. In fact, baseball's experience has shown that free agency is a better mechanism to achieve a mix of competitive balance with disproportionate participation by big-city teams; one study showed that free agents in baseball tended to migrate to large markets *and* to inferior squads.[116] To date, then, competitive balance remains the only purpose that has been recognized as sufficient to justify blanket restraints on competition for player services by sports leagues.[117]

Still, simply invoking the mantra "competitive balance" will not result in a judicial finding that a sports league's trade restraint is reasonable. To justify significant trade restraints, the two-part test set forth by the Supreme Court in *NCAA* requires both that the defendants show that their goal is legitimate and that the chosen restraint is reasonably necessary to the goal's achievement. In *NCAA*, for example, the Supreme Court held that the collegiate athletic association had failed to meet the "heavy burden"[118] borne by defendants whose agreements significantly restrain competition, because the restriction

116. David A. Besanko & Daniel Simon, *Resource Allocation in the Baseball Player's Labor Market: An Empirical Investigation*, REV. BUS. & ECON. RES., Fall 1985, at 71.

117. In *NCAA v. Board of Regents*, 468 U.S. 85, 115 n.55 (1984), the Supreme Court suggested that where a sports league faced "'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete." The Court's analysis of the NCAA's market power in college football, *see id.* at 111-13, would suggest that the current major sports leagues could not avail themselves of this defense.

It is by no means clear that the Court had blanket restraints in mind in offering this suggestion. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-57 (1977), the Supreme Court approved the use of nonprice restraints on product distribution by a firm with a tiny market share. To the extent that a league faced the sort of interbrand competition that Sylvania did in the television manufacturing market, intraleague limits on competition for player services would arguably not even constitute a significant trade restraint, because of the ability of players to receive competitive offers from rival leagues.

Even where interleague rivalry might appear to justify more serious player restraints, the better course would be to rely on the league to persuade its players of the necessity of the restraint so it would be protected from antitrust challenge under the labor exemption. *See supra* note 97. The danger in allowing a labor restraint that does not improve the quality of the product for consumers, but simply promotes competition by lowering costs, is that this justification could be invoked by every employer in a competitive industry. Thus, to take a strong case, consider a new football league that sought to justify a rigid salary cap as necessary to (1) attract investors and (2) ensure that some of its members do not overspend in hopes of transferring its franchise to the dominant NFL. To the extent that these concerns had merit, a union representing the league's players should be willing to accept these restraints in a collective bargaining agreement.

118. 468 U.S. at 113.

on the sale of college football television rights at issue in that case was not "even arguably tailored" to serve the asserted interest in promoting competitive balance.[119] Thus, the *NCAA* case did not expressly address how a stronger claim by a sports league might be evaluated. As I have detailed elsewhere, however, the proper approach to any rule of reason case is to hold unreasonable those restrictions that are broader than reasonably necessary to achieve the legitimate goals outlined by the defendant.[120] This approach has been a critical element of antitrust jurisprudence since 1898, when Judge William Howard Taft wrote the landmark opinion in *United States v. Addyston Pipe & Steel Co.*[121] In that case, Taft held that the Sherman Act was intended to make criminal and tortious those contracts that were void as unreasonable restraints of trade under the common law and concluded that the common law tolerated restraints among competitors only when "ancillary to the main purpose of a lawful contract, and *necessary* to protect the covenantee in the enjoyment of the *legitimate* fruits of the contract."[122]

Antitrust cases involving sports league trade restraints have consistently applied the same standard. On two occasions, the NFL's amateur draft has been found illegal because "it went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purposes might be asserted for it."[123] In its opinion in *Smith v.*

119. *Id.* at 119.

120. *See generally* Ross, *supra* note 37, at 121-43; Ross I, *supra* note 36, at 489-97.

In *Chicago Professional Sports Ltd. v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996), Judge Frank Easterbrook suggested that the test enunciated in *NCAA* was not an exposition of the application of the rule of reason toward evaluating whether a sports league joint venture's ancillary restraints were permissible, but was instead an unprecedented invocation of a "bobtailed Rule of Reason." The high degree of economic integration among members of a sports league requires, in his judgment, a "full Rule of Reason" where proof of substantial market power is "an indispensable ingredient." *Id.* This is not the first occasion that Judge Easterbrook has suggested that plaintiffs challenging particular trade restraints agreed to by members of a joint venture must provide proof of economic power in a relevant market, no matter how unreasonable and unnecessary the challenged restraints are to legitimate goals. *See, e.g.*, Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188 (7th Cir. 1985).

There is some irony, of course, in this narrow reading of *NCAA* by a leading antitrust scholar who, prior to his appointment to the bench, represented the NCAA in its unsuccessful attempt to persuade the Supreme Court that it lacked market power and thus could not unreasonably restrain trade. *See* Brief for the Petitioner, NCAA v. Board of Regents, 468 U.S. 85 (1984) (No. 83-271). In any event, it is clear that all major North American sports leagues do enjoy economic power in the market for their players' services. *See supra* note 31.

121. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

122. *Id.* at 282 (emphasis added).

123. Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978); Kapp v. NFL, 390 F. Supp. 73, 81 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978). In *Smith*, the district court judge had similarly held that it "need not fully evaluate the league's claims of necessity for a college draft because, even conceding the need for some such system, the current structure is significantly more restrictive than necessary." Smith v. Pro Football, Inc., 420 F. Supp. 738, 746 (D.D.C. 1976), *aff'd*, 593 F.2d 1173 (D.C. Cir. 1978). For the NFL draft to be found lawful under the rule of reason, the judge said he would have to find that the draft "is a reasonable way of pursuing legitimate business interests, and that it does not have the purpose or effect of unreasonably restraining competition." *Id.* at 745.

*Pro Football, Inc.*,[124] the D.C. Circuit first questioned the degree to which the draft accomplished the goal of competitive balance at all. The court expressed the view that the key to competitive balance in the NFL was not the amateur draft but the equal sharing of network television revenues.[125] The court also suggested that the effect of the amateur draft paled in comparison to the impact of the head coach on the success or failure of the team, noting that over a three-year period the same nine teams occupied twenty-two of the available twenty-four playoff spots, and at least six of them included veteran successful coaches. Thus, "the player draft does not have an equalizing effect to the extent of knocking out the top teams, if the top teams have good coaches."[126] The court concluded that "the effects of fine coaching swamp whatever effect the draft may have on team performance."[127] Turning to overbreadth, the court noted that the league justified the draft "primarily by the need to disperse the *best* players," but the restraint "applied to all graduating seniors, including average players who were, in a sense, fungible commodities."[128] The court suggested several less restrictive alternatives to allocate amateur talent among NFL clubs.[129] Most significantly, the court noted that the "least restrictive alternative" would be the elimination of the draft and the use of revenue sharing to equalize teams' financial resources.[130]

Likewise, veteran players were able to successfully challenge the NFL's restraints on free agency on overbreadth grounds in *Mackey v. NFL*.[131] The court emphasized the application of the virtual ban on

---

In *Kapp*, the court did not cite *Addyston Pipe*, but nonetheless adopted the same analytical framework, relying on a "well-settled rule of contract law" that restrictions on an employee's right to freely pursue his trade are permitted under a reasonableness standard only if they "afford fair protection to the interests of the employer without imposing such an undue hardship on the employee as to interfere with the *public interest*." 390 F. Supp. at 81. The court concluded that the NFL draft "goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL." *Id.* at 82.

124. 593 F.2d 1173 (D.C. Cir. 1978).

125. *See id.* at 1184 n.46.

126. *Id.*

127. *Id.*

128. *Id.* at 1187 (emphasis added).

129. *See id.* at 1187-88. These included a scheme that would permit several teams to draft a player and limit the number of players any one team might sign; league rules that set minimum acceptable terms that a team must offer to a drafted player lest they lose their exclusive rights; a second draft if a player did not come to terms with the team initially drafting him; or a sharply limited draft that would cover only the top players. *See id.*

130. *Id.* at 1188.

The court in Kapp v. NFL, 390 F. Supp. 73, 88 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), concluded without elaboration that the perpetual allocation to one team of exclusive negotiating rights to a drafted player was overbroad.

131. 543 F.2d 606, 622 (8th Cir. 1976). The court noted:

> We need not decide whether a system of inter-team compensation for free agents moving to other teams is essential to the maintenance of competitive balance in the NFL. Even if it is, we agree with the district court's conclusion that the Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes it might have in this regard.

*Id.* at 622.

competition for player services to mediocre players as well as superstars. The court also noted that the restriction on a player's ability to receive competing bids for his services was perpetual and that there were no standards for determining the compensation required.[132]

While these blanket restraints faltered because of overbreadth, others have been found illegal because the league was unable to show any correlation between the restraint and its asserted purpose. Most notably, the NCAA's television restrictions were invalidated by the Supreme Court because they were not even "arguably tailored" to promote competitive balance.[133] The Court expressed its doubt that "there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years [the opinion was written in 1984, over a decade before Northwestern's "miracle season" and Rose Bowl appearance] without the NCAA's television plan."[134] The Court also observed that the NCAA produced no evidence that "the restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity."[135]

### C. *The "Single Entity" Argument*

A final objection to applying the venerable *Addyston Pipe* methodology to sports league trade restraints comes from sports owners and some academics, who assert that sports leagues should be considered a "single entity" akin to corporations or partnerships. If so, agreements among owners would not be considered "contracts, combinations, or conspiracies," and section 1 of the Sherman Act would not apply to them. This issue has been extensively debated in the academic literature and will not be rehearsed here in detail.[136] As the

132. *See id.* The most notable example of overbreadth was the application of the NFL's compensation rule to the signing, by the lowly New Orleans Saints, a team that had recently joined the league, of star receiver Dave Parks from the San Francisco 49ers, a contender. Commissioner Rozelle awarded the 49ers two first-round draft picks. This award, in particular, was found to act as "an effective deterrent to clubs signing free agents." Mackey v. NFL, 407 F. Supp. 1000, 1004, 1006 (D. Minn. 1975), *aff'd*, 543 F.2d 606 (8th Cir. 1976).

133. NCAA v. Board of Regents, 468 U.S. 85, 87 (1984).

134. *Id.* at 118 n.62.

135. *Id.* at 119.

136. For arguments in favor of a single entity defense for sports league owners, see, e.g., Myron G. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219 (1984); John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013. Critics of the single entity defense include Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751 (1989); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 (1991); Daniel E. Lazaroff, *Antitrust Analysis and Sports Leagues: Reexamining the Threshold Questions*, 20 ARIZ. ST. L.J. 953 (1988); Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 465-68 (1990).

district judge who tried the recent NFL player restraint case found, this argument has been expressly rejected by several courts of appeals and implicitly rejected in the many other cases where player restraints have been invalidated under section 1.[137] The judge noted that prior courts had relied on a host of factors in rejecting the single entity defense, including: (1) the organization of sports leagues as unincorporated associations of separately owned teams that do not share profits and losses;[138] (2) the independent management of each team concerning matters such as player acquisitions;[139] and (3) active competition among clubs in the acquisition of players and management personnel.[140] This conclusion is likewise consistent with the general "ease with which the courts have pierced the corporate veil to find a 'contract, combination, or conspiracy'" when participants in an enterprise are also competitors.[141]

In *Copperweld Corp. v. Independence Tube Corp.*,[142] the Supreme Court held that the single entity defense is properly applied to agreements between a corporation and its wholly owned subsidiaries.[143] In contrast, there is clearly no "unity of interest" or "corporate consciousness" among fractious sports league owners.[144] Owners of clubs with poor records in markets where fans demand winners may prefer fewer trade restraints, so that they can act quickly to meet consumer demand; owners of champion teams may prefer many trade restraints, so that they can keep their talented roster intact. Owners who leave business operations to skilled general managers able to

---

137. *See* McNeil v. NFL, 790 F. Supp. 871, 879 (D. Minn. 1992); *see also* Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1388-90 (9th Cir. 1984) (expressly rejecting this defense) [hereinafter *Raiders*]; North Am. Soccer League v. NFL, 670 F.2d 1249, 1256-58 (2d Cir. 1982) (same); Chicago Prof'l Sports Ltd. Partnership v. NBA, 874 F. Supp. 844, 849 (N.D. Ill. 1995), *vacated*, 95 F.3d 593 (7th Cir. 1996) (same).

138. *See Raiders*, 726 F.2d at 1389-90; *North Am. Soccer League*, 670 F.2d at 1252. *Compare* Arizona v. Maricopa Co. Med. Soc'y, 457 U.S. 332, 356-57 (1982) (holding that price fixing by doctors not sharing profits or losses was illegal under § 1), *with* Hassan v. Independent Practice Assocs., 698 F. Supp. 679, 689 (E.D. Mich. 1988) (permitting price fixing by medical association that shared all profits and losses).

139. *See* Los Angeles Mem'l Coliseum Comm'n v. NFL, 519 F. Supp. 581, 582 (C.D. Cal. 1981), *aff'd*, 726 F.2d 1381 (9th Cir. 1984).

140. *See Raiders*, 726 F.2d at 1390-91; North Am. Soccer League v. NFL, 505 F. Supp. 659, 666 (S.D.N.Y. 1980), *aff'd*, 670 F.2d 1249 (2d Cir. 1982).

141. Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 506 (1992); *see also* Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 215 n.1 (D.C. Cir. 1986) (Bork, J.) (concluding that neither an exclusionary joint venture among independent moving companies nor the American League's refusal to admit a new baseball team are exempted from § 1, but instead are "boycotts" to be analyzed under the rule of reason).

142. 467 U.S. 752 (1984).

143. *See id.* at 771.

144. *See* Lazaroff, *supra* note 136, at 966; James L. Brock, Jr., Comment, *A Substantive Test for Sherman Act Plurality: Applications for Professional Sports Leagues*, 52 U. CHI. L. REV. 999, 1006 & n.30, 1007, 1031 (1985).

Although league commissioners may work hard to set policies based on a single "Leaguethink," individual owners establish the policies based on their perceptions of their own individual interests. *See* Ross II, *supra* note 36, at 701-02.

identify talented prospects and balance the books prefer few trade restraints; owners who insist on intermeddling and are unable to avoid overpaying mediocre players will demand more trade restraints. As one district court found, winning "translates into greater financial prosperity for the victors. One team's gain on the court is thus generally another's loss at the bank, and while some cooperation is necessary, the profit seeking interests of one team are often contrary to those of other teams."[145] As a result, the mix of trade restraints that emerges will not necessarily be one that is in the best interests of the sport as a whole, but rather the one that is in the best interests of the requisite majority of the individual owners. The decision to operate a sports league with independently owned franchises is thus not simply a matter of "organizational choice, [an] apparently optional decision[ ] that [can] easily be manipulated to satisfy current antitrust rules."[146] The divergence of interests reflects economic realities and makes sports leagues much different from the single entity that would be created if, for example, the Emir of Kuwait were to purchase the entire National Hockey League and have his employees run the individual franchises.

The critical difference between self-interested NBA owners and the hypothetical league owned by the Emir of Kuwait also has been recognized by Professor Herbert Hovenkamp, who notes that when the profit-maximization goals of a venture's individual members differ from those of the venture as a whole, "the venture may be more likely to behave anticompetitively."[147] As Hovenkamp observes, this distinction has been recognized by the Supreme Court in cases like *Associated Press v. United States*,[148] which invalidated AP's practice of allowing newspapers to exercise a veto on membership applications from competitor newspapers. If AP had been a single firm, it would have admitted additional firms whenever efficient for the entity as a whole and would not have subjected an application to a veto by local self-interest.[149]

The argument that sports leagues are single entities not subject to the requirement that agreements in restraint of trade be reasonable is also inconsistent with more recent judicial developments. In its 1979 ruling on an antitrust challenge to an agreement whereby numerous rival songwriters combined to set the price for one blanket license for their copyrighted works, the Supreme Court took note of the new,

145. Chicago Prof'l Sports Ltd. Partnership v. NBA, 874 F. Supp. 844, 849 (N.D. Ill. 1995) (footnote and citation omitted), *vacated*, 95 F.3d 593 (7th Cir. 1996).

146. Jacobs, *supra* note 136, at 40 (quoting Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562, 586 (1986)).

147. Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 9 (1995).

148. 326 U.S. 1, 14-15 (1945).

149. *See* Hovenkamp, *supra* note 147, at 43.

unique product being offered by the agreement, a product that could not be offered without the agreement of competing songwriters.[150] Still, the Court remanded the case to the court of appeals to determine whether the agreement was reasonable, rather than dismissing the case because of the single entity theory.[151] Moreover, this theory would dictate that the NCAA's television restrictions struck down in 1984 would not have been held unlawful, because no single college can create college football on its own and no team has any independent existence or worth other than as part of the integrated NCAA framework.[152]

However, new life has been breathed into league single entity arguments by the recent appellate decision in *Chicago Professional Sports Ltd. v. NBA*.[153] The district court had read *Copperweld* narrowly, requiring a complete unity of interest among the defendants to permit invocation of the single entity defense. Judge Frank H. Easterbrook regarded this proposition of law as "silly."[154] Recognizing that characterizing the NBA "is a tough question," his majority opinion directed the district court on remand to reconsider the issue "using the correct legal approach."[155] Judge Easterbrook's reasoning is severely flawed, and it is not clear that other courts will necessarily follow it. Even within the Seventh Circuit, however, the majority's analysis suggests that blanket player restraints are subject to a rule of reason analysis under the Sherman Act.

Easterbrook correctly stated the characterization question in the abstract: "Conduct that 'deprives the marketplace of the independent centers of decisionmaking that competition assumes,' without the efficiencies that come with integration inside of a firm, go on the 'concerted' side of the line."[156] The essence of the antitrust challenge to blanket restraints is that the efficient operation of a sports league does *not* require the elimination of "independent centers of decisionmaking" (each club) as to how much money should be spent on player talent. Perhaps Judge Easterbrook means that whenever formerly independent firms combine to achieve efficiencies, whatever they jointly decide should be exempt from rule of reason scrutiny; if so, he rejects

150. Broadcast Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 22-24 (1979).

151. *See id.*

152. It is true that professional sports league teams exist as integrated economic units, unlike the entirely separate and economically independent colleges that comprise the NCAA. The fact that colleges operating major football programs also compete with each other in other markets is totally irrelevant, however, to the question whether their football programs exist as independent economic actors or as part of an integrated unit (the NCAA). Legal analysis of the NBA's superstation rules would hardly be changed if, for example, NBA teams were operated as divisions of 27 rival beer companies.

153. 95 F.3d 593 (7th Cir. 1996).

154. *Id.* at 598.

155. *Id.* at 599.

156. *Id.* at 598 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).

the teaching of his mentor, Judge Richard Posner, who wrote that it "does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition."[157]

The majority's analogies reveal a flawed perspective. Judge Easterbrook noted that divisions within a single firm might have competing interests, with separately compensated executives seeking to maximize their own division's profits, but that these conflicts do not "imply that these large firms must justify all of their acts under the Rule of Reason."[158] The critical difference between General Motors and the National Basketball Association, however, is that ultimately the decision whether Saturn should refurbish a run-down Oldsmobile plant (good for Oldsmobile) or build a new plant far away from the traditional culture of Detroit (good for Saturn) will be made either by senior executives or a board of directors concerned only about maximizing revenues for the entire corporation, whereas NBA decisions are made by the self-interested owners themselves. Similarly, the court suggested an analogy to McDonald's franchisees.[159] Again, the critical difference is that fundamental decisions about the price, output, and quality of McDonald's food is made by McDonald's Corporation, not the individual franchisees.[160]

The majority opinion in *Chicago Professional Sports* was careful to suggest that sports leagues might be found to be a single entity when selling broadcast rights "in competition with a thousand other producers of entertainment" but as a joint venture "when curtailing competition for players who have few other market opportunities."[161] Although the majority did not spell out the "correct" legal approach, Judge Cudahy's concurring opinion did. He suggested that courts focus on whether the league's ownership structure affords individual

157. General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 594 (7th Cir. 1984).

158. *Chicago Professional Sports*, 95 F.3d at 598.

159. *See id.* at 598, 600.

160. In his initial opinion in the case, Judge Easterbrook foreshadowed this misunderstanding. He wrote that the "persons denominated owners of teams may not own them in an economic sense. Many of their actions are subject to review by the league's board, so that the 'owners' may be no more than financier-managers of the league's branch offices." Chicago Prof'l Sports Ltd. v. NBA, 961 F.2d 667, 672 (7th Cir. 1992). What his analysis ignores, however, is the fact that these "financier-managers" *are* the league's board of governors, and their narrow self-interested voting can block any changes that would liberalize trade restraints.

161. *Id.* at 600. This language suggests, though, that the court is improperly conflating the single entity issue with the substantive issue, under the rule of reason, of whether the defendants have significantly restrained trade. If in fact NBA broadcast rights are "reasonably interchangeable by consumers for the same purposes" with other programming, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956), there is no unreasonable restraint of trade. If NBA broadcasts are unique, *cf.* International Boxing Club v. United States, 358 U.S. 242, 250 (1959) (holding that championship boxing matches are a distinct market), then consumers would be harmed by the restrictions on telecasting Chicago Bulls games at issue in *Chicago Professional Sports*.

teams "some chance of economic gain at the expense of the league."[162] This analysis points to a joint venture characterization for sports leagues when they impose blanket player restraints. Owners of both teams with superior young talent and clubs with loyal fans who will support the team without significant improvement will favor blanket restraints, even if the league as a whole would be better off with free competition that affords clubs whose fans will reward significant improvement the opportunity to make that investment.[163]

Characterizing a business entity as a single firm or a joint venture is relevant to corporate as well as antitrust law. One reported decision suggested in dicta that when the owners of clubs in the World Hockey Association, which was organized as a Delaware corporation, sat as the governing board of the league, they were obligated to make decisions for the benefit of the league as a whole even if it was against the self-interest of their own clubs.[164] It is clear, however, that the course of performance of owners of the major professional sports leagues is inconsistent with any notion of fiduciary duty to each other or to the best interests of the league as a whole. As the Ninth Circuit noted in the *Raiders* case, although individual clubs often act for the common good of the NFL, reflecting a commonality of interest that exists in every cartel, "we must not lose sight of the purpose of the NFL as stated in Article I of its constitution, which is to 'promote and foster the primary business of League members.'"[165] Whether by course of performance or explicit agreement, a business entity will be treated like a joint venture and not like a single firm when the principals' behavior suggests mutual relief from corporate/partnership concepts of fiduciary duty.[166] Courts have held that entities formally established as corporations can be treated under corporate law as partner-

162. *Chicago Prof'l Sports*, 95 F.3d at 603 (Cudahy, J., concurring).

163. As a matter of antitrust jurisprudence, Judge Cudahy carefully framed his analysis within the context of an assumption that "the sole goal of antitrust is efficiency or, put another way, the maximization of total social wealth." *Id.* at 602. He thus focused on whether an ownership structure affected the ability of the defendant to make efficient management decisions. *Id.* at 603. Whatever the accuracy of Judge Cudahy's initial assumption under his own circuit's precedents, the Supreme Court has never adopted this unidimensional view of antitrust. If, for example, antitrust law seeks to maximize the wealth of consumers (who comprise the majority of voters who elect legislators who enacted the antitrust laws), *see* Ross, *supra* note 37, at 8-11, then, under Cudahy's reasoning, rule of reason scrutiny should apply whenever an ownership structure affected the ability of a defendant to exploit consumers. Consumers clearly benefit when the antitrust laws permit economic units to be integrated in order to produce a new or better product but constrain these units from agreeing with each other unnecessarily where the effect is to restrain output or make output unresponsive to consumer demand.

164. Professional Hockey Corp. v. World Hockey Ass'n, 191 Cal. Rptr. 773, 777 (Cal. Ct. App. 1983).

165. Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1389 (9th Cir. 1984).

166. Thus, although partners generally owe a duty to disclose information concerning partnership affairs, such a duty was held inapplicable where partnership documents expressly provided that limited partners in an oil development scheme were not entitled to confidential information about the leases. Exxon Corp. v. Burglin, 4 F.3d 1294, 1299-1300 (5th Cir. 1993).

ships where this reflects the reality of the ownership structure;[167] similarly, where a sports league claims to be a partnership, but the reality of the ownership structure suggests it is a joint venture, this is how they should be treated.[168]

The landmark case defining reasonable restraints of trade, *Addyston Pipe*, established the principle that competitors may agree to restrain trade among themselves only where the restraint is ancillary and reasonably necessary to achieve a lawful purpose.[169] In *NCAA*, the Supreme Court applied the *Addyston Pipe* approach in the context of sports leagues, holding that leagues carry a heavy burden to demonstrate that significant restraints are tailored to promote competitive balance among their teams.[170] This holding applies fully to player restraints. The following part applies the standard set out in *Addyston Pipe* and *NCAA* to such restraints.

## III. Applying the Legal Standard

In evaluating the legality of blanket restraints imposed by sports leagues, the issue is, of course, not whether *any* restraint on competition for player services is permissible, but whether the *particular* schemes adopted by the leagues pass antitrust muster. Blanket restraints have the purpose, and often the effect, of significantly limiting the salaries of professional athletes, and they are the result of an agreement made by league owners who would otherwise compete with each other for players' services. In order to establish a prima facie case, an antitrust plaintiff challenging these rules must, of course, show that they have an anticompetitive effect. For example, the recent agreement in Major League Baseball[171] seems, at the outset, to be a blanket restraint in form only—in actual effect, applying a tax (rather than a cap) on only a handful of teams appears unlikely to significantly reduce competition for players' services. Likewise, if the league rules implementing a restraint are so riddled with loopholes that the market for players' services is not effectively restrained, there would be no Sherman Act claim. The standard set forth in *NCAA v.*

167. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 512-13 (Mass. 1975).

168. Thanks to Cynthia Williams for her insights on these points.

Query why the National Basketball Association has not gone public. The owners would benefit immensely from being able to sell shares in the NBA, even under extremely favorable conditions whereby they could (1) maintain control by insisting that the stock was nonvoting and (2) structure in advance the franchise relationship between the league and individual clubs by preserving revenues from ticket sales, luxury boxes, and local broadcasting for individual teams. One plausible reason why owners have declined this lucrative opportunity is that the Board of Directors of the NBA would then owe a fiduciary duty to public shareholders to conduct their affairs in the best interests of the entire league rather than the best interests of the majority of the owners.

169. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

170. *See* NCAA v. Board of Regents, 468 U.S. 85, 113 (1984).

171. *See supra* note 2 and accompanying text.

*Board of Regents* suggests that a plaintiff challenging a restraint on competition for player services would have to show that club managers are in fact significantly constrained in the freedom to bid for players whose services they desire and that there is an actual effect on salaries paid or other significant market distortion.[172] Once anticompetitive effect is shown, however, the *NCAA* standard requires a professional sports league seeking to avoid antitrust liability to demonstrate that its rules are reasonably necessary to increase the quality and popularity of its product by enhancing competitive balance throughout the league.[173]

A blanket restraint that applies to all teams, regardless of their rank in the standings, cannot meet this standard—it is not tailored to promote competitive balance. The salary caps currently in effect in the NBA and the NFL, the restrictions on free agency in the NHL, and the punitive payroll successfully resisted by the baseball players' union[174] each have this fatal flaw—they equally restrain teams with high payrolls and successful records, for whom the acquisition of additional talented players might reasonably be thought to facilitate dynasties and harm competitive balance, as well as teams with high payrolls and inferior records, whose owners should be required to expend additional capital in order to improve their product. Whatever the legality of more modest or tailored restraints, the blanket restraints in effect in the major sports other than baseball cannot withstand antitrust analysis.[175]

172. *See NCAA*, 468 U.S. at 102-04.

173. *See id.* at 113.

174. *See* Chass, *supra* note 5, at B13 (owners, either through a salary cap or a limitless luxury tax on payrolls, sought to place a "drag" on player salaries and create cost certainty for themselves).

175. No cases have directly addressed the legality of a sports league salary cap under the Sherman Act. The NFL's cap was not introduced until it was made part of its collective bargaining agreement with the players' union and is thus exempt from antitrust scrutiny under the labor exemption. *See* White v. NFL, 822 F. Supp. 1389, 1431 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994). The NBA's cap has been challenged three times, once when it too was incorporated into an existing labor agreement, Wood v. NBA, 809 F.2d 954 (2d Cir. 1987), and on two other occasions after the agreement expired. In these latter cases, the courts held that the labor exemption still applied to the agreement. *See* NBA v. Williams, 45 F.3d 684, 690-93 (2d Cir. 1995); Bridgeman v. NBA, 675 F. Supp. 960, 965-66 (D.N.J. 1987).

The trial court in *Williams*, having first ruled that the NBA owners' agreement was protected by the labor exemption, went on to opine that "it appears that the Players have failed to show that the alleged restraints of trade [including a salary cap] are on balance unreasonably anti-competitive." NBA v. Williams, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995). The court did not explain these remarks in detail, and the court of appeals found it unnecessary to reach these arguments. *See Williams*, 45 F.3d at 688.

Because the current NHL rules that permit unrestrained competition only for the most veteran players are embodied in a collective bargaining agreement, they too are exempt from antitrust scrutiny. *See* McCourt v. California Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979). Earlier cases condemned league rules that barred virtually any competition for services of any player. *See, e.g.*, Mackey v. NFL, 543 F.2d 606, 621 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); McCourt v. California Sports, Inc., 460 F. Supp. 904, 912 (E.D. Mich. 1978), *vacated on other grounds*, 600 F.2d 1193 (6th Cir. 1979); Robertson v. NBA, 389 F. Supp. 867, 893-94 (S.D.N.Y. 1975). Although the current NHL rules have the fatal flaw, discussed in text, of apply-

Two arguments have dominated the conventional debate about blanket restraints. Leagues and their defenders argue that these restraints actually promote competitive balance. According to this argument, the restraints prevent rich teams located in big cities from outbidding their smaller and poorer rivals for the best talent. It follows that an unrestrained labor market would result in competitive imbalance and a less desirable product for fans generally. If the league's argument were accepted, the antitrust significance is that the restraint would be reasonable. On the other hand, league critics, principally from the discipline of economics, argue that the restraints have no effect one way or the other on the allocation of players among teams.[176] According to this argument, clubs will find ways (such as cash sales or unequal trades) to ensure that players will end up on the rich teams who value players more highly. Thus, although the restraints have a severe effect on players' salaries, the same degree of competitive balance will result regardless of the rules that govern the labor market. The antitrust significance of the critics' argument is that the restraints are unreasonable, but the only ones who should care are players; fans have no interest in which side of this greedy war prevails.

This article offers a third and different perspective: that blanket restraints affirmatively harm competitive balance. The implications of this argument are two-fold. First, the restraints are unreasonable under the Sherman Act; second, sports fans have a vital stake in allying themselves with players' unions in the latter's efforts to resist blanket restraints. In short, the debate about blanket restraints is not simply a tug-of-war between management and labor over their share of the pie—it is a battle about the shape and size of the pie as well, a battle in which players and fans have similar interests in free competition.

To demonstrate the unreasonableness of blanket restraints, the analysis in this part begins in subpart A with an example of a player restraint that appears to be lawful because it *is* reasonably tailored to promote competitive balance—the waiver rule.[177] Next, subpart B marshals evidence to reject the owners' contention that blanket restraints promote competitive balance,[178] and subpart C then develops the argument that, in fact, these restraints affirmatively *harm* competi-

ing to teams regardless of whether their acquisition of additional player talent would harm competitive balance, the current rules are significantly less restrictive than those condemned in earlier cases by permitting unrestricted free agency for some veteran players.

The proposed "luxury tax" in baseball is a novel concept that has not been implemented previously by any professional sports league and thus has not been challenged in court.

176. *See infra* notes 227-28 and accompanying text.

177. *See infra* notes 181-85 and accompanying text.

178. *See infra* notes 186-219 and accompanying text.

tive balance.[179] Finally, subpart D concludes with a consideration of less restrictive alternatives to improve competitive balance.[180]

### A. *A Reasonably Tailored Restraint—The Waiver Rule*

The fundamental problem with blanket restraints can best be illustrated by contrasting them with the waiver rule imposed by virtually all leagues, a rule that has received little attention but that exemplifies a restraint reasonably tailored to promote competitive balance. The typical standard player contract includes a clause permitting the club to assign the player's services to another team in the league;[181] under the waiver rule, a player's contract must be offered to all other teams in the league before it is terminated. If two or more teams would like to receive the player's services at the contract price, the team that is lowest in the standings may exercise the privilege. This is true, of course, even if another team would be willing to pay the player more than the contract price for his services. Indeed, the rule has a real effect only where a team with a superior record would be willing to outbid others for the player's services; otherwise, the team successfully claiming the player on waivers could just sign him for the minimum salary.

In Major League Baseball, the waiver rule also comes into play when a team seeks to assign a player's contract to a minor league club. In general,[182] major league teams may have up to sixteen "optional agreements" in effect at any one time. These optional agreements allow a team to send the player down to the minors over the course of up to three seasons and then recall him back to the majors, as the team sees fit. Otherwise, no player may be sent to the minors without clearing waivers.[183]

---

179. *See infra* notes 220-61 and accompanying text.

180. *See infra* notes 262-74 and accompanying text.

181. Players may individually negotiate no-trade clauses, *see* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 93 (1993 Statutory and Documentary Supp.) (reprinting baseball's standard player contract), and collective bargaining agreements often contain provisions limiting a team's ability to trade veteran players without their consent. *See id.* at 61 (explaining that baseball's collective bargaining agreement bars trades without players' consent for 10-year veterans who have been with a club for at least five years).

182. The Major League Rules in this regard are quite complex. Many clubs have hired administrative staff, often with legal training, to advise them on how to comply with the rules. Indeed, one noticeable snafu resulting in the loss of prized prospects cost a General Manager his job. *See* Stan Savran, *A Second Chance: This Time, Pirate Brass Should Be More Tolerant with GM*, PITT. POST-DISPATCH, Mar. 6, 1993, at D4.

183. The rules are not models for future drafters. Ignoring some redundant and confusing clauses, it may be best to focus on Major League Rule 11. Rule 11(a) requires that all assignments of player contracts be absolute, subject to Major League Rule 11(c). THE BASEBALL BLUEBOOK 551 (1987). The latter provision permits a club, for up to three seasons, to assign a player to a minor league club with a right of recall. *See* Major League Rule 11(c), *id.* at 552. With that exception, Major League Rule 10(c)'s requirement that waivers are required for assignment comes into play. *See id.* at 548.

The waiver rule is tailored to promote competitive balance in two respects.[184] In sports with minor leagues, like Major League Baseball, it prevents dominant teams from stockpiling players who could contribute immediately to a lesser team. Suppose, for example, that the pitching-rich Atlanta Braves have a talented starting pitcher who cannot break into their rotation. Unless the player is sent to the minor leagues under an optional agreement, the Braves must either waste a spot on their twenty-five man roster on a player who will not be effectively utilized or place the player on waivers so that he may be claimed by a team with a lesser pitching staff.[185] Thus, the rule allocates released players whose services are in demand elsewhere so as to *promote competitive balance*, to help the inferior team in the standings. Unlike blanket restraints, the waiver rule benefits, rather than hinders, those teams with poor records who have an economic incentive (because of consumer demand) to improve their roster even if they happen to be in large markets and already have large payrolls.

As developed below, blanket restraints are designed to prevent teams from larger markets or with larger payrolls from competing effectively for player talent. The waiver rule would be analogous in anticompetitive effect if, instead of favoring the team that was lowest in the standings, it gave priority to the team with the smallest payroll, or from the smallest market. Conversely, blanket restraints would be

184. Waivers are also required in a third situation: when a baseball team seeks to assign—i.e., trade—a player to another team after August 1 and before the end of the season. *See* Major League Rule 10(e)(1), *id.* at 550. This requirement serves another purpose—to preserve the integrity of the championship season by limiting the ability of teams to influence the pennant race by making a favorable trade to one of the contenders. Teams out of contention by July 31 do, of course, make trades to acquire young talent that will help them in the future in return for veteran talent that can help a contender now. Setting an early deadline makes this process more available to all.

185. This antistockpiling rule is facilitated by Major League Rule 5, which permits teams in higher classifications of organized baseball to draft players (after a three-year grace period) from the rosters of clubs in lower classifications. *See id.* at 535-38. Each year, Major League clubs must establish a 40-man roster (actually, if they suspect they might wish to participate in the Rule 5 draft, they must leave a spot vacant). Any player not placed on that roster is subject to being drafted by other teams, in reverse order of finish from the prior year's standings. *See id.* Together with the option rules, the Rule 5 draft limits the ability of a team to maintain its rights to the services of a minor league player with the talent to play on a major league team. Although the rule primarily applies to a player whose team, because of questions about his ability or health, is not confident of his prospects for major league success, it can have dramatic balance-promoting effects when a team has a surplus of talent. Perhaps the classic illustration concerns Hall of Fame outfielder Roberto Clemente. Signed as an amateur by the Brooklyn Dodgers in 1954, he played in only 87 minor league games for the Montreal Royals of the Class AAA International League. He batted .247 for Montreal, then a Brooklyn Dodgers' farm club, and contributed a mere two home runs and 12 runs batted in. The Dodgers' major league roster for that year constituted the famed "Boys of Summer" who would win the 1955 World Series, and they left Clemente off the list. He was drafted for $4,000 by the last-place Pittsburgh Pirates, for whom he started the following year (when they remained in the cellar). *See* THE BASEBALL ENCYCLOPEDIA 416, 420 (Joseph E. Reichler ed., 7th ed. 1988); Don Reed, *Eye Openers Column*, ST. LOUIS POST-DISPATCH, Oct. 4, 1992, at 2F; *Trivia Quiz*, SPORTING NEWS, July 22, 1991, at S22.

analogous to the procompetitive waiver rules if they applied only to those clubs who were most successful on the field.

### B. *Significant, Across-the-Board Player Restraints Do Not Promote Competitive Balance*

While the waiver rule facially promotes competitive balance by aiding weaker teams, a more complex argument is necessary for league defenders to plausibly claim that blanket restraints promote competitive balance.[186] The argument proceeds as follows: without blanket restraints, teams in certain markets will systematically outbid others for talented players; these favored teams will therefore systematically dominate league play; the resulting competitive imbalance will reduce the quality and attractiveness of the league's product.[187]

For over a century, owners have claimed that restraints on competition for player services are necessary to promote competitive balance. The analysis in this subpart demonstrates the fallacy of this argument. First, empirical evidence rejects both the claim that a handful of rich teams systematically outbid their rivals for star players and

---

186. One principal justification for a salary cap is that it promotes investor confidence and boosts the value of franchises by assuring owners that their salary expenses will be limited. Trial Declaration of Russell T. Granik, Deputy Commissioner, National Basketball Association, ¶ 42, NBA v. Williams, 857 F. Supp. 1069 (S.D.N.Y. 1994) (No. 94 Civ. 4488 (KTD)); *see also* George G. Daly, *The Baseball Player's Labor Market Revisited*, *in* DIAMONDS ARE FOREVER: THE BUSINESS OF BASEBALL 12 (Paul M. Sommers ed., 1992) (stating that sports league practices "have an efficiency rationale" because they "secure and thereby encourage" investment). This justification, of course, is no different from one employed by any buyers' cartel and cannot protect sports owners from liability under either the antitrust statutes or the common law. *See supra* notes 94-98 and accompanying text. A salary cap may well be a system "'where it seems that everything got better and both management and labor prospered but not at each other's expense,'" as NBA Commissioner David Stern claims. Anthony Cotton, *David Stern with NBA Ratings, Revenues up, Commissioner Sees Resurgence*, WASH. POST, June 23, 1985, at D1. To the extent that management can persuade the players' union, rather than a court, of this position, both sides may agree to a salary cap that would be immune from antitrust challenge under the labor exemption. Wood v. NBA, 809 F.2d 954 (2d Cir. 1982).

187. *See* Powell v. NFL, 690 F. Supp. 812, 816 (D. Minn. 1988) ("While some freedom of movement after playing out a contract is in order, complete freedom of movement would result in the best franchises acquiring most of the top players."). A fine articulation of the leagues' argument, albeit by two commentators who demonstrate its flaws, is provided in Christopher D. Cameron & J. Michael Echevarria, *The Ploys of Summer: Antitrust, Industrial Distrust, and the Case Against a Salary Cap for Major League Baseball*, 22 FLA. ST. U.L. REV. 827, 852-53 (1995):

> The competitive balance theory hypothesizes that unless all the teams in each league agree to salary parity, great salary disparities among teams will emerge. Wealthier clubs in the larger markets, such as Chicago, Los Angeles, and New York, will outspend poorer clubs in the smaller markets, such as Montreal, San Diego, and Seattle, and sign the most talented players. By cornering the talent market, the larger clubs will essentially buy division titles, league pennants, and World Series rings, thereby monopolizing success in the sport. By contrast, smaller clubs will struggle merely to finish respectably.
>
> The theory also projects that, as an oligarchy of wealthy teams emerges, we would see the same clubs playing for the championship year in and year out. As the smaller clubs become athletically inferior, fan support will dwindle, leaving small market clubs economically marginalized, if not bankrupt. Thus the sport's competitive balance will be destroyed.

As the authors note, the "main problem with the competitive balance theory is the lack of empirical evidence supporting it." *Id.*

the claim that dynasties result from an unrestrained labor market. Indeed, the data suggest that teams in need of improvement tend to sign more free agents. Next, a discussion of the realities of baseball's labor market shows flaws in the theoretical underpinnings of the owners' logic that big cities equals big money equals more talent equals dynasties and competitive imbalance.

Because sports feature a plethora of statistics, the owners' argument has been subject to a host of studies by social scientists. Those who have studied Major League Baseball and the National Football League have demonstrated that free agency in those leagues has not enabled the teams located in large metropolitan areas to systematically outbid others, and these studies have been unable to find any other coherent category of franchise that has dominated the bidding.[188] To be sure, all things being equal, teams located in larger markets may be somewhat more successful in obtaining free agents, and some franchises located in the smallest markets may face a disadvantage, but all things are rarely equal. Growth of markets plays an important role, as does the willingness of the local fans to support a winner and punish a loser by fluctuations in attendance.

The competitive balance argument discussed in the text above is premised on the notion that a more balanced league will be more popular for more fans and is thus an economically efficient result. This argument must be distinguished from the noneconomic argument that it is somehow "unfair" that teams located in the very smallest markets will often lose superstars to teams located in larger markets. Consider the case of the Montreal Expos baseball team. Over the past decade, the Expos have consistently been unable to hold on to their top free agents. Nevertheless, skillful management has allowed the team to go through cycles of rebuilding and excellence. These cycles epitomize, rather than conflict with, competitive balance. The key to balance is not that each team has an equal chance of winning half of its games over the course of a decade, but that each team has a reasonable chance of contending for the championship every few years.[189]

---

188. *See* Alan Balfour & Philip K. Porter, *The Reserve Clause in Professional Sports: Legality and Effect on Competitive Balance*, 42 LAB. L.J. 8, 17 (1991); Donald J. Cymrot, *Migration Trends and Earnings of Free Agents in Major League Baseball, 1976-1979*, 21 ECON. INQUIRY 545 (1983). Although one early study found a "clear trend for free-agents to gravitate toward larger cities," it was concededly based on gross numbers without looking at the quality of the teams that acquired the players. George Daly & William J. Moore, *Externalities, Property Rights and the Allocation of Resources in Major League Baseball*, 19 ECON. INQUIRY 77, 93-94 (1981). A later study showed general movement from smaller to larger markets, but this movement was less significant than that from better to worse teams. *See* Besanko & Simon, *supra* note 116, at 82-83. One study actually found a greater movement from larger to smaller markets than vice versa. *See* Eric M. Leifer, *Endogenizing Context: Opportunity, Organization, and Dealmaking in Major League Baseball*, 23 SOC. SCI. RES. 263, 283 (1994).

189. *See* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 486 (E.D. Pa. 1972).

Most importantly, the tendency for winning teams to lose free agents (because each player is marginally less valuable to that team than to a weaker team[190]) "should undermine further any trend toward domination by a few teams."[191] Several studies of the movement of free agents in baseball suggest that the value of a valuable veteran player to an inferior team outweighs the increased purchasing power possessed by a pennant winner from a large city.[192] The NFL's pre-salary cap experience under the less restrictive "Plan B," which allowed non-star players to receive competitive offers, also showed that "player migration was distinctly *from* winning teams *to* losing teams" and that the four teams signing the most free agents were located in relatively small markets with an average population just over two million, while the five teams with the least movement had average populations well over eight million.[193]

The data also reject the contention that freer labor markets result in dynasties and reduced competitive balance. A number of studies show a weak, insignificant correlation between on-field performance and city size.[194] But almost all of the many studies that have compared Major League Baseball before and after the 1976 arbitration decision that led to significant free agency for veteran players reject the proposition that competitive balance has declined.[195] Indeed, as

---

190. For example, consider 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 300,000. *See* JAMES QUIRK & RODNEY D. FORT, PAY DIRT 242-43 (1992).

191. Cymrot, *supra* note 188, at 554-55; *see also* John Vrooman, *A General Theory of Professional Sports Leagues*, 61 S. ECON. J. 971, 975-77 (1995) (demonstrating that the marginal cost of acquiring a star is higher for a dominant team than an inferior one and noting that those who have ignored the increasing marginal cost of talent have thus overestimated the likely competitive dominance of teams in large markets).

192. For example, one study of the period from 1976-82 found that while 55% of free agents moved to larger markets, 57% moved to teams with a worse winning percentage. *See* Besanko & Simon, *supra* note 116, at 82-83. Among superior players, 59% moved to larger markets, but 64% moved to teams with inferior records. Additionally, some of the 36% of players who moved to better teams helped competitive balance by allowing a second- or third-place team to compete more evenly with the prior champion. Another 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. *See* Leifer, *supra* note 188, at 283.

193. Balfour & Porter, *supra* note 188, at 17.

194. *See* ERIC M. LEIFER, MAKING THE MAJORS: THE TRANSFORMATION OF TEAM SPORTS IN AMERICA 168-69 (1995) (finding a correlation between population and performance shows no dominance by large-city teams); Philip Porter, *Market Advantage as Rent: Do Professional Teams in Larger Markets Have a Competitive Advantage?*, *in* 1 ADVANCES IN THE ECONOMICS OF SPORTS 237, 238 (Gerald W. Scully ed., 1992) (reviewing literature).

195. *See, e.g.*, QUIRK & FORT, *supra* note 190, at 284-85; GERALD W. SCULLY, THE BUSINESS OF MAJOR LEAGUE BASEBALL 95-97 (1989) (comparing pre- and post-free agency and finding no increase in competitive imbalance in American League despite expansion, and increased competition within the National League); Robert C. Dolan & Robert M. Schmidt, *Assessing the Competitive Effects of Major League Baseball's Reentry Draft*, AM. ECONOMIST,

discussed below, studies that focus on measures of competitive balance that seem better correlated with those factors most appealing to sports fans suggest that competitive balance has *improved* as a result of free agency.[196] Similarly, a comparison of the standings in the National Basketball Association in eras where teams were forced to bid competitively against franchises in rival leagues and eras of "secure monopsony" revealed *more* balance when there is more competition for players.[197]

A careful analysis of the economics of the professional sports labor market identifies the flaw in the logic of those who claim that blanket restraints promote competitive balance. An owner seeking to maximize profits[198] will not pay a player a salary that exceeds the player's expected marginal revenue product (MRP).[199] Only if the MRP for most players is systematically higher in certain markets (such as larger cities) will bidding for services be skewed in an imbalanced fashion. For this to happen, the variety of factors that affect attendance and broadcast revenue must systematically favor certain franchises over others. Evidence suggests this is not the case.

The conventional wisdom among economic students of professional sports is that a player's MRP will be systematically higher in larger markets.[200] This consensus appears to be based on data showing that market size is a factor in explaining the likely movement of free agents[201] and studies that show that teams in larger cities will, *all else equal*, draw more fans than teams in smaller locales.[202] The conventional wisdom, however, is suspect. An analysis of baseball showed no statistically significant correlation between the size of the city in which a team was located and its winning percentage.[203] The data also suggest that all else is not equal: that in some markets fans

---

Spring 1985, at 21, 28-29 (finding that free agency caused no decline in competitive balance, using Spearman rank technique).

196. *See infra* note 234.

197. Roger Noll, *Professional Basketball: Economic and Business Perspectives*, *in* THE BUSINESS OF PROFESSIONAL SPORTS 18, 39-40 (Paul D. Staudohar & James A. Mangan eds., 1991).

198. An unexplored area demanding further research is the extent to which an owner seeking to maximize long-term profits might be willing to acquire a player for a wage in excess of the short-term MRP, as part of management's effort to obtain or maintain fan loyalty. *See infra* note 209.

199. Trial Declaration of Roger G. Noll ¶ 7, NBA v. Williams, 857 F. Supp. 1069 (S.D.N.Y. 1994) (No. 94 Civ. 4488 (KTD)) [hereinafter Noll Trial Declaration]. A player's marginal revenue product can be roughly defined as the difference between the revenue the team will receive based on its likely record with that player and the revenue the team would have received based on the team's record with a mediocre player who was paid the minimum salary.

200. *See, e.g.*, SCULLY, *supra* note 195, at 83 ("[P]layers are worth more on big-city teams than on small-city teams.").

201. *See* Donald J. Cymrot & James A. Dunleavy, *Are Free Agents Perspicacious Peregrinators?*, 69 REV. ECON. & STAT. 50, 58 (1987) (citing data to "support the position that market structure does influence the outcome of the market").

202. The germinal work is Roger G. Noll, *Attendance and Price Setting*, *in* GOVERNMENT AND THE SPORTS BUSINESS 115, 154 (Roger G. Noll ed., 1974).

203. *See* SCULLY, *supra* note 195, at 94-95.

are more sensitive to their team's on-field success than others, independent of the size of the market.[204]

A player who can be expected to improve a team's win-loss percentage will be more valuable to a franchise located in a market with fickle, fair-weather fans than in a market with a larger population of loyal fans.[205] One study demonstrated, for example, that a one percent increase in the win-loss record would increase attendance at Minnesota Twins and St. Louis Cardinals games by more than 93,000, whereas a similar improvement would yield an increase of only 74,000 for the New York Mets and 77,000 for the California Angels.[206] Another study incorporating revenues from concessions, parking, and ticket prices found a similar variance that does not mirror the size of the market; that study found that an additional win generated an additional $694,892 in revenue for the New York Mets, but only $253,839 for the New York Yankees, and $520,447 for the small-market Montreal Expos, but only $138,543 for the larger-market Toronto Blue Jays.[207]

---

204. *See* Gerald W. Scully, *Pay and Performance in Major League Baseball*, 64 AM. ECON. REV. 915, 920 (1974). Scully's statistical estimate of the marginal effect of win-loss records on baseball attendance from 1957-71 showed "wide differences in the slopes" for different teams. *Id.* Another empirical study found that prospective victories, prospective championship teams, and past championships contributed significantly to the fans' interest in a baseball team, while "generic" variables (such as market size) were less accurate predictors of attendance. *See* James D. Whitney, *Winning Games Versus Winning Championships: The Economics of Fan Interest and Team Performance*, 26 ECON. INQUIRY 703, 705-13 (1988).

A number of scholars have used statistical analysis to determine the *average* marginal revenue realized by each extra game that a team wins. Scully concluded that, in 1968-69, "raising the team win-loss record one point increases team revenue by $10,330." Scully, *supra*, at 920; *see also* ANDREW ZIMBALIST, BASEBALL AND BILLIONS 190 (1992) (finding that each .1% increase in winning percentage augments team revenues by $63,026); Asher A. Blass, *Does the Baseball Labor Market Contradict the Human Capital Model of Investment?*, 74 REV. ECON. & STAT. 261, 263 (1992) (stating that in 1987 marginal revenue from an additional win averaged approximately $315,000); James Richard Hill, *The Threat of Free Agency and Exploitation in Professional Baseball: 1976-1979*, 25 Q. REV. ECON. & BUS., Winter 1985, at 68, 70 (finding that a 1% increase in wins equals $15,434 in revenue); J.C.H. Jones & W.D. Walsh, *The World Hockey Association and Player Exploitation in the National Hockey League*, 27 Q. REV. ECON. & BUS., Summer 1987, at 87, 90 (stating that scoring a goal increases revenue by $5,117 for the NHL, and preventing a goal increases revenue by $4,900). But, other than demonstrating that winning is positively correlated with increased revenue, each of these figures appears to be a meaningless average that predicts nothing about the marginal revenue increases for any *particular* team.

205. *See* Vrooman, *supra* note 191, at 975 ("[A] small market team can still be competitive if its fans have a sufficiently higher elasticity of the demand for winning than do the fans in the large market.").

As Professor Porter notes, "The absolute value of the attendance and media revenue advantage in large markets does not affect the profit-minded owner's decision to hire talent." Porter, *supra* note 194, at 238. Rather, the larger guaranteed season-ticket base, the value of local broadcast contracts, and other benefits of major metropolitan areas result in an increased franchise value—what economists would call rent.

206. *See* Philip K. Porter, *The Role of the Fan in Professional Baseball*, *in* DIAMONDS ARE FOREVER: THE BUSINESS OF BASEBALL 63, 73 (Paul M. Sommers ed., 1992).

207. *See* Dale R. Oorlog, *Marginal Revenue and Labor Strife in Major League Baseball*, 16 J. LAB. RES. 25, 30 (1995); *see also* GERALD W. SCULLY, THE MARKET STRUCTURE OF SPORTS 130 (1995) (stating that "revenue is 2.6 times more sensitive to club performance than to franchise market size").

Even if a player's marginal revenue were higher in larger markets when considered in isolation, a player's value to any particular club is a function of his teammates. Thus, although John Wetteland saved all four World Series victories for the New York Yankees in the 1996 season, he was not given a serious offer as a free agent by the World Champions, who planned on making another relief pitcher their star "closer." Instead, Wetteland signed a highly lucrative four-year contract with the Texas Rangers (who lost to the Yankees in the 1995 league divisional playoff). Wetteland saved as many games in 1995 as the entire Ranger bullpen; the Rangers blew eleven leads in the ninth inning, and the Rangers' previous closer, who was not given a new contract offer, blew six saves, lost seven games without a victory, and gave up an average of almost six earned runs per game.[208]

These insights are significant. If marginal revenue is not an inexorable function of the size of the market, then the fans' response to a winning team (in "economese," the demand curve) is likely to be (as it is in many other industries) subject to dynamic movement based on skillful marketing. Therefore, a franchise's ability to attract top players is, to a significant extent, a function of the quality of its front-office management.[209] Consider two recent examples, the Colorado Rockies and Seattle Mariners. Less than a decade ago, an analysis that focused primarily on market size concluded that the Denver market was only marginally viable for an expansion franchise, although Denver was fifth among metropolitan areas without a Major League Baseball franchise and with a population greater than only three existing major markets.[210] In 1996, with a new stadium and effective marketing throughout the entire mountain time zone, the Rockies led the major

208. *See* Jack Curry, *Wetteland Closes, but It's with Texas*, N.Y. TIMES, Dec. 16, 1996, at C1; Kevin Lonnquist, *Signed, Sealed, Delivered; Yankees MVP Relief Pitcher Teams Up with Rangers for Four Years, $23 Million*, ARLINGTON MORNING NEWS, Dec. 17, 1996, at 1A. Thanks to Jack Sidorov for pointing out this excellent recent example.

209. Quirk and Fort's conclusion that a free labor market will "lead to a situation in which, on average, strong-drawing areas have strong teams, and weak drawing areas have weak teams," QUIRK & FORT, *supra* note 190, at 276, seems to assume that the demand curve in each market is static.

Because we know that Major League Baseball has enjoyed remarkable competitive balance over the past two decades, see *infra* notes 234-38, some dynamic effect is likely to be present. Otherwise, according to Professor Porter's study, *supra* note 194, the teams with the most elastic demand curves would systematically outbid, and therefore dominate, those with inelastic curves.

One possible explanation for the lack of dominance in baseball may be that a player may be acquired not because his salary is less than or equal to his expected marginal revenue product over the term of his contract, but as part of management effort to manipulate the fans' demand curve. One of the implications of Professor Porter's study is that management should undertake marketing efforts to make fans less fickle (i.e., to make the elasticity of demand for wins less elastic), so that it is not necessary to have a contending team and high payroll costs in order to draw profit-maximizing crowds. However, if fans *perceive* that management is not actively trying to build a championship contender, they may become less loyal. Thus, skilled management may well decide to acquire a player even if, using Porter's data, the additional wins attributable to that player will not result in marginal revenue equal to the player's salary, so that the team can maintain a more valuable asset—the loyalty of its fans.

210. Ross II, *supra* note 36, at 758.

leagues in attendance and had the tenth largest payroll in baseball,[211] and are now considered to be among the "high-revenue, big-market" franchises in baseball.[212] When the Mariners developed and maintained a talented team with the ninth-highest payroll in baseball, the owners of this small-market team were rewarded with phenomenal attendance,[213] thus demonstrating that large-market teams are not the only ones who benefit from the ability to quickly improve.

Another flaw in the argument made by defenders of league restraints is that even where the data show a pattern of long-term dominance by some teams, all teams go through cycles of momentum where they improve, peak, and decline. Thus, historically inferior teams at their peak can compete successfully against historically superior teams in their decline. According to one statistical analysis, half the variance in performance between different teams is really due to this phenomenon.[214]

Professor Andrew Zimbalist's comprehensive study of the economics of baseball concluded that one reason that teams are not being overwhelmed on the field is because baseball player's salaries do *not* correlate closely with their current economic value, but rather with their performance in the prior year.[215] As he notes: "[T]eam owners since 1976 have done a singularly unimpressive job of signing top-performing free agents or of paying a player according to his output. Consequently, average team salary has been related only tenuously to team performance . . . . Put differently, it has not been possible to buy a winning team."[216] In addition to management's inability to accurately predict how much a player will contribute to the team's success, other factors—including the decrease in "team chemistry" that can ac-

---

211. *See* Andrew Brandt, *The Business of Sports* (last visited Apr. 1, 1997) <http://www.bizsports.com/mlb.html> (hard copy on file with *University of Illinois Law Review*).

212. Tony DeMarco, *McMorris: Owners Need Convincing*, DENVER POST, Nov. 5, 1996, at D-7.

213. *See* Blaine Newham, *Turnstiles Show Best Numbers for M's*, SEATTLE TIMES, July 4, 1996, at C1 ("Who would have ever imagined that Seattle would be averaging more fans for its baseball team than Toronto or Boston or New York?").

214. *See* SCULLY, *supra* note 207, at 84-85.

215. *See* ZIMBALIST, *supra* note 204, at 193.

216. *Id.* at 96; *see also* Cameron & Echevarria, *supra* note 187, at 871 (finding that during 1989-93, only six of the 20 playoff teams ranked among the top four in terms of payroll cost).

At first glance, the results of the 1996 season may suggest a contradictory trend that supports the owners' traditional claims: the teams with the four highest payrolls all made the playoffs. *See supra* note 7. The effects of revenue sharing and a limited luxury tax on the five highest payrolls during the course of the new labor agreement will provide more definitive evidence of whether Zimbalist's conclusions are outdated. A closer look at payrolls and profitability, moreover, suggests an image less stark than one obtained from looking only at the top finishers. The fifth, sixth, and seventh biggest spenders (Chicago White Sox, Cincinnati Reds, and Boston Red Sox) were not among the top eight finishers, and all suffered a reduction in attendance. San Diego (18th payroll) won the NL East, and Montreal (lowest payroll) missed the playoffs by two games. *See* sources cited *supra* note 7.

company the signing of highly paid free agents,[217] variation in front-office talent, and the reduction over time in the difference between the best, average, and worst players in the league—help explain why free agency has not reduced competitive balance in baseball. Any team can compete effectively with a small payroll by making superior cost-benefit decisions regarding personnel.[218] In sum, the data do not support the contention that the teams located in the largest markets have systematically dominated their sports.[219]

### C. *Significant, Across-the-Board Player Restraints Actually Harm Competitive Balance*

Of greater concern to the public is the fact that blanket restraints affirmatively reduce competition because they actually *hurt* competitive balance and thus diminish the quality of league play.[220] From the

217. *See* ZIMBALIST, *supra* note 204, at 96-97 ("[R]ich teams purchasing many high-priced free agents may end up with destructive ego conflicts.").

218. *See* Oorlog, *supra* note 207, at 34. Oorlog's study found that the correlation between payroll and winning percentage was statistically insignificant, and each team's total winning percentage had only a marginally significant correlation with its market size. *See also* Murray Chass, *Payroll May Not Buy Coveted Wild Card*, N.Y. TIMES, Aug. 20, 1995, Sec. 8, at 5 (Acting Commissioner Bud Selig, owner of Milwaukee Brewers, attributes close race for American League wild card between his franchise, with a $16 million payroll, and the Yankees, with a $55 million payroll, to efforts of general and field manager); Murray Chass, *The Manager as Alchemist: Alou Turns Young Players into Gold for Expos*, N.Y. TIMES, Apr. 29, 1996, at C5.

219. Regardless of the empirical evidence, as a legal matter, blanket restraints are not appropriate, even if professional sports leagues might be justified in imposing some restraints to correct for the competitive imbalance that results from a completely unrestrained market. This is so for three reasons: (1) generalized restrictions on competition seem to be unduly restrictive means of helping the small number of franchises that cannot compete in a free market; (2) revenue sharing among teams is a far superior way of equalizing the value of players among franchises; and (3) any other restraint designed to promote competitive balance should and can be targeted to facilitating the reallocation of players from superior teams to inferior rosters, or inhibiting the movement of players from poor to superior teams, rather than generally imposed on all teams, regardless of their competitive position within the league. Because blanket restraints are not reasonably necessary to achieve competitive balance, they constitute unreasonable restraints of trade; in short, they represent the unjustified use of collective economic power to transfer wealth from the players to the owners.

220. Professors Daly and Moore correctly observe that leagues have an incentive to prevent player allocations that hurt competitive balance, and facilitate player allocations that will help balance. *See* Daly & Moore, *supra* note 188, at 80-81. *See also* Daly, *supra* note 186, at 24. However, this incentive is insufficient to avoid careful scrutiny under antitrust's rule of reason. Owners are willing to tolerate reductions in quality because the revenue they lose is more than recouped by the lower salaries they pay as a result of the restraints on competition for player services. *See* Ross II, *supra* note 36, at 676 (noting that although the increased competitive balance in baseball during the decade after 1976 coincided with a 57% increase in attendance, salary costs escalated by 316%). Moreover, because of supermajority voting requirements, it is not clear that enlightened leadership could persuade league owners to adopt balance-enhancing rules even if they wanted to. These factors explain why leagues adopt blanket labor market restraints that have the principal effect of monopsonizing the market, rather than tailored restraints that treat player moves differently depending on how they affect the efficient distribution of player talent among the league's teams. It is one thing to prevent a dominant team, flush with revenues from winning a World Series, from outbidding a small-market rival with a mediocre record for one of the latter's free agents. It is another thing to impede a team like the Washington Redskins, with record sellouts, a high payroll, and a lousy record, from quickly rebuilding.

perspective of the consumer-fan, the desirable aspect of unrestricted competition is that it allows teams to spend money to improve themselves and reap the rewards through increased patronage. A recent example of this phenomenon is the San Diego Padres. In 1995, when the Los Angeles Dodgers clinched the division title with a win at San Diego's Jack Murphy Stadium, a crowd dressed in Dodger Blue roared its approval. In both 1994 and 1995, the Padres were last in both win-loss record and attendance in the major leagues. In 1996, the Padres sported the National League's second-best record, sixth-best attendance,[221] and, not coincidentally, a doubling of its payroll.[222] If a team in need of selective or wholesale improvement cannot obtain the players it needs because of a blanket restraint, it simply cannot make a meaningful run for the league championship. In a free market, a team with a specific need can obtain a crucial player without having to yield any other players as compensation, which, if the signing is a good one, will convert a contender into a champion, enhancing the quality of the experience for loyal fans and attracting new fans.[223] Very poor teams with no realistic hopes for immediate improvement typically draw poorly at the gate because of consumer disenchantment. Not only will effective use of free agents improve their records, and consequently their attendance figures, but the publicity generated by the acquisitions will change the hopes and aspirations of the fans and thus increase box office appeal.[224] Blanket restraints limit every club, inhibiting teams with both inferior and average records from improving. Blanket restraints interfere with this important free-market mechanism and thus make output unresponsive to consumer demand—the hallmark of an antitrust violation.[225]

Neither trading nor the rookie draft is an effective alternative for poor or average teams that wish to improve quickly. Notwithstanding a few infamous one-sided trades, it is generally difficult for an inferior team to improve significantly by trading, because the team must give up one of its few talented players in order to acquire another one. Indeed, exclusive reliance on trading harms competitive balance: a superior team is likely to have players who do not contribute that much to the team's success and whom the team can trade in return for a player that can really improve its roster; an inferior team is much

221. *See* Brandt, *supra* note 7. The Padres' attendance increased by 84%; the runners-up in this category, Texas and Pittsburgh, each enjoyed a 31% increase. *Id.*

222. *See* Tom Krasovic, *Padres at the Break: Padres No Longer Outsiders at Home*, SAN DIEGO UNION-TRIB., July 9, 1996, at D1, *available in* LEXIS News Library, SDUT file.

223. *See* Balfour & Porter, *supra* note 188, at 11.

224. *See id.* at 11-12. The authors cite the example of the Chicago White Sox, who signed free agents Greg Luzinski and Carlton Fisk in the early 1980s, thereby transforming the team from an also-ran into a contender and dramatically increasing attendance at the gate. *See id.* at 11 n.11. The franchise's popularity was sufficiently great to persuade the taxpayers of Illinois to contribute substantially—after the franchise threatened to move to Florida—to the building of a new ball park.

225. *See* NCAA v. Board of Regents, 468 U.S. 85, 107 (1984).

more likely to have to give up a player who does contribute to the team's success in order to obtain a player who might contribute a bit more. Although all sports leagues have drafts that give a preference to lower-ranking teams in obtaining the exclusive negotiating rights for amateur players, the NBA is the only league where an amateur player can make a significant contribution without several years of training.[226] Thus, the draft is a highly unreliable means of improvement for weak teams.

Because the majority of sports fans root for teams who are not among the top finishers each year, rules that inhibit quick and significant improvement by poor and average teams reduce the quality of the product for most fans. This gives fans a stake in the players' efforts to fight restraints on competition. This conclusion, it must be noted, is contrary to extensive commentary in the economics literature, where prominent scholars have defended the "invariance hypothesis," the view that player restraints have *no* effect, positive or negative, on competitive balance.[227] This hypothesis is based on an application of the "Coase Theorem," which holds that the allocation of legal rights will not, in a world of zero transactions costs, affect the distribution of resources.[228] Relying on the Coase Theorem, supporters of the invariance hypothesis insist that the allocation of player talent does not vary depending on labor market rules, because a player will end up on the same team—the one that values his services the most—regardless of whether the league has an airtight reserve clause or complete free agency. The only difference the labor market rules make is that the player receives a large salary under free agency,

226. For example, only 17 of the 105 players picked in the first round of the NHL draft in 1985-89, and only one of the 105 players picked in the second round, played the following season in the NHL. *See* William D. Walsh, *The Entry Problem of Francophones in the National Hockey League: A Systemic Interpretation*, 18 CAN. PUB. POL'Y 443, 459 n.30 (1992). The NHL amateur draft is such a "highly uncertain activity" because "junior players are far from having matured when they are drafted." Not only do many top picks fail to contribute in the NHL, but other players who were not even drafted become regulars or even superstars. Marc Lavoie et al., *Discrimination and Performance Differentials in the National Hockey League*, 13 CAN. PUB. POL'Y 407, 414 & n.10 (1987) (citing examples of undrafted 50-goal scorers Tim Kerr and Dino Cicarelli); Walsh, *supra*, at 453 (stating that objective indicators such as goals and assists, skating skills, and defensive skills used in draft are "uncertain guides to a player's likely performance at the NHL level of competition"). Less rigorous analysis of football and baseball suggests similar results. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1184 n.46 (D.C. Cir. 1978) (finding that player draft does not equalize talent if top teams have good coaches); Bob Nightengale & Ross Newhan, *End of an Era: Lasorda Retires; The 10 to Remember Him by*, L.A. TIMES, July 30, 1996, at C4 (stating that Los Angeles Dodgers' catcher Mike Piazza, who is emerging as perhaps the finest hitting catcher in baseball history, was drafted in the 62nd round by the Dodgers as a favor to manager Tom Lasorda, who was a personal friend of his family).

227. A concise summary of this proposition is provided in Daly, *supra* note 186, at 13-14. The proposition was first articulated in Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956). As Daly notes, this hypothesis "proved compelling to many economists, some of whom viewed its logic to be so unassailable as to constitute proof of its empirical validity. Its grip on economists' thinking persists to this day." Daly, *supra* note 186, at 14.

228. *See* QUIRK & FORT, *supra* note 190, at 278.

whereas the player's former employer receives a large payment in return for trading the player with a reserve clause.

Critics of the invariance hypothesis in turn have argued that the world of professional sports involves significant transactions costs,[229] as well as other deviations from the idealized world of economic theory,[230] that lead to a different distribution of player talent with a less-restrained labor market.[231] Although some of the earlier theoretical criticism of the invariance hypothesis relied on the hypothesis' demonstrably false assumption that, where a player is more highly valued by another team, his owner will simply assign his contract to the other club in return for cash,[232] later work has recognized that teams may trade players of unequal value with side agreements concerning deferred compensation that is economically equivalent to a cash sale. However, these trades are more complex, more costly, and thus less likely to occur than reallocations in a free marketplace.[233]

229. For a detailed example of the difficulties in allocating players by barter when one team's needs do not fortuitously complement another team's surplus players, see Ross II, *supra* note 36, at 671-73.

230. One commentator has suggested that owners, like most people, do not value opportunity costs as highly as out-of-pocket costs and hence will refuse to trade or otherwise give up players more highly valued by another team, even if the owners would be unwilling to bid a sufficiently high salary in a free market for the same players. *See* Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 684 (1979).

Another example that suggests that the real people who make economic decisions in the baseball industry do not behave in a manner consistent with Coase's theories can be found in the history of collective bargaining in Major League Baseball. Prior to 1976, a baseball owner had perpetual and exclusive rights to a player's services. Although the players' union sought in labor negotiations to bring about more competition for player services, the owners' economic strength was sufficient to prevent the union from prevailing. In 1976, an arbitrator interpreted the existing language of the standard player contract so as to give a team owner the exclusive right to a player's services for only one year beyond the contract period. The owners then agreed to a new collective bargaining agreement, which allowed for complete free agency for veterans with six years of service. *See* Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs v. Major League Baseball Players Ass'n, 66 Lab. Arb. (BNA) 101 (Dec. 23, 1975). The Coase Theorem would predict that, absent transaction costs, the same economic strength that permitted the owners to resist changes in the reserve clause would have permitted them to insist (through threat of lockout, if necessary) on a bargain that overturned the arbitrator's decision and reinstated their perpetual and exclusive rights.

231. The logical corollary to the Coase Theorem is that the allocation of property rights will affect the distribution of resources if transaction costs are significant. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 78-83, 104-05 (2d ed. 1997).

232. Ross II, *supra* note 36, at 685.

233. I thank Roger Noll for this insight. Although some of Noll's work appears to support the invariance hypothesis, *see* Roger G. Noll, *The Economics of Sports Leagues*, *in* 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS 17-1, 17-26 (Gary A. Uberstine ed., 1988) (stating that under free or restrained market, player will go to team valuing services most highly, the only difference being "who receives the money: the player or his old team"), his most recent analysis seems to be in agreement with this article's thesis. *See* Noll Trial Declaration, *supra* note 199, ¶ 11 (stating that "greater restrictions against competition are more likely to create situations in which teams are persistently good or persistently bad"). The different approaches taken by this eminent sports economist may be explained by the time horizon being considered. For purposes of pure economic analysis, the arguments for the invariance hypothesis have greater weight over an extremely long period of time: even with blanket restraints, one might expect that lousy teams in markets that will reward improvement will eventually get better. Neither antitrust law

We need no longer rely on theoretical arguments about whether free agency results in domination by teams in large markets or, conversely, whether a freer market allows inferior teams to rebuild quickly. Empirical evidence concerning the movement of baseball players, as well as the most important bottom line, the actual degree of competitive balance within a league, supports the argument that player restraints hurt, and free agency helps, competitive balance.

As Andrew Zimbalist notes, "By 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."[234] One study of the decade beginning with the 1983 season noted that baseball enjoyed a "remarkable" degree of competitive balance without blanket restraints: different teams won twenty of forty division titles during that period, fifteen of the twenty pennants, and nine of the ten World Series, and all twelve National League teams took turns finishing in last place.[235]

Although a complete economic model identifying those aspects of "competitive balance" that make a sports league attractive to fans is beyond the scope of this article, Judge Leon Higginbotham suggested that leagues are balanced when "each team has the opportunity of becoming a contender over a reasonable cycle of years."[236] Given that there are always more also-rans than champions, consumer welfare would appear to be maximized when there are more close pennant races and fewer dynasties. Several comparisons of pre- and post-free agency standings have demonstrated that under this standard, consumers were indeed better off with free agency.[237] Another study that seems to best measure competitive balance as defined by Judge Higginbotham showed that during free agency, the correlation between a team's performance in one year and its performance several years later went down.[238] In other words, free agency made it signifi-

---

nor public policy support tolerating unjustified restraints because ultimately the market may be self-correcting.

234. Zimbalist, *supra* note 204, at 95; *see also* Besanko & Simon, *supra* note 116, at 78-79 (1985) (presenting 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"; also finding no significant change in the correlation between team success and market size before and after the onset of free agency).

235. *See* Cameron & Echevarria, *supra* note 187, at 853-59.

236. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 486 (E.D. Pa. 1972).

237. *See* Balfour & Porter, *supra* note 188, at 15 (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%); Ross II, *supra* note 36, at 673-76 (arguing that comparable seven-year periods showed increase in number of teams finishing within 10 games of the pennant winner from 34 to 48; 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).

238. *See* Balfour & Porter, *supra* note 188, at 16-17. Using this measure, a statistically significant correlation indicates that contenders and cellar dwellers tend to remain in their lofty and lowly positions; whereas a low correlation indicates that contenders do fall back among the pack,

cantly harder for top teams to maintain dominance and easier for lousy teams to improve.

An important insight by one of the leading advocates of the invariance theory, Professor Gerald Scully, actually provides additional support for the argument that restraints harm competitive balance. Scully found that, over time, teams experience cycles of peaks and valleys as their existing player talent develops, matures, and then declines—for example, when a team is composed of aging veterans of past glory.[239] Nonetheless, Scully notes,

> In rare instances, *as in baseball under free agency*, a club can buy wisely in the market for experienced veteran talent and immediately propel itself to a championship; recall, for example, the remarkable transformation of Atlanta and Minnesota, which both finished last in their divisions in the 1990 season; then finished division winners and league champions in the 1991 season. The acquisition of Barry Bonds by the San Francisco Giants has led to a remarkable turnaround for the club.[240]

Scully's insights lend even greater credence to Professor Roger Noll's observation that "greater restrictions against competition are more likely to create situations in which teams are persistently good or persistently bad."[241] In Noll's view, baseball teams have "frequently traversed the path from last place to pennant contender—and the reverse—in a single season, with their fates determined by successes and failures in bidding for free agents. The effect is more indeterminacy of outcomes."[242] Thus, what is rare is not the phenomenon observed by Scully of bad teams improving; what is rare is that baseball is the only North American league sport with such few restrictions on the acquisition of veteran players.

Supporters of the invariance hypothesis have presented some empirical evidence to support their claim. The most extensive analysis, by Professors James Quirk and Rodney Fort, looked at the actual distribution of win-loss records, compared to the random distribution that one would expect from a normal bell curve. They found no statistically significant difference in the degree of competitive balance before and after free agency came to baseball.[243] These scholars

---

and lousy teams have the opportunity to become contenders. A team's performance during one year and its performance the following year were significantly correlated 86.7% of the time while the reserve clause was in effect, and only 66.7% of the seasons during free agency. The elimination of significant player restraints coincided with a drop in significant correlations with a three-year time lag, from 76.9% to 40%. *See id.* at 18.

239. *See* SCULLY, *supra* note 207, at 88.

240. *Id.* at 94 (emphasis added).

241. Noll Trial Declaration, *supra* note 199, ¶ 11.

242. *Id.*

243. Rodney Fort & James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. ECON. LITERATURE 1265 (1995). Their methodology is similar to that employed by eminent sports economists Roger Noll and Gerald Scully. Fort and Quirk's previous study reached a similar conclusion. *See* QUIRK & FORT, *supra* note 190, at 285.

found a slight increase in the distribution of league championships during free agency, although again the results were not statistically significant.[244]

This work might appear to undermine the claim that sport league restraints actually harm consumers. On close reflection, however, their study should be unpersuasive to those asked to evaluate player restraints under the antitrust laws. At most, the study shows that the data do not reject the invariance hypothesis to the high degree required for statistical significance.[245]

If antitrust courts do not require such a demanding level of proof,[246] work by these economists and others actually supports the argument that competitive balance has improved. In a prior work, these same economists used the average dispersion of win-loss percentages over time as the measure of competitive balance and found a persistent increase in competitive balance in baseball since the late 1950s, although the results were not statistically significant.[247] (Under this methodology, a league would be perfectly balanced if each team played .500 ball.)[248] Another empirical study using similar methodology likewise found that both baseball leagues have become increasingly more competitive.[249]

Quirk and Fort acknowledge that there has been "a discernible trend toward more competitive balance in both leagues."[250] Yet they proceed to attribute this change to (1) relocation of franchises to more profitable markets; (2) the reverse-order-of-finish rookie draft introduced in 1964; and (3) the virtual disappearance of sales of star players for cash since the 1950s. Amazingly, although their data show that baseball experienced much more balance during the 1980s than any other decade this century, the authors simply note that during this period "there was collusion among owners in the veteran free agent market."[251] Their failure to attribute improved competitive balance to the more obvious and permanent change in baseball—free agency itself—is difficult to comprehend. First, although in theory competitive balance might be improved if teams with poor records in less profitable

244. *See* Fort & Quirk, *supra* note 243, at 1275-76.

245. *See id.* at 1275.

246. As a leading evidence scholar has noted, courts do not and should not be bound to standards of statistical proof when making judgments about the probable effects of challenged conduct:

> My thesis, broadly stated, is that 'probability' as we use the term in law, particularly in the civil standard of proof, is not a hard-edged mathematical concept. It is, rather, 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.

Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontiers of Knowledge*, 66 B.U. L. REV. 521, 521 (1986).

247. *See* QUIRK & FORT, *supra* note 190, at 247 (tbl.7.1).

248. *See id.*

249. *See* Vrooman, *supra* note 191, at 984.

250. *See* QUIRK & FORT, *supra* note 190, at 248.

251. *Id.*

markets moved, the principal franchise relocations the authors cite all involved teams that were highly successful on the field both before and after their relocation.[252] Second, if transaction costs are sufficiently low so that a player will always end up on the team that values him the most, then the other two factors should be irrelevant to competitive balance. Assigning a star rookie's draft rights to a poor team in a small market will, according to the invariance theory, simply net that team a wealth transfer from a team in a large market that will end up with the player anyway. If cash sales are not customary, the invariance theory suggests that teams would find some other equally efficient way of transferring the contracts of players to their most valued employers. These two factors are relevant only if, as this article asserts, there are significant transaction costs involved in allocating player talent so that restraints on a free market will affect the allocation of player talent. As to Quirk and Fort's last point, it is difficult to understand how they can plausibly suggest that the continuing increase in competitive balance through the 1970s and 1980s is attributable to a three-year period of collusion (1988-90) in the free agent market. Thus, it is not surprising that, in their later work, these authors were compelled to concede that "if anything, competitive balance has improved slightly under free agency in baseball."[253]

Even if the Quirk and Fort studies showed no significant change in competitive balance since free agency, their measurement of competitive balance, the degree to which clubs deviate from the mean (.500 ball), is probably not the best measure of those aspects of balance that fans desire and that improve output. Several obvious scenarios demonstrate that a league which was completely balanced according to their methodology would not be very attractive to fans, while a league that was completely imbalanced would be more attractive. Consider the following hypothetical[254] based on the win-loss record's of the teams that comprised the National League during the 1960s:

252. The authors refer to the moves of the Brooklyn Dodgers to Los Angeles, the New York Giants to San Francisco, and the Milwaukee Braves to Atlanta. *See id.*

253. Fort & Quirk, *supra* note 243, at 1276.

254. This hypothetical is inspired by the analysis of competitive balance in college football in Randall W. Bennett & John L. Fizel, *Broadcasting Deregulation and Competitive Balance*, 54 AM. J. ECON. & SOC. 183 (1995). In that study, the authors observe that the measure used by Quirk and Fort, and others, "captures the dispersion in team winning percentage but does not identify which teams have done best or which teams have done worst." *Id.* at 191.

TABLE 1
HYPOTHETICAL NATIONAL LEAGUE STANDINGS

| Year 1 | | Year 2 | | Year 3 | |
|---|---|---|---|---|---|
| Dodgers | 95-67 | Dodgers | 100-62 | Cubs | 94-68 |
| Cubs | 88-74 | Reds | 87-75 | Dodgers | 93-69 |
| Reds | 87-75 | Cubs | 85-77 | Reds | 87-75 |
| Pirates | 86-76 | Phillies | 82-80 | Cardinals | 82-80 |
| Braves | 84-78 | Cardinals | 82-80 | Phillies | 81-81 |
| Cardinals | 78-84 | Braves | 80-80 | Braves | 81-81 |
| Phillies | 76-86 | Pirates | 80-82 | Pirates | 80-82 |
| Astros | 75-87 | Astros | 85-77 | Astros | 75-87 |
| Mets | 74-88 | Mets | 75-87 | Mets | 69-93 |
| Giants | 67-95 | Giants | 62-100 | Giants | 68-94 |
| **Year 4** | | **Year 5** | | **Year 6** | |
| Pirates | 105-57 | Astros | 100-62 | Phillies | 100-62 |
| Dodgers | 104-58 | Mets | 99-63 | Braves | 99-63 |
| Cardinals | 103-59 | Cubs | 98-64 | Cardinals | 98-64 |
| Braves | 102-60 | Reds | 97-65 | Dodgers | 82-80 |
| Astros | 81-81 | Dodgers | 96-66 | Astros | 81-81 |
| Mets | 81-81 | Phillies | 66-96 | Mets | 81-81 |
| Cubs | 60-102 | Pirates | 65-97 | Cubs | 80-82 |
| Reds | 59-103 | Cardinals | 64-98 | Giants | 64-98 |
| Phillies | 58-104 | Braves | 63-99 | Reds | 63-99 |
| Giants | 57-105 | Giants | 62-100 | Pirates | 62-100 |

By focusing on the distribution of wins and losses, Quirk and Fort would conclude that the first three years were relatively balanced—the teams' win-loss records followed the standard bell-shaped statistical curve.[255] Then, they would suspect that something untoward might have happened because beginning in the fourth year, the standings became very skewed and "imbalanced." On the other hand, most fans across the country would probably enjoy the latter three years of baseball more than the first three. Outside of Chicago, Cincinnati, and Los Angeles, fans never got to see their teams in contention during the first three years. In contrast, every team but the Giants was in a very close pennant race at least once during the last three years. Baseball fans generally also would prefer the latter years, which always featured close down-to-the-wire races between three outstanding clubs. In particular, is there any doubt that Pirate fans would gladly suffer through Year 6, when their team was a horrendous thirty-eight games out of first place, as the price to pay for the joy of Year 4, when their team won a fantastic 105 games and beat out two close rivals in a

255. A baseball league that was perfectly balanced and played 162 games would have a standard deviation of .039, which means that two-thirds of the teams would win between 75 and 87 games, almost all the rest would win no fewer than 68 games and no more than 93 games, and one in 20 would win more than 99 games. *See* QUIRK & FORT, *supra* note 190, at 245.

torrid pennant race? This example illustrates why Professor Porter's study[256] focusing on how often top teams maintain dominance and cellar-dwellars remain in the basement—a study concluding that competitive balance has improved since the onset of free agency—more accurately measures the consumer welfare effects of competitive balance than the Fort and Quirk approach.[257] In sum, antitrust judges and other policymakers should glean from the economic literature a clear message that the experience of Major League Baseball demonstrates that blanket restraints harm competitive balance.

The particular features of the salary caps currently in place in the NFL and the NBA raise additional problems that exacerbate the harm to fans. It is not unusual for veteran players to be paid in excess of their expected marginal revenue product late in their careers, because local fans may be willing to patronize the team in order to see these aging stars quite apart from the stars' ability to win games.[258] The NFL's salary cap, for example, does not account for this phenomenon, thus forcing a team to release or trade a popular star so as to limit payroll and meet the cap. The NBA responded to this concern by allowing teams to re-sign their own players without regard to salary limitations.[259] However, this approach exacerbates the competition-lessening effect of a salary cap by making it even more difficult for inferior teams to improve. Every team has a decided advantage in the bidding war for its own players, which will tend to facilitate the status quo and make it harder for inferior teams to lure players away from superior ones. This is especially true in basketball, where one or two key players can significantly affect a team's overall quality.[260]

---

256. *See* Porter, *supra* note 194.

257. One statistically important cause of competitive imbalance has been expansion. *See* QUIRK & FORT, *supra* note 190, at 250 ("For the first few years of their history, expansion teams are manned primarily by players acquired in the expansion draft, which pretty much ensures very weak teams with low W/L records."). However, the Colorado Rockies have enjoyed remarkable success in their early years, in part due to their ability to sign free agents. The 1996 NFL season amply demonstrated the success achievable by expansion franchises who are not subject to blanket restraints. *See* Helyar, *supra* note 8, at A1. (Note: because the Carolina and Jacksonville franchises were new, they had no preexisting payroll to count against a salary cap, so the cap did not effectively constrain them.)

258. *See* SCULLY, *supra* note 207, at 87-88.

259. Under the recently ratified collective bargaining agreement in basketball, the team may re-sign one of its own players for any amount of money, with up to 150% of the player's prior salary counting against the cap. For example, the Chicago Bulls were free to pay Michael Jordan $30 million, although to do so would violate the cap. Because Jordan's previous wage was $3.7 million, for cap purposes Jordan's salary is only considered $5.55 million. *See* Mark Asher, *Bulls Give Jordan a Record Deal*, WASH. POST, July 13, 1996, at C1.

260. Salary caps also inhibit efficient trades among average teams. Suppose Team *A* has an overpaid power forward yet covets Team *B*'s lower paid reserve point guard. In a free market, the clubs could arrange a trade and negotiate over what portion of the forward's salary each would pay. In the NBA, the power forward's salary will count against Team *B*'s salary cap, and thus Team *B* could make the trade only if it parted with additional talent. *See* Barry M. Staw & Ha Hoang, *Sunk Costs in the NBA: Why Draft Order Affects Playing Time and Survival in Professional Basketball*, 40 ADMIN. SCI. Q. 474, 487-88 (1995).

Defenders of the NBA salary cap have argued that the cap enhances competition by requiring all teams to spend a minimum amount on salaries and thereby field more competitive teams. However, in operation, the NBA rules provide no meaningful incentive for a team to increase its payroll expenditures. Although NBA rules contain a financial penalty for franchises with low payrolls, the NBA central office has interpreted the rules so that the penalties do not apply if the overall level of salaries throughout the league exceeds the minimum required by the collective-bargaining agreement. Because of the loophole for re-signing current players, NBA payrolls easily exceed the requisite minimum, so that no team is required to make any particular level of investment.[261]

The foregoing analysis indicates that the baseball players' firm and successful rejection of the owners' initial demand for a salary cap and the subsequent demand for a comprehensive, competition-lessening luxury tax benefitted sports fans in addition to serving their own self-interest. Each season ends with the majority of baseball fans disappointed with their team's performance, and the only way for inferior teams to improve quickly or for marginal teams to add the one "missing element" is through the addition of new talent that costs the owner money but does not cost the team a valued player from its existing roster. Contrary to conventional economic wisdom, Major League Baseball's experience under free agency shows that the existence *vel non* of significant trade restraints does affect the outcome of championship seasons: using the most reliable statistical measures, competitive balance has increased since baseball's rules changed to permit significant free agency.

### D. *Blanket Restraints Are Unnecessary*

The final, fatal flaw in efforts to justify blanket restraints under the antitrust laws is that they are unnecessary. Rivals may not adopt clearly anticompetitive agreements where a clearly less restrictive alternative appears,[262] and revenue sharing is an obvious less restrictive

261. *See* D. Albert Daspin, Note, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95, 107 (1986). Daspin suggests that the NBA's official interpretation of the agreement's minimum-spending requirement is contrary to the original goals of the salary cap and demonstrates that competitive balance is not what actually motivated the NBA to introduce a salary cap. *See id.* at 107, 119, 124.

262. *See* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 352-54 (1982) (holding that illegal price agreement among doctors unnecessary to provide health insurance coverage because insurance companies, rather than doctors, can set price); McNeil v. NFL, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,771-72 (D. Minn. 1992) (instructing jury that if league rules substantially harmed competition for player services, burden then shifted to league to show restraints were "reasonably necessary" to achieve competitive balance); *cf.* Jeffrey A. Rosenthal, *The Football Answer to the Baseball Problem: Can Revenue Sharing Work?*, 5 SETON HALL J. SPORTS L. 419, 421 (1995) ("One of the reasons the owners have been relatively unified in pressing for a salary cap is that taking from the players is a far easier concept for them to agree upon than sharing amongst themselves.").

way of negating any imbalancing factors that may exist in an unrestrained market. For example, NBA franchises located in major media markets, such as the New York Knicks and the Chicago Bulls, receive significantly more revenue from luxury boxes, game tickets, and local broadcast rights than do smaller market franchises such as the Sacramento Kings or the Milwaukee Bucks. Requiring New York and Chicago to share these revenues with Sacramento and Milwaukee would appear to be an effective way of achieving the NBA's purported goal of achieving competitive balance. Under a system that included revenue sharing and did not impose salary caps, a small-market team not only would be permitted to sign highly paid superstars, but its ability to do so would be significantly increased, given the funds it would receive from richer and more successful franchises.[263] Where, as appears to be the case in baseball, gate receipts are more sensitive than broadcast revenues to team performance, teams in small markets can and do outdraw franchises in large metropolitan areas if they perform better on the field. Thus, sharing broadcast revenues would significantly diminish any advantage that franchises in large markets have in bidding for player services.[264] One study showed, for example, that the NFL, which shares all broadcast and ticket revenue, is significantly more balanced than the NBA.[265]

Major League Baseball owners have suggested that revenue sharing is not a less restrictive *alternative* to salary caps, but instead that salary caps are necessary to effectuate revenue sharing. A salary *floor* might well be linked to revenue sharing, so that richer teams could be sure that those receiving shared revenue did not merely pocket the money but used it to boost payroll.[266] But it is unclear why a salary *cap* is essential. According to the owner of the Boston Red Sox, "If we're giving away some of our money, we need to know there won't be a competitive imbalance in that the Yankees still could withstand

263. Conventional economic analysis, which is premised on the notion that a championship team will attract less revenue in a small market, would suggest that Sacramento would not have an incentive to bid against franchises in larger markets for these stars. As shown in Porter, *supra* note 194, Sacramento's ability to recoup its investment in star players is more a function of how responsive Kings' fans are to the team's record rather than of market size. In any event, a revenue-sharing scheme can be designed to increase the Kings' incentive to build a superior basketball team, and league rules can require a certain minimum level of expenditure on salaries.

264. *See* Rosenthal, *supra* note 262, at 431 & n.41 (noting that Seattle Mariners, Kansas City Royals, Minnesota Twins, Oakland Athletics, Cincinnati Reds, and St. Louis Cardinals were all able to outdraw the New York Mets and Yankees in 1991). Even advocates of the conventional view that labor market restraints do not affect competitive balance acknowledge that "introducing local TV revenue sharing would move the league toward more equal competitive balance, which increases league-wide revenues and profits." Fort & Quirk, *supra* note 243, at 1288.

265. *See* Vrooman, *supra* note 191, at 984. Concededly, Vrooman's measure—comparison of actual standard deviations to a bell curve—is not the most accurate way of measuring those aspects of competitive balance that are attractive to fans. *See supra* notes 255-57 and accompanying text.

266. *But see* Daspin, *supra* note 261, at 107 (1986) (criticizing NBA officials for interpreting salary cap rules so as to excuse low payroll teams from increasing payrolls).

their [revenue-sharing payment] and have a higher payroll than us."[267] This argument fails to appreciate that the purpose of revenue sharing is to help equalize the bidding between the wealthiest and poorest franchises, not to eliminate completely all wealth disparities or to prevent the wealthiest teams from spending more on player salaries than others.

The leagues' inability to demonstrate that blanket restraints are reasonably necessary to promote competitive balance bears a distinct likeness to the NCAA's inability to persuade the Supreme Court that its television restraints were justifiable. In rejecting those efforts, the Supreme Court noted that the NCAA had done virtually nothing to achieve competitive balance among college football teams other than to limit the ability of successful programs to freely televise their games; it had not, for example, limited overall spending by football programs or restricted the amount of alumni funds colleges could dedicate to athletic programs.[268] Moreover, the Court observed that college basketball had maintained competitive balance without imposing comparable television restrictions.[269] Similarly, sports leagues do not limit spending in any area other than player salaries, nor (excepting the NFL) have owners been willing to facilitate a more competitive environment by sharing any significant amount of revenues.[270] Despite the obvious impact that high-quality coaches, scouts, and player personnel directors have on a franchise's success, there are no restrictions whatsoever on the ability of the richest teams to horde talent in those positions.[271] Finally, just as college basketball's success

267. Mark Maske, *The Evolution of a Major League Disaster*, WASH. POST, Sept. 18, 1994, at D1 (quoting Boston Red Sox General Partner John Harrington).

268. *See* NCAA v. Board of Regents, 468 U.S. 85, 119 (1984).

269. *See id.* at 120.

270. Following the trial in a suit challenging the NBA's broadcast restrictions, the trial judge found that only 6% of regular season home gate revenues were shared, no revenue from the sale of local broadcast rights was shared, and total revenue from shared sources amounted to a maximum of 20% of team revenue. The trial court concluded that the NBA's failure to share revenue more generously had an adverse impact on competition on the court. *See* Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336, 1341-42 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992).

Until their most recent agreement, the baseball owners engaged in very little revenue sharing. National broadcasting revenues are split evenly among the 28 teams, but gate receipts are shared minimally (the visiting team gets 5% of gate receipts in the National League and 25% in the American League), and local television revenue is not shared at all. As a result, there is a wide disparity in revenue among the teams: in 1994, for example, total projected revenue for the New York Yankees was $94.8 million, but only $37.3 million for the Pittsburgh Pirates. *See* Charles D. Marvine, Comment, *Baseball's Unilaterally Imposed Salary Cap: This Baseball Cap Doesn't Fit*, 43 U. KAN. L. REV. 625, 659 (1995) (citing Maske, *supra* note 267, at D1, D6). Under a new revenue-sharing plan that is being implemented along with the new labor agreement, a small tax on each player's salary, along with a portion of local broadcast rights, would be shared by owners. The effect would be a transfer of approximately $39 million from high- to low-revenue clubs. *See* Murray Chass, *Team Owners Approve Revenue-Sharing Plan*, N.Y. TIMES, Mar. 22, 1996, at B10.

271. *See* Noll Trial Declaration, *supra* note 199, ¶ 29. As Professor Noll notes, the New York Knicks had a long history of spending significant amounts of money on players, but they

without television restrictions demonstrated to the Supreme Court that the NCAA's restrictions were not necessary to achieve competitive balance in college football, Major League Baseball's ability to achieve superior competitive balance without blanket restraints demonstrates that those restraints are unreasonable in all professional sports.

One form of a salary cap that might pass antitrust muster (and be acceptable to players) is what tax lawyers might call a "progressive salary cap." Such a cap would operate differently for each team, depending on its record during the previous season, with a "tight fitting" cap on the top handful of teams, a more relaxed limitation on contenders, and no salary limitation on below-average teams. One example of this type of scheme is the so-called Rooney Rule, which under the NFL's current collective bargaining agreement comes into play if a salary cap is not in effect.[272] Under this rule, the top eight teams are limited in their ability to sign a greater number of veteran free agents than they lost from their own roster.[273] Unlike the salary caps in effect in the NBA and NFL, this rule *is* tailored to promote competitive balance. It restrains only those teams whose continued improvement would actually jeopardize such balance, without limiting franchises who, due to bad luck, poor personnel decisions, or other factors, have high payrolls but poor records.[274]

## IV. Conclusion

One of the realities of the business world is that firms with an inferior product must often spend more than rivals with a superior

---

were never in serious contention for a championship until they acquired Pat Riley as their coach. *See id.* Likewise, in finding that the NFL draft was not reasonably tailored to achieve competitive balance, the District of Columbia Circuit noted that six football franchises consistently made the playoffs despite low draft picks because of the continuity they enjoyed under successful coaches and that four franchises continued to flounder until they were able to hire a top coach. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1184-85 n.86 (D.C. Cir. 1978). And finally, one study suggested that Earl Weaver's contribution to the success of the Baltimore Orioles was as great as Sandy Koufax's contribution to the Los Angeles Dodgers. *See* Phillip Porter & Gerald Scully, *Measuring Managerial Efficiency: The Case of Baseball*, 48 S. Econ. J. 642, 649 (1982).

272. This occurred only during the first year of the agreement, in 1994.

273. *See* White v. NFL, 822 F. Supp. 1389, 1413 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994).

274. As noted above, because the luxury tax adopted by baseball owners inhibits, but does not preclude, additional free agent bidding by teams with the five highest payrolls, it may not constitute a significant restraint at all. The White Sox signing of Albert Belle to a multiyear, $55 million contract, for example, would result in a tax this year of $3.5 million. *See* Claire Smith, *In Baseball, Reinsdorf Smiles Alone*, N.Y. Times, Nov. 21, 1996, at B17. If the tax were really competition-inhibiting, however, it would be problematic. After all, the White Sox suffered a loss in attendance in 1995, did not make the playoffs, and finished 14 games behind the Cleveland Indians. Signing one of the Indians' star players would seem to promote, rather than hinder, competitive balance and thus should be encouraged, not discouraged (unless the only consumers whose welfare one is seeking to maximize are Indian fans!).

Another alternative designed to actually achieve competitive balance would allow inferior teams to "draft" players from the rosters of superior teams. *See* Marvine, *supra* note 270, at 658.

product in order to compete effectively. Lee Iacocca, for example, spent hundreds of millions of dollars reorganizing Chrysler, money that would not have been spent had Chrysler not been losing market share because of inferior products. Similarly, owners whose teams perform poorly due to bad luck, mismanagement, or the natural aging of players, must increase their investment to regain prominence.

In contrast to the realities of a free market, blanket restraints condemn fans of perennial losers to yet another season with little hope that their favorites will rapidly improve. These restraints ought to be found unreasonable under the antitrust laws because they are not tailored to improve competitive balance. Indeed, notwithstanding some economic literature to the contrary, these restraints actually reduce competitive balance among the teams in a sports league.

Sports fans need not rely solely on the antitrust laws, however, to secure the benefits of free competition in the player market. Rather, consumers can form an alliance with the players, who also favor unrestrained competition. To be sure, fans would probably prefer to endure an anticompetitive system of restraints than see a World Series cancelled; in this sense, the interests of fans and players are not always identical. Still, if all fans are to be treated to exciting pennant races in the coming years, and if fans of teams who used to be resigned to waiting until next year are to be in the thick of the race, it is clear that the credit should not go to Bud Selig and the owners, but rather to Don Fehr and the players' union, and to the memory of Curt Flood.