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ANTITRUST'S OUTLIER: CONSUMER WELFARE AND WAGE RESTRAINTS IN PROFESSIONAL SPORTS

Andrew Buttaro*

INTRODUCTION

It is an axiom that the guiding objective of antitrust law is to enhance consumer welfare.[1] While now canonical, this consensus is a relatively recent legal innovation, spurred mainly by Robert Bork's arguments in *The Antitrust Paradox* (and to a lesser extent, some of Richard Posner's writings).[2] By the late 1970s, the consumer welfare goal had become accepted by the Supreme Court, meaning a host of previously illegal arrangements—like vertical resale restrictions, for instance—were permissible if they offered demonstrable benefit to consumers.[3] In the context of

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[1] *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (noting that the antitrust laws form a "consumer welfare prescription").

[2] *See* ROBERT BORK, THE ANTITRUST PARADOX (1978); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976). *See also* Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449, 451 (2008) ("When Bork's article was first published in 1966, his thesis was novel; by 1977, it had become the conventional wisdom of the federal courts.").

[3] Continental Television v. GTE Sylvania, 433 U.S. 36, 56 (1977) (concluding that GTE's behavior transgressed the Sherman Act only if it was an unreasonable restraint of trade that would diminish competition and promote inefficiency, essentially adopting a method of analysis proposed by Bork in a 1966 law review article and further explained in the manuscript to his book). In a concurring opinion, Justice Byron White directly

sports, a similar argument can be made that agreements among teams to restrict player salaries would reduce costs, pass on savings to consumers, and thereby enhance consumer welfare.[4] By this logic, one could reasonably argue that the law surrounding sports is anomalous when judged against the wider antitrust jurisprudence, and therefore more aggressive wage restraints than current salary cap schemes should be permitted—and perhaps implemented.

This article explores the intersection of antitrust's movement toward a focus on consumer welfare and the resistance of professional sports to this marked shift. Ultimately, this writing offers two cheers for the status quo. Although there is a case to be made that sports, particularly in the context of player salaries, should be treated more like other areas of antitrust, in the final analysis the argument is more provocative than persuasive, as the relationship between aggressive wage restraints and consumer welfare is tenuous at best. This article proceeds as follows. First, it briefly surveys the key scholarship undergirding antitrust's shift to consumer welfare as the lodestar of enforcement, focusing on Bork's seminal efforts in particular. Second, it outlines the way in which sports law generally departs from antitrust orthodoxy. Third, the article scrutinizes the handful of cases that address the narrow issue of the pro-competitive effects (*i.e.*, consumer welfare gains) offered by salary controls. Finally, it concludes with a weighing of the merits of the present arrangement against a hypothetical system in which professional sports leagues would have wider latitude to restrict player salaries.

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cited Bork's article to support the Court's holding. *Id.* at 69 (White, J., concurring). *See also Reiter, supra* note 1.

[4] *See, e.g.*, PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 130 (1993).

I. A Primer on the Consumer Welfare Revolution

No individual was more responsible for centering modern antitrust enforcement on consumer welfare than Robert Bork.[5] Though remembered more in the public imagination for the contentious confirmation hearings that thwarted his 1987 nomination to the United States Supreme Court, Bork's early career was defined by his pioneering efforts to reshape antitrust law.[6] Bork's proposed antitrust reforms were first outlined in a 1966 scholarly article,[7] which was later expanded into a highly influential book, *The Antitrust Paradox*.[8] Bork's critique began with one central question: What is the guiding objective of antitrust law? Wading into the history of the Sherman Act, the 1890 statute that is the foundation of antitrust law, Bork argued that the answer was clear: Congress intended the courts to implement "only that value we

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[5] ROBERT PITOFSKY, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 50 (2008) (acknowledging Bork's influence by saying antitrust "analysis almost always begins with Chicago" school ideas); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835 (2014) ("Of all Robert Bork's many important contributions to antitrust law, none was more significant than his identification of economic efficiency, disguised as consumer welfare, as the sole normative objective of U.S. antitrust law.").

[6] Linda Greenhouse, *Legal Establishment Divided Over Bork Nomination*, N.Y. TIMES (Sept. 26, 1987), http://www.nytimes.com/1987/09/26/us/the-bork-hearings-legal-establishment-divided-over-bork-nomination.html; Adam J. Di Vincenzo, *Editor's Note: Robert Bork, Originalism, and Bounded Antitrust*, 79 ANTITRUST L.J. 821 (2014) ("It is difficult to overstate Robert Bork's impact on law and politics in the second half of the 20th century. As most readers of this Symposium are aware, Bork is widely credited with upending long-standing principles governing the aims and methods of antitrust law and policy.").

[7] Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

[8] ROBERT BORK, THE ANTITRUST PARADOX (1978).

would today call consumer welfare."[9] While late nineteenth century legislators did not speak of the concept with the precision of a modern economist, "their meaning was unmistakable."[10] A full consideration of the legislative history "contains no colorable support for application by courts of any value premise or policy other than maximization of consumer welfare."[11] This was the essential starting point for Bork's antitrust reform campaign.

Bork's investigation into the legislative history scrutinized the first draft of the Sherman Act, which proscribed "arrangements, contracts, agreements, trusts, or combinations" that "prevent full and free competition" by design, or which "tend to advance the cost to consumer."[12] Bork contended that Senator John Sherman employed these two criteria of illegality in every measure he presented to the Senate.[13] The first test, of "full and free competition," can be understood only as a consumer welfare prescription in Bork's reading.[14] The second test, measuring the "cost to consumer," makes this even more apparent. For Bork, this was strong (and nearly dispositive) evidence that Sherman drafted his bill with consumer welfare in mind. Bork also pointed to a floor statement made by Sherman on the subject of monopolistic mergers and predatory practices:[15]

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[9] Bork, *supra* note 7.
[10] *Id.* at 10.
[11] *Id.*
[12] Sherman Antitrust Act, 15 U.S.C. § 1 (2012).
[13] Stephen Labaton, *Administration Plans Tougher Antitrust Action*, N.Y. TIMES (May 11, 2009), http://www.nytimes.com/2009/05/11/business/11antitrust.html (sketching a brief biography of the sponsor of the eponymous Sherman Act).
[14] BORK, THE ANTITRUST PARADOX, *supra* note 8, at 10.
[15] For an excellent summation of the uses (and misuses) of legislative history materials like floor statements, *see* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39 (1990).

> The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry ... it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public .... [T]he individuals engaged in it should be punished as criminals.[16]

Bork justifiably concludes that the "emphasis in this passage is upon harm done to consumers."[17]

Some scholars have criticized this inference.[18] Law professor Barak Orbach, for instance, curiously responds that Bork "did

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[16] BORK, THE ANTITRUST PARADOX, *supra* note 8, at 10.

[17] *Id.*

[18] Two particularly persistent critics are Robert H. Lande (who contends that the legislative intent behind the Sherman Act was to prevent wealth transfers from consumers to businesses) and Herbert Hovenkamp (who asserts that the Sherman Act was intended to protect small businesses). *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68 (1982); John B. Kirkwood and Robert H. Lande, *The Fundamental Goal of Antitrust*, 84 NOTRE DAME L. REV. 191, 192 (2008); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L.

not consider the possibility that the politician Senator Sherman simply addressed his audience while discussing concerns to competition," as "every novice politician knows that he can gain some political capital by arguing that his agenda also promotes consumer interests."[19] This may well have been the case, although for legislative history purposes, it is also largely irrelevant.[20] If one is prepared to use legislative history in construing a statute—a controversial technique in itself[21]—one must take a legislator's statement at face value.[22]

REV. 1, 23–24 (1989). *See also generally* PITOFSKY, *supra* note 5 (collecting essays from scholars more or less opposed to Bork, Posner, and other free-market theorists of the Chicago School); RICHARD HOFSTADTER, "What Happened to the Antitrust Movement," *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 192 (1965).

[19] Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 155 (2011).

[20] D.C. v. Heller, 554 U.S. 570, 605 (2008) (noting that "[l]egislative history," in the judicial sense, "refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding").

[21] Justice Antonin Scalia had been one of the most persistent critics of what he perceived as the judiciary's overreliance on legislative history, stating, for instance, that "most legislative history" is "less than crystal clear." McDonald v. City of Chi., Ill., 561 U.S. 742, 834 (2010). Less tepidly, he wrote: "I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of law." ANTONIN SCALIA, A MATTER OF INTERPRETATION 31 (1998). Bork himself acknowledged the "difficulties inherent in the very concept" of legislative intent. Bork, *supra* note 7, at n.2.

[22] At the risk of belaboring the point, it simply does not matter what Sherman *really* meant when he made the statement above. If Sherman did not believe at all in consumer welfare on a personal level, but expressly invoked consumer welfare in his public defense of the bill, it is of no import: It is the public justification that matters. It is nearly impossible to know what politicians really intend by passing bills, and looking beyond the four corners of floor statements would invite metaphysical

Other objections to Bork's consumer welfare model are more normative. For example, some argue that serving consumer welfare may not be socially desirable. Orbach gives the example of tobacco products. For these goods, "the efficiency of tobacco companies and competitiveness of markets are not related to consumer welfare. Low prices and more cigarettes can only harm consumers."[23] Again, Orbach's criticism is somewhat idiosyncratic. A court hearing an antitrust case need not—and should not—evaluate whether an activity is considered socially desirable, as Congress has already made that threshold determination.[24] The only question before the court is how to maximize the industry's efficiency; or said another way, to advance consumer welfare. But whatever the merits of the scholarly criticism, Bork's framework endures. As Judge Douglas Ginsburg has noted, "the academy has failed to persuade the judiciary, and Bork's consumer welfare

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speculation of unknowable questions. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., dissenting) ("It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times."); *see also* Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute ..., or even the formal motivation for a statute where that is explicitly set forth ..., discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.").

[23] Orbach, *supra* note 19, at 152.

[24] The issue is one of judicial competence. It is not the task of judges to decide what industries are beneficial or what products are morally proper goods for consumers; Congress implicitly does that through its lawmaking power (*e.g.*, heroin is illegal while tobacco is not). One may disagree with the legislative classification, but that is part and consequence of the democratic process. Orbach seems to envision the antitrust judge as an amalgam of the Food and Drug Administration and the legislative branch.

thesis has become one of his many enduring contributions to U.S. antitrust law."[25]

Though the argument that consumer welfare should guide antitrust may seem straightforward, implementation is often complex. The best way to think of the utility of the doctrine is to envision it as setting guideposts for judicial decision-making. "Consumer welfare operates to allow courts to decide whether there's a claim or not," explains Mark Levinstein, an antitrust attorney with Williams & Connolly in Washington, D.C. "If so, judges will take into account how long the disruption has lasted."[26] If a judge has strong reason to believe that market forces will correct a temporary disruption, then the court likely will be reluctant to intervene. "Essentially, the court is trying to determine who is getting hurt," says Levinstein. "Once that's established, the court needs to consider whether the violation is so serious that the law should correct it."[27] Thus, consumer welfare offers a useful yardstick to judges confronted with antitrust problems. The uniqueness of the law surrounding professional sports, however, presents some special difficulties.

II. The Unique Position of Antitrust Law in Sports

The world of sports has long been an outlier from larger jurisprudential trends, and nowhere has this been more conspicuous than in the realm of antitrust.[28] A classic example of this relative insulation can be seen in the Supreme Court's opinion in

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[25] Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449, 453 (2008).

[26] Telephone Interview with Mark S. Levinstein, Partner, Williams & Connolly (May 7, 2012) [hereinafter "Interview with Mark. S. Levinstein"].

[27] *Id.*

[28] Cyntrice Thomas et al., *The Treatment of Non-Team Sports Under Section One of the Sherman Act*, 12 VA. SPORTS & ENT. L.J. 296, 296 (2013) ("Sports have introduced a unique problem in the application of the Sherman Act.").

Flood v. Kuhn.[29] A groundswell in the history of both law and baseball, *Flood* had two major implications. First, baseball was granted broad immunity from many tenets of antitrust law, and the Court held that only Congress could remove this immunity.[30] Second, the Court affirmed that all other professional sports (besides baseball) were subject to antitrust law's traditional strictures.[31]

The degree to which a sports league is insulated from—or subject to—antitrust law turns largely on the "single entity" question. In other words, this inquiry asks whether a league is acting as a unified collection of teams (*i.e.*, a single entity) or an assortment of individual parties when it is making business decisions on salaries and other matters.[32] This characterization determines the reach of the Sherman Act.[33] Section 1 of the Sherman Act expressly requires a "contract, combination, or conspiracy" in order for the legislation to apply.[34] The writ of the second section is broader, applying to "every person who shall monopolize."[35] The key difference between the two sections is that while the first requires the involvement of two distinct parties to a collusive arrangement that restrains trade, the second may implicate a single party. When applied in the sports law context, then, "[t]he obvious question" is "whether the league—the NFL, the NBA or the NHL—when it adopts intra-league policies is a single entity subject only to section 2 of the Act or a combination of separate clubs whose internal arrangements are exposed to section 1 scrutiny."[36] The answer to this question has far-reaching effects. While typically the issue has

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[29] Flood v. Kuhn, 407 U.S. 258 (1972).
[30] *Id.* at 412. The reserve system upheld by the Court, however, was ultimately dismantled by collective bargaining, not congressional action.
[31] *Id.* at 418.
[32] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
[33] Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).
[34] *Id.* § 1.
[35] *Id.* § 2.
[36] WEILER & ROBERTS, *supra* note 4, at 128.

been raised in connection with suits brought against the league by franchise holders (Oakland Raiders owner Al Davis providing one of the more colorful examples[37]), the single entity determination also informs league practices regarding the players market.[38]

Even more important to understanding antitrust in the sports context is the so-called labor exemption.[39] The labor exemption to the federal antitrust laws removes from antitrust scrutiny restraints on trade that are the product of a collective bargaining agreement between labor and management.[40] Courts have by and large accepted that restraints of trade exist not just in the product

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[37] *See, e.g.*, Bruce Weber, *Al Davis, the Controversial and Combative Raiders Owner, Dies at 82*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/sports/football/al-davis-owner-of-raiders-dies-at-82.html ("Davis, who became the team's principal owner in 2005, sued the N.F.L. several times, once attacking the league as an unlawful cartel for forbidding him to move the Raiders from Oakland to Los Angeles to take advantage of a larger market.").

[38] In the landmark *American Needle* case, the Supreme Court held that, at least as far as intellectual property rights connected with team merchandise are concerned, the NFL's attempt to operate as a "single entity" in order to offer exclusive merchandising rights amounted to concerted action that is not categorically beyond Section 1's coverage. As the Court wrote, "it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label." Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 197 (2010). In other words, the Court focused on substance, not form, in analyzing the single entity question.

[39] *See, e.g.*, Kieran Corcoran, *When Does the Buzzer Sound? The Non-statutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1045 (1994).

[40] *See* Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1184 (1980). It is often referred to as the "non-statutory labor exemption" because it is a judicial practice, not a legislative mandate. *See* Joseph T. Casey, Jr. and Michael J. Cozzillio, *Labor-Antitrust: The Problems of Connell and a Remedy that Follows Naturally*, 1980 DUKE L.J. 235, 235 (1980).

market, but in the labor market as well. This conclusion troubles some observers, particularly as the judiciary tends to assume this proposition without engaging in serious consideration of its merits. Commentators like Gary Roberts observe that the trade and commerce that antitrust seeks to protect from collusive restraint (or monopolization) does not include the labor market. And indeed, placing labor within the ken of the Sherman Act seems to contradict one of the defining features of antitrust law of the last four decades—namely, the notion that the guiding purpose of antitrust enforcement should be the enhancement of consumer welfare. As Roberts articulates it, the idea that the Sherman Act bars restraint of trade in the labor market "raises significant questions within contemporary scholarly and judicial analysis which presumes that the principal, if not exclusive, aim of antitrust law is to enhance consumer welfare through a more efficient allocation of economic resources."[41]

The applicability of this iteration of the consumer-welfare paradigm to sports law varies depending upon whether monopoly or monopsony power is at stake. Monopoly power typically imposes two costs. First, because one firm controls market power, consumers must pay a higher price for goods and services, and thus there is a transfer of wealth from consumers to producers.[42] Second, the amount of the good or service produced will drop, which inflicts a deadweight loss upon the economy as a whole (*i.e.*, some factors of production that would be most efficient at creating the monopolist's product are diverted into areas for which they are less suited).[43] The latter consequence of monopoly power—the

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[41] WEILER & ROBERTS, *supra* note 4, at 128.

[42] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control price or exclude competition.").

[43] Albert A. Foer, *The Spectrum of Monopolism: An Introduction to the Future of Monopoly and Monopolization*, 2008 WIS. L. REV. 225, 226 (2008) ("[S]tandard economics teaches that monopoly creates a deadweight loss that is of negative value to the society compared to a

deadweight loss—tends to animate Chicago School economists like Bork more than the former.

Where there is monopsony power, however, the harm is inverted.[44] Sellers are forced to accept a lower price, given that there is only one purchaser, and this transfers wealth from the seller to the buyer.[45] Given the diminished profit margins presented by a monopsony, sellers will tend to produce less of the good being sold, which also imposes costs on society.[46] As with monopoly power, most agree that the societal costs are concerning; unlike monopoly power, fewer observers fret over the wealth transfer effect. Further, monopsony power can be difficult to evaluate. One writer notes that the existence of monopsony power "may actually lower the cost and enhance the quality of output of that factor of production—in particular, labor—for the benefit of consumers who almost invariably outnumber the producers of any one

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competitive model because it means that goods and services for which there would be a demand at a competitive price will not be produced.").

[44] A monopsony is "A market situation in which one buyer controls the market." *Monopsony*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Monopsony is often thought of as the flip side of monopoly. A monopolist is a seller with no rivals; a monopsonist is a buyer with no rivals. A monopolist has power over price exercised by limiting output. A monopsonist also has power over price, but this power is exercised by limiting aggregate purchases. Monopsony injures efficient allocation by reducing the quantity of the input product or service below the efficient level." LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 137–38 (2000).

[45] Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 GEO. L.J. 1611, 1613 (2007) ("In monopoly and monopsony, the quantity of goods transacted decreases and wealth is transferred to the parties with market power.").

[46] Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 599 (2005) ("As a result, producers in the monopsonized market with average costs between the competitive price and the monopsony price will withdraw from production, causing supply in the final goods market to be less than demand at the competitive price.").

product."[47] This last point is crucial to understanding the *Kartell* case discussed in the following section, which analyzes judicial consideration of potential pro-competitive benefits from wage controls in sports.

III. The Courts

A. Decisions Accommodating Wage Restraints

Kartell v. Blue Shield of Massachusetts, Inc. offers an interesting platform for discussion of some of these issues.[48] The case—aptly named given the antitrust context—considered whether Blue Shield, then the leading provider of health insurance in Massachusetts, violated the Sherman Act by requiring all doctors who performed services for patients insured by Blue Shield to accept its fee schedule. The First Circuit held it did not. Blue Shield had demanded that wages paid according to its scale be treated as full payment for services rendered, and doctors were prohibited from charging patients any additional fees.[49] The court upheld the arrangement despite evidence that the restriction dissuaded at least some young doctors from practicing medicine in Massachusetts (thus reducing the *quantity* of medical services available) and caused other doctors not to authorize sophisticated-but-more-expensive treatments for certain afflictions (thereby reducing the *quality* of medical services).[50] Nonetheless, the court found no antitrust violation, reasoning that the overall impact of this arrangement was to lower medical and insurance costs for consumers.[51] The court's discussion is worth excerpting at length:

> First, the prices at issue here are low prices, not high prices. Of course, a buyer, as well as a seller, can possess significant market power; and courts

[47] WEILER & ROBERTS, *supra* note 4, at 129.
[48] Kartell v. Blue Shield of Mass., 749 F.2d 922 (1st Cir. 1984).
[49] *Id.* at 923, 934.
[50] *Id.* at 924.
[51] *Id.* at 925.

> have held that *agreements* to fix prices—whether maximum or minimum—are unlawful. Nonetheless, the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high,* not too low. And, the relevant economic considerations may be very different when low prices, rather than high prices, are at issue. These facts suggest that courts at least should be cautious—reluctant to condemn too speedily—an arrangement that, on its face, appears to bring low price benefits to the consumer.[52]

Kartell essentially draws a clear distinction between monopoly and monopsony power. Monopoly power strikes the court as invariably threatening the interests of consumers, and is therefore verboten. Monopsony power, on the other hand, does not engender a commensurate level of antitrust scrutiny for the simple reason that it tends to improve the situation of consumers in the marketplace.

The application of this reasoning to the world of sports is readily apparent. Sports leagues are effectively functional monopsonies. Players are selling, in the form of labor, a unit of production to these single purchasers. This arrangement explains the near-universal opposition of professional sports unions to curtailments of players' contracting power (*e.g.*, the draft or free-agent restrictions), because the more latitude a league has to limit a player's services to a single team, the closer the league comes to attaining monopsony power. Monopsony power, or at least the elements of it, grants the buying team the leverage to offer players lower salaries than they would otherwise command in an open market where all teams could bid for any individual's athletic

[52] *Id.* at 930–31 (emphasis original). Notably, the court cited Bork for the proposition that "the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high,* not too low." (emphasis original).

services.[53] Players, of course, are only tangentially concerned—if at all—with the impact of this setup on consumer welfare, whether consumer welfare is judged to be the prices that fans pay for tickets, the amount networks are willing to pay for broadcasting rights, or the overall quality of the product available to fans. Players and their representatives are acting more immediately to maximize their incomes and to enhance their share of aggregate wealth vis-à-vis team owners.

Although discerning the effects of monopsony power on consumer welfare is not a frequent judicial inquiry, *Kartell* is not the only case to grapple with the question. In *Fraser v. Major League Soccer, L.L.C.*, a federal district court expressly considered the issue in the context of sports.[54] The plaintiffs, players in the most prominent professional soccer league in the United States, challenged the league's "transfer fee," which authorized a player's former team to demand compensation from his new team for costs associated with "training and/or development."[55] The rule applied to players whose contracts with their former clubs had expired ("out-of-contract-players") as well as to players whose contracts were still in effect ("in-contract players").[56] Plaintiffs argued that as applied to out-of-contract players, the fee was a horizontal agreement in restraint of trade that limited the terms under which players may engage in price competition, and consequently was a per se illegal restraint of trade under Section 1 of the Sherman Act.[57] Defendant Major League Soccer ("MLS") countered that it had never paid or requested a transfer fee for an out-of-contract player, and had no intention of doing so in the future.[58] The court

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[53] In this pure free-market system, the best players in a major league would almost certainly be paid higher salries than under the current arrangement. *See infra* note 83.

[54] Fraser v. Major League Soccer, L.L.C., 7 F. Supp. 2d 73 (D. Mass. 1998).

[55] *Id.* at 75.

[56] *Id.*

[57] *Id. See also* 15 U.S.C. § 1.

[58] *Fraser*, 7 F. Supp. 2d at 75.

denied that the restraint was per se illegal. Instead, it evaluated it according to the Rule of Reason, meaning that the plaintiffs were required to show that the anticompetitive effects of the rule outweighed any putative pro-competitive benefits.[59]

Interestingly, the court took its cue from *Kartell* to acknowledge that pro-consumer benefits were potentially implicated in the arrangement. Citing the language from *Kartell* quoted above (*i.e.*, that courts are rightly reluctant to condemn an arrangement that appears to offer price benefits to the consumer), the *Fraser* court offered: "While it is not immediately clear that the transfer fee rule actually has this effect, it is not obviously out of the question that one of the effects of lower player salaries is lower prices for the consumer."[60] Accordingly, the court was prevented from deeming the transfer fee a per se violation of the Sherman Act, and instead conducted the more expansive Rule of Reason analysis. Though the comment was largely dicta, it was nonetheless novel for a court to contemplate potential consumer benefits from player wage restraints.

The *Fraser* case stands as the clearest example of a court acknowledging pro-competitive benefits from a wage restraint in sports. Thus, it may have struck some readers as a harbinger of things to come; or at the very least, an exemplar of a compelling alternative school of thought. Two cautionary notes should be sounded, however. The first is contextual. MLS faced unique challenges as a young league, in an arguably saturated viewership market, showcasing a sport of less-than-overwhelming popularity

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[59] *Id.* at 76. The Rule of Reason is defined as "[t]he judicial doctrine holding that a trade practice violates the Sherman Act only if the practice is an unreasonable restraint of trade, based on the totality of economic circumstances." *Rule of Reason*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[60] *Id.* at 78. *See also* State Oil v. Khan, 522 U.S. 3, 12 (1997) (emphasizing that low prices "benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition").

in the United States.[61] Given such circumstances, the league had to make special concessions to draw investors, including offering owner-protections that would be non-starters in other major sports leagues. "The MLS could basically say, 'look, we're a fledgling organization, and without this restraint we won't be able to have a league at all,'" observes Levinstein.[62] "If the MLS couldn't attract sufficient owners, then there is no league, so the issue over wages seems moot."[63] Thus, to get the league off the ground, the league had to limit price competition among owners. Second, and more prosaically, there is a tendency in all litigation to press as many arguments as possible into one's case; as a result, Levinstein notes, judges "often throw in the kitchen sink" when it comes time to write the opinion.[64] Thus, it is worth reiterating that the sentence in the *Fraser* opinion referencing "pro-competitive justifications" was essentially dicta; at the very least, it was hardly central to the court's holding.[65] As time proved, *Fraser* did not inaugurate a revolution in antitrust litigation in sports, although the opinion will surely be mined by a future court willing to uphold player wage restraints on consumer welfare grounds.[66]

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[61] *Fraser* was decided in 1998, and it is worth noting that the sport has grown considerably in popularity since then. "Major League Soccer, the top North American men's professional league, has had average per-game attendance of 21,023 this season, an increase of almost 40% over the past 10 years. The league's title game, the MLS Cup, pulled in 1.6 million viewers in December, its biggest audience since 1997, the league's second season, according to Nielsen." Jonathan Clegg, *Has Soccer Finally Made It in the U.S.?*, WALL ST. J. (July 8, 2015), http://www.wsj.com/articles/has-soccer-finally-made-it-in-the-u-s-1436395661.

[62] Interview with Mark S. Levinstein, *supra* note 26.

[63] *Id.*

[64] *Id.*

[65] *Fraser,* 7 F. Supp. 2d at 78.

[66] Some contemporary commentary was more effusive about the implications of the case for a range of antitrust issues. *See, e.g.*, Edward Mathias, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 203–04 (1999) ("The importance of *Fraser v. MLS* for the future of professional sports leagues, however,

B. Decisions Disallowing Wage Restraints

On the whole, however, most courts have declined to adopt the argument that aggressive wage restraints enhance consumer welfare.[67] One particularly vivid example of this judicial reticence emerged in the legal saga that enveloped football player Maurice Clarett.[68] Clarett, a standout running back at Ohio State, was a tremendously gifted athlete pegged by many analysts as an early-round draft pick.[69] Clarett's success on the field, however, was matched by repeated impropriety off of it, and school officials ultimately dismissed him from the program.[70] Determined none-

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transcends the continuing legality of the MLS regulations challenged in the suit. *Fraser* is momentous because it is the first antitrust challenge to a 'single entity league,' a league that is organized as a single corporation rather than as a group of individually owned teams.").

[67] It is worth remembering, however, that observers are working with a small sample size given the relative dearth of decisions in this area.

[68] Mike Freeman, *Citing Antitrust, Clarett Sues N.F.L. To Enter Its Draft*, N.Y. TIMES (Sept. 23, 2003), http://www.nytimes.com/2003/09/24/sports/football-citing-antitrust-clarett-sues-nfl-to-enter-its-draft.html.

[69] Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES (July 13, 2003), http://www.nytimes.com/2003/07/13/sports/colleges-when-values-collide-clarett-got-unusual-aid-in-ohio-state-class.html?pagewanted=all ("Clarett is also thought likely to leave college for the National Football League before exhausting his four years of eligibility.").

[70] *Id.* ("Clarett walked out of a midterm exam last fall in an introductory course in African-American and African studies without completing the exam. He never retook the midterm and did not take the final exam. But he passed the course after taking oral exams instead, an Ohio State official said."). *See also* Damon Hack, *Lawyer Says Clarett Prefers Return to Buckeyes Over Draft*, N.Y. TIMES (Jan. 17, 2004), http://www.nytimes.com/2004/01/17/sports/colleges-lawyer-says-clarett-prefers-return-to-buckeyes-over-draft.html?_r=0 (recalling that Clarett was "charged with filing a police report that exaggerated the value of items stolen from a car he had borrowed … pleaded guilty to a misdemeanor charge of failing to aid law enforcement and was fined $100"). *See also* Mike Freeman, *Citing Antitrust, Clarett Sues N.F.L. To Enter Its*

theless to play professional football, Clarett moved to Los Angeles and sued to overturn a National Football League ("NFL") rule that prohibited players from entering the draft until they have been out of high school for at least three years.[71] The suit argued that the league's rule violated federal antitrust law and petitioned Federal District Judge Shira Scheindlin strike the mandate as an unlawful restraint. Clarett also sought to be declared eligible for the 2004 NFL draft (or alternatively, to force the league to hold a special supplemental draft sooner).[72] As the rules stood at the time, Clarett would not have been eligible until the 2005 draft.[73]

Draft, N.Y. TIMES (Sept. 23, 2003), http://www.nytimes.com/2003/09/24/sports/football-citing-antitrust-clarett-sues-nfl-to-enter-its-draft.html ("[A]n Ohio businessman had given Clarett a $500 check and paid at least $1,000 of his cellphone bills. It was those alleged extra benefits that led to an N.C.A.A. investigation into Clarett's finances and ultimately his suspension from the team for at least one year.").

[71] Tom Friend, *Clarett's Call Came Two Hours Before Arrest*, ESPN THE MAG. (Aug. 16, 2006), http://espn.go.com/nfl/columns/story?id=2545078 (recounting Clarett's troubled history after leaving Ohio State). *See also* Freeman, *Citing Antitrust*, *supra* note 69.

[72] The suit contended: "Had Clarett been eligible for the 2003 draft, it is almost certain he would have been selected in the beginning of the first round and would have agreed to a contract and signing bonus worth millions of dollars." *Id.* Also, Clarett's attorneys argued that the rule is not contained in the collective bargaining agreement and that the rule's purpose is to "perpetuate a system whereby college football serves as an efficient and free farm system for the N.F.L. by preventing potential players from selling their services to the N.F.L. until they have completed three college seasons." *Id.*

[73] The NFL is one of the only major professional sports organizations with such a stringent age requirement for entering players. League executives have maintained that the rule is in place to protect younger, smaller players from competing against older and presumably more physical opponents. *Id.* Clarett's lawyer Alan Milstein offered his personal take on the NFL's regulations in an interview: "I see Maurice's case as a league trying to make certain players, young players, who are often poor, wait on earning a living, while the N.F.L. and colleges, either

The court agreed that the NFL's rule was an unlawful restraint, but interestingly, near the end of the opinion, it considered the league's pro-competitive justifications for the rule. Since the case was decided under the Rule of Reason, the anti-competitive effect of the restriction had to be weighed against the league's arguments that the arrangement enhanced competition (a key tenet of Bork's framework). The NFL argued that the three-year requirement helped its member teams save money, as it streamlined the pipeline of players entering the league and prevented a free-market bidding war from sparking potentially ruinous competition. "The fact that the League and its teams will save money by excluding players does not justify that exclusion," wrote the court. "Indeed, the vast majority of anti-competitive policies are instituted because they will be profitable to the violators."[74] The court reasoned that such a holding risked upending the entire structure of antitrust law:

> The exercise of market power by a group of buyers virtually always results in lower costs to the buyers—a consequence which arguably is beneficial to the members of the industry and ultimately their consumers. If holding down costs by the exercise of market power over suppliers, rather than just by increased efficiency, is a pro-competitive effect justifying joint conduct, then section 1 can never apply to input markets or buyer cartels. That is not and cannot be the law.

Clarett's legal victory proved short-lived, however.[75] In an opinion written by future Supreme Court Justice Sonia Sotomayor, the

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directly or indirectly, make millions off of them," Milstein said. Mike Freeman, *The Case for Clarett*, N.Y. TIMES (Sept. 25, 2003), http://www.nytimes.com/2003/09/25/sports/football/25milstein.html.

[74] Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004).

[75] Damon Hack, *Judge Orders N.F.L. to Permit Young Athletes to Enter Draft*, N.Y. TIMES (Feb. 6, 2004),

Second Circuit held that the NFL's eligibility rules were immune from antitrust scrutiny under the non-statutory labor exemption.[76] Unfortunately, the appellate court did not comment on the district court's weighing of the lower-costs-to-consumers argument excerpted above.

The courts, however, had rejected the NFL's consumer welfare argument prior to the *Clarett* decision. In *Brown v. Pro Football, Inc.*, the federal district court for Washington, D.C. also swatted away the NFL's argument that wage controls convey price

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http://www.nytimes.com/2004/02/06/sports/football-judge-orders-nfl-to-permit-young-athletes-to-enter-draft.html (noting that the opinion proved deeply divisive, with one observer commenting "the labor exemption is just about as clear as can be on this point").

[76] Clarett v. Nat'l Football League, 369 F.3d 124, 125 (2d Cir. 2004). In the wake of the decision, Clarett's once-promising career continued to deteriorate. He was a surprise third-round pick by the Denver Broncos in 2005, but news reports indicated that his temperament and work ethic created friction in the organization and he was released without a single regular season carry. Clarett was alleged to have robbed two people of a cell phone early on New Year's Day in 2006; later that year, he was found parked near the home of a key witness in the upcoming robbery trial, wearing a bulletproof vest, with an automatic weapon in the car. In 2010, he was released from jail and was scheduled to begin classes at Ohio State. JoAnne Viviano, *Clarett Arrested With Four Loaded Guns*, WASH. POST (Aug. 10, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/09/AR2006080900316.html. *See also* Michael Wilbon, *The Clarett Saga Is a Wake-Up Call for Us All*, WASH. POST (Aug. 10, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/09/AR2006080902074.html; Associated Press, *Clarett Agrees to Plea Deal, Will Serve Three-And-A-Half Years,* ESPN (Sept. 20, 2006), http://espn.go.com/nfl/news/story?id=2593068; Erick Smith, *After Release from Prison, Clarett Back as Student at Ohio State*, USA TODAY (July 26, 2010), http://www.cleveland.com/buckeyeblog/index.ssf/2010/07/maurice_clarett_back_at_ohio_s.html.

benefits to consumers.[77] The *Brown* case involved a challenge to the NFL's wage scale for "development squad" players, or players who participate in practices to help the starters sharpen their schemes for regular Sunday opponents.[78] To head off competition among teams for the best development squad players, a league-wide rule leveled their salaries at $1,000 per week. The plaintiffs, a class of practice squad players, challenged this uniform wage provision as violating the Sherman Act. The court rebutted the NFL's assertion that wage-fixing restraints imposed by employer groups on employees do not implicate antitrust laws, finding them "price-fixing restraints subject to the antitrust laws," particularly Section 6 of the Clayton Act.[79] Thus, the court found "no discernible reason, given that the Sherman Act applies to services as well as goods, why wage-fixing by purchasers of services should be treated differently than price-fixing by sellers of goods."[80] Applying the Rule of Reason, the court granted the plaintiff players' motion for summary judgment.

The National Collegiate Athletic Association ("NCAA") has also proffered consumer welfare arguments to defend wage restrictions, albeit without much success.[81] Beginning in 1992, the NCAA had a rule in place that limited the number of coaches a program could have and specified pay ceilings for assistants.[82] A

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[77] Brown v. Pro Football, Inc., CIV. A. 90-1071(REL), 1992 WL 88039, at *1 (D.D.C. Mar. 10, 1992), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996).

[78] Linda Greenhouse, *Supreme Court Considers Antitrust Case Against N.F.L.*, N.Y. TIMES (Apr. 5, 1996), http://www.nytimes.com/1996/04/05/sports/pro-football-supreme-court-considers-antitrust-case-against-nfl.html.

[79] *Id.* at 5. *See also* Clayton Act § 6, 15 U.S.C. § 17 (1982).

[80] *Brown*, 1992 WL 88039, at *5.

[81] Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998).

[82] Kirk Johnson, *Assistant Coaches Win N.C.A.A. Suit, $66 Million Award*, N.Y. TIMES (May 5, 1998),

class of college basketball coaches that fell into this "restricted earnings" group challenged the rule, alleging that limiting annual compensation for certain Division I assistant coaches at $16,000 was an unlawful restraint of trade. The court found the NCAA's argument that the regulation lowered operational costs unconvincing, as "cost cutting by itself is not a valid pro-competitive justification."[83] If it were, said the court, any group of competing buyers could agree on maximum prices.[84] Lower prices cannot justify a cartel's control of prices charged by suppliers, "because the cartel ultimately robs the suppliers of the normal fruits of their enterprise."[85] The court also noted that as a general matter, setting maximum prices reduces the incentive of suppliers to improve their products.[86]

The court's assumption seems reasonable, as it is certainly conceivable that coaches would be less inclined to improve performance absent the chance for increased pay. At the same time, however, entry-level coaches are likely motivated more by the opportunity to get exposure and experience than actual compensation, as is the case for many industries in which the supply of enthusiastic would-be participants outstrips demand.[87] Indeed, the

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http://www.nytimes.com/1998/05/05/sports/colleges-assistant-coaches-win-ncaa-suit-66-million-award.html.

[83] *Id.* at 1022.

[84] *See, e.g.*, Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948).

[85] *Id.*

[86] *Id.* ("As the Supreme Court reiterated in *Superior Court Trial Lawyers*, 'the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services ... This judgment recognizes that all elements of a bargain-quality, service, safety, and durability-and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.'") (citation omitted).

[87] *See, e.g.*, Fred Thys, *Coaches at Some Liberal Arts Colleges Struggle with Low Pay*, WBUR (Aug. 13, 2015), http://www.wbur.org/2015/08/11/coaches-salaries-liberal-arts-colleges ("College coaches at big Division I schools can pull in big salaries. Last

NCAA claimed to have devised the rule in part to help streamline the career ladder for coaches.[88] Regardless, the court prohibited the NCAA from implementing the rule in question (or devising a similar rule) to regulate entry-level coach salaries and rejected the consumer welfare argument.

CONCLUSION

What, then, to make of the argument that expansive salary restrictions in professional sports should be permitted—and perhaps even encouraged—as beneficial to consumer welfare? Adherents of this point of view observe that player labor services are a component of the total price equation for a professional sports team, and therefore it is commonsensical for teams to fix prices for player services. By restricting wages, costs are lowered, and teams may reduce prices charged to consumers (or at the very least, there would be no need for an increase in what consumers are charged). However compelling in theory, such a position has proved a tough sell in reality. The Supreme Court and the lower federal courts have clearly stated that price fixing by purchasers is per se illegal

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year, for example, Derek Kellogg, the head coach of men's basketball at the University of Massachusetts Amherst, made $1.1 million. But at mid-sized liberal arts colleges around New England, compensation for coaches is often a very different story. … [One assistant coach], who worked at Williams until this year, says he was paid $18,000 a year by the college. ... Coaches at Williams and Dartmouth say the colleges are able to pay the salaries they do because they always have a plentiful supply of passionate young coaches.").

[88] Kirk Johnson, *Assistant Coaches Win N.C.A.A. Suit, $66 Million Award*, N.Y. TIMES (May 5, 1998), http://www.nytimes.com/1998/05/05/sports/colleges-assistant-coaches-win-ncaa-suit-66-million-award.html ("The rule restricting salaries, approved by the N.C.A.A.'s board at its national convention in 1991, took effect in August 1992. It was aimed at controlling costs, but also, the association said, at providing a career ladder for beginning coaches. The new rules eliminated one coaching position from Division I rosters, cutting the number of assistants to four from five, and capped the salary of the fourth and lowest member of the staff.").

on the grounds that such agreements restrain trade, reduce competition, and distort the proper functioning of competitive markets. Moreover, even if such wholesale wage restraints were permissible, they would not necessarily lead to lower prices for consumers. Unlike a linear supply chain in which input units are clearly and closely interrelated, profits in sports do not move in such a direct fashion. Owners, reasonably enough, are interested in maximizing profits, and do not sell players to consumers on a unit-by-unit basis (stated more aphoristically, a shortstop is not a refrigerator). Thus, while stricter wage restraints may result in increased savings to owners, it is not at all clear that they would result in reduced prices for consumers. Owners might simply pocket the difference, especially given the relative inelasticity of sports ticket prices.

Of course, most major sports leagues already exercise wage restraints through the use of a salary cap.[89] Without a cap in place, salaries for professional athletes would look dramatically different than they do today. In such a universe, the top players would be at worst unaffected and at best would be paid a premium for their services. Superstars like Lebron James[90] or Michael Jordan would

[89] Internationally, professional sports leagues have an even greater range of rules and regulations to restrain player wages. *See* Stephen F. Ross, *Player Restraints and Competition Law Throughout the World*, 15 MARQ. SPORTS L. REV. 49, 49–50 (2004) ("In most professional sports leagues around the world, participating clubs compete among themselves to sign players, subject to rules imposed by the league or agreed to among themselves. Rules imposed by leagues often significantly restrain competition for players.").

[90] Allen St. John, *What Would LeBron James Be Worth In A Free Market NBA?*, FORBES, July 11, 2014 ("But James and a small handful of other mid-career superstars are simply worth lots more than any team can pay them under the salary cap."); Arash Markazi, *What Could LeBron James, Stephen Curry Make Without Salary Cap?*, ESPN (July 5, 2015), http://espn.go.com/nba/story/_/id/13182761/what-lebron-james-stephen-curry-kevin-durant-make-salary-cap ("James will once again be the most underpaid athlete in professional sports. There's nothing James or the Cavaliers can do about this. He plays in a league with maximum contracts and salary caps. James, who is expected to make about $22 mil-

command astronomical salaries while in their prime, and would benefit from this pure free-market system if evaluated from a purely contractual standpoint (indeed, Jordan was paid over $30 million under the soft cap in place during the 1997–98 season, an enormous sum relative to his colleagues).[91] The real cost of a free-market system would be borne by the least desirable players—who also happen to be the most fungible—who in the absence of a collective bargaining agreement would lose their minimum salaries, and potentially healthcare and other benefits as well. "In sports, the union gives up the rights of the rich to assist the less rich," says Levinstein. "The agreement helps the average journeyman but hurts the star."[92] Because of the wage-depression effect that the salary cap exerts on elite players, Levinstein criticizes it as "simply indefensible price fixing."[93]

Antitrust is a complicated discipline, and it only grows more complex when overlaid on the world of sports. Numerous carve-outs, like the non-statutory labor exemption and the single-entity defense, have muddied the legal waters as the ceaseless tug-of-war between sports leagues and players carries on. While the argument evaluated in this article (*i.e.*, consumer welfare is enhanced by restraining the salaries of professional athletes) is ultimately unconvincing, it is not meritless. Certain restrictions on player wages may well be good for the game. For instance, while few are pining for a return to the bad old days of the reserve clause, it is an open question as to whether unrestricted free agency

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lion next season, can try and squeeze as much out of the current system as possible, but it will always shortchange him at least half of his actual worth, according to estimates from industry experts.").

[91] Joe Flood, *NBA Parity? History Shows New Labor Deals Achieve the Opposite*, SPORTS ILLUSTRATED (Sept. 7, 2011), http://www.si.com/nba/2011/09/07/nba-parity ("During the 1997–98 season, the salary cap was $26.9 million, but the soon-to-be-retired Jordan was making more than $30 million thanks to the [Larry] Bird exception.").

[92] Interview with Mark S. Levinstein, *supra* note 26.

[93] *Id.*

has been an unfettered good for baseball and other professional sports.[94] The annual reshuffling of rosters, lament many owners and some fans, erodes team loyalty and detracts from viewer enjoyment of the game[95] (as the inimitable Jerry Seinfeld put it, modern fans are left "rooting for laundry").[96] Still, while wage restraints are not without their benefits in the context of professional sports, the costs they impose have proved to be too much to bear. Given the popularity and wealth of sports in the United States and the prodigious creativity of attorneys representing both leagues and players, however, it is clear that this debate is far from settled.

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[94] *See, e.g.*, *Flood*, 407 U.S. at 258; Federal Baseball Club v. Nat'l League, 259 U.S. 200 (1922).

[95] "Baseball's owners have argued strongly for decades … that 'free agency [leads] to league domination by teams with the largest markets, destroying [the] competitive balance' of the game. Indeed, even the fans have shared such worries, going so far as to say that free agency threatens the 'very essence of sport.' The basic argument is that in a free market for player services, rich teams from large markets would dominate the market for the most talented players, leaving the less wealthy small market clubs to field their teams from a pool of less desirable players. The resulting uncompetitive baseball games would diminish attendance and revenues across the board—even in the dominant markets, where fans would quickly tire of lopsided scores and uncontested pennant races." Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. 293, 316–17 (2005). After summarizing those arguments, the author observes "such destruction has not befallen baseball" and indeed "this prediction defies general economic and statistical reason." *Id.*

[96] Scott Ostler, *For A's Fans, A Clean Start in Rooting for Laundry*, S.F. GATE (Feb. 8, 2015), http://www.sfgate.com/sports/ostler/article/For-A-s-fans-a-clean-start-in-rooting-for-6070074.php ("Jerry Seinfeld famously noted that sports fans cheer for their teams despite wholesale roster changes, so you're really rooting for laundry.").