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THE NARCOTIC EFFECT OF ANTITRUST LAW IN PROFESSIONAL SPORTS

THE NARCOTIC EFFECT OF ANTITRUST LAW IN PROFESSIONAL SPORTS:
HOW THE SHERMAN ACT SUBVERTS COLLECTIVE BARGAINING

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Abstract

Using textual analysis and data from federal court opinions, I explore the relationship between collective bargaining and antitrust litigation in baseball, football, basketball, and hockey. Since collective bargaining began in these sports in the 1960s, there have been 21 strikes or lockouts. Baseball and football have had the most labor strife, with 8 work stoppages apiece—but their experiences have been very different. Because the Supreme Court ruled that baseball is completely exempt from antitrust law, players have had to use the strike weapon under the National Labor Relations Act (NLRA) to liberalize free agency and increase team competition for their services. Football players, in contrast, staged several unsuccessful strikes in the 1970s and 1980s. Because of their weak bargaining power, they decertified their union in 1991 and 2011. This gave them standing as individuals under the Sherman Act to challenge NFL restrictions on their labor market mobility. Using detailed case materials, I show how a district court constantly supervised their labor agreement from 1993-2011.

My study draws from legal and industrial relations theories to explain how labor agreements in pro sports are settled by collective bargaining or antitrust litigation. First, when courts do not define the antitrust-labor law boundary so that labor disputes are exempt from their jurisdiction, they open an alternative path to bargaining these agreements. Second, when courts entertain antitrust lawsuits, they raise the odds that economic weapons under the NLRA will not be used because of judicial inclination to protect players from irreparable harm and injury resulting from league-imposed labor market restrictions. Third, as this behavior becomes a pattern, collective bargaining is disrupted by faulty information as players, unions, and leagues guesstimate the odds that their differences will be settled at a collective bargaining table or in a court supervised negotiation. Fourth, as players negotiate better agreements in court compared to the bargaining table, they become addicted to this settlement process.

To apply these theories, I use data from 82 federal antitrust court opinions from 1965-2011. Individual players are the most common antitrust plaintiff (65.5%), compared to player unions (8.6%). This means the dispute resolution processes of collective bargaining are supplanted by litigation in federal courts. And except for baseball players, pro athletes often lose labor disputes when economic weapons are used. Their dismal bargaining experience substantially improves, however, by suing under the Sherman Act. In court, players win 43.9% of the rulings, compared to 46.3% for the leagues. These rulings—for example, an injunction that ends a league’s restrictions on free agency—can have dramatic consequences for antitrust settlements that are later codified in a collective bargaining agreement. Textual analysis of cases supports this conclusion.

Applying the “narcotic effect” theory from industrial relations, I conclude that antitrust litigation addicts players in football and basketball to the adjudicatory procedures of the Sherman Act—thereby replacing collective bargaining. This is undesirable because Congress intended, under the NLRA, to leave labor and management free from government interference as they adjust their differences. In contrast, baseball’s total exemption from antitrust law, combined with its high frequency of work stoppages, shows what happens when the opiate of antitrust litigation is not available to players: In time, labor and management establish an informed bargaining protocol, and work through their issues by making difficult concessions on their own. As long as courts entertain these sports lawsuits under the Sherman Act, collective bargaining will be subverted.
# The Narcotic Effect of Antitrust Law in Professional Sports

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THE NARCOTIC EFFECT OF ANTITRUST LAW IN PROFESSIONAL SPORTS

I. INTRODUCTION

A. Overview and Research Question

To what extent do professional athletes substitute antitrust for collective bargaining? I analyze 82 antitrust decisions made by federal courts after players formally entered into collective bargaining relationships with the NFL (football), NBA (basketball), NHL (hockey) and MLB (baseball). In these cases, players tried to stop league imposed labor market restrictions, including the draft (which limits a new player to negotiate with one team), reserve clause (which allows a team to renew automatically a player’s contract for next season), and salary cap (which sets a ceiling on player pay).

My Article presents an important theory and new empirical findings. Applying “narcotic effect” theory from industrial relations, I use data to determine whether antitrust litigation addicts players to the adjudicatory procedures of the Sherman Act—thus replacing collective bargaining. If such addiction occurs, this would nullify congressional intent, under the National Labor Relations Act, to leave labor and management free from government interference as they adjust their differences.

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1 E.g., Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049, 1056 (D.C.Cal. 1971). Occurring once a year, the draft is designed to maintain the various NBA teams “at roughly equivalent levels of playing ability, so that the games played between league teams shall be as attractive as possible to spectators and others interested in the sport of professional basketball.” Id. Weaker teams draft first to improve the competitiveness of the league.

2 E.g., Robertson v. National Basketball Ass’n, 389 F.Supp. 867 (D.C.N.Y. 1975). The reserve clause is part of every player’s Uniform Contract. Id. at 874. If a player refused to sign the Uniform Contract for the next season, his preceding agreement allowed the club “unilaterally to renew and extend the Uniform Contract for one year on the same terms and conditions including salary.” Id. If a player was traded or his contract was sold, the reserve clause bound him anew the new club.

3 E.g., Bridgeman v. National Basketball Ass’n, 838 F.Supp. 172, 176 (D.N.J. 1993), detailing terms of a salary cap that the NBA negotiated with the player’s union. This complex formula set a maximum cap, and minimum floor, on player salaries. These salary parameters required teams to pay 53% of the NBA’s revenues in aggregate salaries and benefits. The salary cap was intended “to preserve team competition throughout the entire league by preventing the richest teams from taking the bulk of the best players to the disadvantage of less well-situated teams.” Id.

4 See Wheeler, infra note 176.

5 See 79 Cong. Rec. 7660, infra note 153, explaining that Congress intended in the National Labor
None of this is meaningful without context. During a formative time for American labor unions, courts blocked strikes, boycotts, and organizing drives by issuing injunctions against union leaders and supporters. Judges were accused of favoring employers. Congress counteracted the judiciary’s tendency to interfere in labor disputes by passing three landmark laws: (1) the Clayton Antitrust Act (1914), which exempted “labor” from earlier antitrust regulation; (2) the Norris-LaGuardia Act (1932), a law that prevented federal courts from issuing injunctions in labor disputes; and (3) the National Labor Relations Act (1935), which granted employees collective bargaining rights.


7 See FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930). To make their point about judicial bias, Frankfurter and Greene explained that businesses often contrived a way to obtain federal diversity jurisdiction in order to win a broadly phrased injunction. Id. at 13-14. They observed: “A device of modest beginnings, the injunction assumed new and vast significance in a national economy in which effective organization and collective action had attained progressive mastery.” Id. at 24.

8 See Clayton Act, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-37 (2011)), enacted Oct. 15, 1914, c. 323. The law amended the Sherman Antitrust Act, 15 U.S.C. §§ 1-11. In Section 6 of the Clayton Act, “labor” was exempted from antitrust law in these broad terms: The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, . . . instituted for the purposes of mutual help, . . . or to forbid or restrain individual members of such organization[] from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. This description of exempt activities corresponded to common union behaviors, such as forming labor organizations and taking actions to promote the economic goals of workers.

9 Norris-LaGuardia Act, Act of Mar. 23, 1932, c. 90, § 4, 47 Stat. 70, codified at 29 U.S.C. § 104. The law denies federal courts jurisdiction “to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute. . . .” Activities that are immune from federal injunctions include ceasing or refusing to perform any work; becoming a member of a labor organization; paying to support someone involved in a labor dispute; aiding persons in a labor dispute; publicizing a labor dispute; and assembling to promote the interests of labor in a dispute.

During this time of labor unrest, baseball grew to its exalted status as the national pastime.\(^{11}\) But players labored under a severe contractual restriction known as the reserve clause.\(^{12}\) Teams could perpetually renew a player’s contract. This denies players the ability to shop their services to other teams, and bid up their labor. They compared the reserve clause to involuntary servitude.\(^{13}\)

When baseball players challenged the reserve clause as an antitrust violation, courts dismissed their lawsuits.\(^{14}\) These rulings traced to a 1922 Supreme Court precedent, *Federal Base Ball Club v. National League of Professional Base Ball Clubs*, which reasoned that because a baseball diamond is located in one state, the sport is not in interstate commerce and is therefore beyond the Sherman Act.\(^{15}\) Frustrated by this myopic view of their industry, baseball players eventually formed a union.\(^{16}\) They achieved limited free agency and better pay through collective bargaining.\(^{17}\)

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12 See Hallman, *infra* note 57, for an early example.
13 See 1972 WL 125836, at *17 (Appellate Brief), where Curt Flood, a star baseball player who was traded against his wishes from the St. Louis Cardinals to the Philadelphia Phillies, argued to the Supreme Court: “The reserve clause is an indentured servitude that works upon all professional baseball players through a worldwide blacklist and group boycott.” He contended that it is a form of “bondage” within the meaning of the Thirteenth Amendment. *Id.*
15 259 U.S. 200, 208 (1922), concluding that the business of “giving exhibitions of base ball... are purely state affairs.” The Court understood that baseball’s popularity was due to competition between teams in different cities and states. But this did not bring the sport within the meaning of interstate commerce, a predicate for the Sherman Antitrust Act. The fact that “Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the [intrastate] character of the business [emphasized word added].” *Id.* at 208-09. The Court reasoned that “the transport [of teams] is a mere incident, not the essential thing,” and therefore baseball was not in interstate commerce pursuant to the Sherman Antitrust Act.
But courts treated all other professional sports differently, ruling that their anti-competitive labor practices were not exempt from the Sherman and Clayton Antitrust Acts.\textsuperscript{18} This opened the door for injunctions, costly damages, and court supervision of the employment relationship. Meanwhile, football, basketball, and hockey players formed unions and bargained collectively with leagues.\textsuperscript{19}

This background frames my research question: To what extent do professional athletes substitute antitrust courts for collective bargaining? Using data and bargaining history from these antitrust lawsuits, I show that players defect from collective bargaining by individually challenging restrictions on their labor market mobility. To illustrate one tactic, NFL players decertified their union in 2011 to create standing to file an antitrust lawsuit after the league implemented a lockout during contract negotiations.\textsuperscript{20} In effect, the players tried to shift their bargaining to a federal court, using the Sherman Antitrust Act as a powerful lever. The NFL, however, treated the disagreement as a labor dispute reporting that negotiations between the nascent player’s union and MLB in 1968 and 1970 “set the stage for later breakthroughs that would result in undreamed of gains for the players.” \textit{Id.} at 32.

\textsuperscript{18} See Radovich v. NFL, 352 U.S. 445 (1957), and U.S. v. International Boxing Club, 348 U.S. 236 (1955), respectively holding that neither football nor boxing were exempt from antitrust laws. When the Supreme Court in Flood reaffirmed baseball’s antitrust exemption, it added: “Other professional sports operating interstate football, boxing, basketball, and, presumably, hockey and golf are not so exempt.” Flood, \textit{supra} note 11, at 282-83. \textit{Also see} Justice Douglas in Haywood v. National Basketball Association, 401 U.S. 1204, 1205 (1971). As Circuit Justice, he reinstated a district court’s antitrust injunction for a professional athlete, stating that “(b)asketball . . . does not enjoy exemption from the antitrust laws.”


\textsuperscript{20} Brady v. National Football League, 2011 WL 1535240 (D. Minn. 2011), at *6, reporting that on March 11, 2001, the date that the CBA was set to expire at 11:59 p.m., a majority of players voted to end the collective bargaining status of their union and also voted to restructure the organization as a professional association. The players took this action immediately before individual players filed an antitrust lawsuit to challenge practices that were included in the NFL’s collective bargaining proposals. \textit{Id.}
under the National Labor Relations Act. These divergent approaches to structuring the employment relationship—and the role of courts in determining whether labor law, or antitrust law applies—are the subjects of my study.

**B. Organization of the Article**

Part II examines legal disputes over labor market restrictions for professional athletes before players engaged in collective bargaining. Beginning with baseball, I show that courts in the late 1800s did not enforce reserve clauses, thus freeing players to sign contracts with rival teams. I then explain how baseball evolved uniquely as the Supreme Court repeatedly ruled that the sport is completely exempt from antitrust challenges. This history shows why collective bargaining became the only avenue for baseball players to challenge this contractual restriction.

The remaining major team sports—football, basketball, and hockey—are grouped in Part II.B. Unlike baseball players, these athletes did not challenge labor restrictions until the time they formed player unions. Also, by the 1950s and 1960s, the status of baseball’s antitrust exemption was clarified to the point where courts ruled that labor restrictions in these sports were not immune from antitrust enforcement. Part II.B also describes how collective bargaining relationships formed in football, basketball, and hockey.

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21 Brady v. National Football League, 640 F.3d 785, 788 (8th Cir. 2011), reporting that when the NFL imposed a lockout, the league also filed an unfair labor practice charge with the National Labor Relations Board, alleging that the union’s disclaimer of representation was a “sham” and therefore a “ploy and an unlawful subversion of the collective bargaining process.” *Id.*

22 *Infra* notes 54 - 125.

23 *Infra* notes 55 - 59.

24 *Infra* notes 60 - 66.

25 *Infra* notes 76 - 125.

26 *Infra* notes 81 - 83.

27 *Infra* notes 76 - 79.
hockey.\textsuperscript{28} In sum, Part II explains the current context for antitrust lawsuits over labor issues in these sports.

Part III explains the theories and methodology for my analysis.\textsuperscript{29} Part III.A describes how Congress intended to separate antitrust and labor law.\textsuperscript{30} When federal courts ruled on anti-competitive practices of unions, they issued injunctions under the Sherman Act.\textsuperscript{31} In response, Congress passed Section 6 of the Clayton Act to keep courts out of labor disputes.\textsuperscript{32} After judges ignored this law by enjoining union activities,\textsuperscript{33} Congress passed the Norris-LaGuardia Act in 1932, and National Labor Relations Act in 1935, to build the wall even higher between antitrust and labor law.\textsuperscript{34}

With this background, I explain how professional sports recreate the conflict between labor and antitrust law. Leagues rely on anticompetitive labor market restrictions (for example, the reserve clause) to promote competition between teams.\textsuperscript{35} Some scholars see these practices as antitrust problems,\textsuperscript{36} while others say these matters are best left to collective bargaining under the NLRA.\textsuperscript{37} I agree with the latter, and theorize that courts should recognize a distinct boundary between antitrust and labor law.\textsuperscript{38}

Part III.B presents legal and social science theories that explain how economic weapons are provided to unions and employers under the NLRA to help them negotiate

\textsuperscript{28} \textit{Infra} notes 81 (football), 82 (basketball), and 83 (hockey).
\textsuperscript{29} \textit{Infra} notes 126 – 179.
\textsuperscript{30} \textit{Infra} notes 149 - 151.
\textsuperscript{31} \textit{Infra} notes 126 - 151.
\textsuperscript{32} \textit{Infra} note 133.
\textsuperscript{33} \textit{Infra} note 132.
\textsuperscript{34} \textit{Infra} note 134.
\textsuperscript{35} \textit{Infra} notes 136 - 139.
\textsuperscript{36} \textit{Infra} notes 140 – 141, and 143.
\textsuperscript{37} \textit{Infra} notes 144 - 151.
\textsuperscript{38} \textit{Infra} note 148.
collective bargaining agreements.\textsuperscript{39} Courts believe that a robust arsenal of weapons, such as strikes by workers and lockouts by employers, are essential to the negotiation process.\textsuperscript{40} Industrial relations research confirms this view.\textsuperscript{41} I devote particular attention to the “narcotic effect” theory, which states that as unions and employers are compelled to submit their bargaining impasses to arbitration, they are prone to form a habit of letting the arbitrator make hard compromises for them.\textsuperscript{42} This is critical to my empirical study because I believe that antitrust judges serve an analogous function. Players, in particular, have become addicted to this bargaining supplement.\textsuperscript{43}

Part IV reports my research methods and empirical results.\textsuperscript{44} Part IV.A explains how I generated my sample of federal antitrust cases.\textsuperscript{45} Part IV.B has two elements. Subpart 1 presents Table 1, which depicts work stoppages in these sports since the inception of collective bargaining.\textsuperscript{46} Figure 1.1 teases out data in Table 1 by arranging the work stoppages in decades. Figure 1.2 breaks out strikes and lockouts along the same timeline to give a sense of which party—leagues or employers—used economic weapons. In Subpart 2, I enumerate and explain the meaning and implications of the data.\textsuperscript{47} Subpart 3 presents more data.\textsuperscript{48} Table 2A shows how often antitrust plaintiffs are unions, players, amateur athletes, retirees, leagues, and teams.\textsuperscript{49} Table 2B has a similar arrangement but shows how often, in percentage terms, these parties win an antitrust

\begin{footnotesize}
\begin{enumerate}
\item \textit{Infra} notes 152 - 179.
\item \textit{Infra} notes 156 - 157.
\item \textit{Infra} notes 158 - 166.
\item \textit{Infra} notes 170 – 173, and 175 - 179.
\item \textit{Infra} note 179.
\item \textit{Infra} notes 180 - 207.
\item \textit{Infra} notes 180 - 193.
\item \textit{Infra} notes 194 - 207.
\item \textit{Infra} notes 197 – 203.
\item \textit{Infra} manuscript 41 - 42.
\item \textit{Infra} manuscript 41.
\end{enumerate}
\end{footnotesize}
ruling.\textsuperscript{50} Subpart 4 discusses the meaning and implications of these data.\textsuperscript{51}

Part V supplements my statistical findings with textual support from these decisions.\textsuperscript{52} First, the NFL player’s union relies the least on collective bargaining. Second, the fact that leagues are antitrust plaintiffs in about 25\% of all cases indicates the extent to which they are captives to long-running antitrust agreements that require judicial administration. Third, pivotal antitrust rulings played a role in the reduction of union use of economic weapons. Fourth, leagues have more commitment to collective bargaining than player unions. Fifth, the fact that antitrust plaintiffs are far more likely to be individual players than unions signifies a profound shift from the labor law paradigm.

Part VI concludes that antitrust litigation has a narcotic effect in professional sports.\textsuperscript{53} Antitrust courts have exerted more influence than collective bargaining in setting terms and conditions of employment for football and basketball players. Looking at the litigation and work stoppages in these sports, players abandon the collective bargaining process at strategic moments, when their bargaining power is weak. Providing a substitute for the bargaining table, federal courts enable the players’ addiction to negotiating their terms for a labor agreement before judges.

\textbf{II. The Dawn of Collective Bargaining in Professional Sports: Player Efforts to Abolish Labor Market Restrictions}

My empirical analysis of antitrust litigation cannot be understood without historical context. I focus on legal disputes over labor market restrictions that players eventually raised at the collective bargaining table. My discussion is organized by the evolution of these labor issues in the four major team sports. This is more than a

\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Infra} notes 204 - 206.
\textsuperscript{52} \textit{Infra} notes 208 - 283.
\textsuperscript{53} \textit{Infra} notes 284 - 309.
chronology, however. For reasons that will soon be clear, it informs my theoretical discussion of the elusive antitrust-labor law boundary.

A. Baseball: The Anomaly of a Total Antitrust Exemption

By the 1880s, organized baseball was popular.\textsuperscript{54} National League teams cultivated fan loyalty by designating 14 players to be “reserved” in personal service contracts. This allowed teams to employ their best players indefinitely. At the end of a season, teams would renew their option to reserve a player’s services for a pre-determined salary. In an 1890 case, \textit{Metropolitan Exhibition Co. v. Ewing},\textsuperscript{55} baseball owners modified the reserve system by guaranteeing a minimum salary—but only after an informal negotiation with a committee of players.\textsuperscript{56} The player committee, and its talks with owners, heralded a modern sports union and collective bargaining.

The reserve clause stifled competition for talented players. \textit{Philadelphia Base Ball Club, Ltd. v. Hallman}\textsuperscript{57} shows, however, that some teams made offers to reserved players from competing clubs. Intensifying this competition, teams from rival leagues also disregarded the reserve status of valuable players, and signed them away from their original team.\textsuperscript{58} In the late 1800s, some courts denied enforcement to reserve clauses, allowing players to jump teams for better pay. Consider the reasoning of the judge in \textit{Philadelphia Base Ball Club} in denying enforcement to the reserve clause:

\begin{quote}
if the proper construction of the contract is that which the plaintiffs [teams] put upon it, the necessary result is that while the defendant [player] ... \textit{has sold himself for life to the plaintiffs for $1,400 per annum}, if they choose to hold him for that length of time, he has no hold upon them.
\end{quote}

\begin{thebibliography}{9}
\bibitem{flood} Flood, \textit{supra} note 11, at 260 - 261.
\bibitem{ewing} 42 F. 198 (C.C.N.Y. 1890).
\bibitem{hallman} \textit{Id.} at 203.
\bibitem{hallman} 8 Pa.C.C. 57 (Pa.Com.Pl. 1890), at *1.
\bibitem{reiley} Columbus Base Ball Club v. Reiley, 11 Ohio Dec.Reprint 272, (Ohio Com.Pl. 1891), at *2 - *3.
\end{thebibliography}
for any period longer than ten days [emphasis added].

In 1922, the players’ judicial winning streak in challenging the reserve clause was dealt a blow before the U.S. Supreme Court. In *Federal Baseball Club*, the Baltimore team in the Federal Baseball League filed an antitrust complaint against the National League. The defendant expanded its business by absorbing all Federal League teams, except for the Baltimore club. The excluded team claimed harm from the merger because it had no teams to play. The Supreme Court ruled that the sport of baseball was exempt from antitrust law, thus dashing hopes in Baltimore of preserving their franchise. In reasoning that defies logic today, Justice Holmes said: “The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions . . . great popularity . . ., competitions must be arranged between clubs from different cities and States. But the fact that . . . Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.”

However antiquated this narrow view seems, the Supreme Court has reaffirmed it twice. Equally important for my analysis, *Federal Baseball Club* ended with a key statement about the reserve clause: “If we are right the plaintiff’s business is to be described in the same way, . . . the restrictions by contract that prevented the plaintiff from getting players to break their bargains . . . were not an interference with commerce

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60 259 U.S. 200 (1922).
61 *Id.* at 207.
62 *Id.*
63 *Id.* at 208.
64 *Id.* at 208 - 209.
among the States (emphasis added).” This meant that the reserve clause was not a proper subject for antitrust enforcement. As I show later with empirical data, this point has large implications today for labor relations in baseball.

While the ruling pertained to a league merger, it had a profound effect on individual players. The reserve clause was immune from antitrust challenges even though it prevented labor market competition. A generation later, a New York Yankee whose contract was assigned to a minor league franchise challenged the reserve clause. By the early 1950s, baseball had business tentacles that extended all over the U.S. and beyond. Its radio revenue was a form of interstate commerce, and baseball maintained minor league teams throughout the U.S. and Mexico. Finding no better reason than adherence to the Federal Baseball Club precedent, the Supreme Court in Toolson v. New York Yankees, Inc. rejected the player’s antitrust action. Another generation later, a great player who built a career in St. Louis strenuously objected to being traded to Philadelphia. Bowing again to precedent, the Supreme Court ruled that baseball was exempt from antitrust law.

The implication: If players had any hope of eliminating the reserve clause—and thereby achieve labor market competition for their services—they would need to form a union and bargain collectively. After they took this path, Andy Messersmith, a star

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66 Id. at 209.
67 Infra IV.B(2)(2) (The MLBPA relies more on collective bargaining than other player unions.).
69 Toolson, supra note 14, at 357-58.
70 Id. at 357.
72 Id. at 285, where the Court reiterated what it said in Toolson: (“the (judgment) below (is) affirmed on the authority of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”).
pitcher, played out his option year. He thought he was free to sign with another team. Arbitrator Peter Seitz agreed with him, and the Eighth Circuit Court of Appeals found no reason to vacate this award.

Free agency owes its humble birth to this mundane dispute resolution process. Key to my analysis, note that the players won this freedom through a collective bargaining procedure. A court played a small role by deferring to the arbitrator’s ruling. But, unlike some antitrust judges who substantially changed labor restrictions in sports, this appeals court did not involve itself in settling a labor dispute.

B. Football, Basketball and Hockey: A Partial Antitrust Exemption

Considering that so many courts exempted baseball from antitrust law, one would think that judges would rule the same for other team sports. Football stadiums, basketball courts, and ice rinks do not physically straddle state borders. Therefore, by the logic of Federal Baseball Club, these sports would not be in interstate commerce.

But not so, according to the Supreme Court in Radovich v. National Football League. A player for the Detroit Lions asked the NFL to allow him to transfer to the league’s Los Angeles team to be near his ailing father. When the NFL refused, he signed with a rival league’s team in California. Later, when Radovich sought re-employment in the NFL, he was blacklisted by a rule that banned play in a rival league. Ruling for the player, the Supreme Court limited Federal Baseball Club and Toolson to

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73 Kansas City Royals v. Major League Baseball Players, 532 F.2d 615, 617-18 (8th Cir. 1976).
74 Id. at 619, n.3.
75 Compare Robertson, infra notes 247 - 248.
77 Id. at 448.
78 Id.
79 Id.
baseball. Thus, Radovich could pursue his antitrust challenge to the blacklisting rule.

Meanwhile, football, basketball, and hockey players formed their own unions. The National Football League Players Association (NFLPA) and NFL entered into their first CBA in 1968. The National Basketball Players Association (NBAPA), established in 1954, negotiated its first CBA in 1967. Similarly, the NHL formally recognized the National Hockey League Players’ Association (NHLPA) in 1967. In the following discussion, I show how the formation of collective bargaining relationships in these sports was significantly affected by antitrust litigation.

**Basketball:** The players’ experience with collective bargaining in basketball was very different from baseball. Because the Supreme Court created a total antitrust exemption for baseball, these players relied exclusively on collective bargaining to limit or abolish the reserve clause and achieve free agency. It is no surprise that players went on strike five times. Lacking recourse under antitrust law, they needed to use economic weapons under the NLRA. Basketball players, in contrast, resorted to antitrust litigation.

NBA players, who were also union officers, filed an antitrust lawsuit in 1970 for

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80 Id. at 452. The court explained:

> If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts . . . . No other business claiming the coverage of those cases has such an adjudication.

Id.

81 Mackey v. National Football League, 543 F.2d 606, 610 (8th Cir. 1976) (the first CBA was effective from July 15, 1968 to February 1, 1970).


83 A detailed account of the union’s early bargaining history appears in Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F.Supp. 462, 496-97 (E.D.Pa.1972), stating that on June 7, 1967, the NHL and the Players’ Association entered into a recognition agreement that designated the Association as the bargaining representative of the players.

84 Paul Staudohar, *Have We Seen the Last of Baseball’s Labor Wars?*, 61 LABOR LAW J. 192, 193 (2010) (reporting that baseball experienced three lockouts and five strikes).
current and future players.\textsuperscript{85} A proposed merger of the NBA and its rival, the American Basketball Association, precipitated their lawsuit.\textsuperscript{86} The merger would eliminate labor market competition for pro basketball players.\textsuperscript{87} Seeking to preserve labor market competition, players sued to eliminate the draft, reserve clause, and other restrictions.\textsuperscript{88}

This effort bore fruit for the players when a judge issued a temporary restraining order against any merger or non-competitive agreements between the two leagues for players.\textsuperscript{89} Extending the injunction, Judge MacMahon explained: “When we consider that youth passes away and consequently basketball players have limited professional careers, the threat of immediate and irreparable injury to the plaintiffs seems clear enough.”\textsuperscript{90} A later round of \textit{Robertson v. National Basketball Association}\textsuperscript{91} set a precedent for professional athletes to resolve their labor issues by suing for an antitrust injunction.

Before this occurred, the judge ordered the presence of players’ counsel or the general counsel of the National Basketball Players Association in merger talks.\textsuperscript{92} After extensive discovery, the players and NBA began settlement negotiations.\textsuperscript{93} The result was an agreement that NBA player representatives unanimously approved.\textsuperscript{94}

Consider how this antitrust settlement mirrored the negotiation of a collective bargaining agreement. A class action lawsuit ended with a proposed settlement agreement

\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} at 873-74.
\textsuperscript{88} \textit{Id.} at 874.
\textsuperscript{89} \textit{Id.} at 873, referring to Judge Tenney’s May, 1970 preliminary injunction. Also see Robertson v. National Basketball Ass’n, 1970 WL 532 (S.D.N.Y. 1970), reporting Judge MacMahon’s issuance of a temporary restraining order.
\textsuperscript{92} \textit{Id.} at 873.
\textsuperscript{94} \textit{Id.} at 66.
that resembled a tentative CBA—and just like a collective bargaining agreement, the litigated settlement was submitted to all players for ratification. The collective nature of the settlement was further bolstered by the small number of players who objected to the terms. Only 3 of 479 active and retired players opposed it. Sounding more like a labor mediator, the judge said: “The proposed settlement constitutes a negotiated compromise which fairly seeks to protect the interests of both the players and the club owners.” The antitrust settlement looked like a CBA, too. It eliminated the reserve clause, and paid players a $4.3 million settlement. Instead of the original draft, which bound a player indefinitely to one team, it limited a drafting team’s hiring rights to one year. The settlement also changed option clauses and the NBA’s version of the Rozelle Rule.

Football: The early collective bargaining experience in football was similar to basketball. Antitrust courts were receptive to player claims of injury. Active and retired football players filed an antitrust lawsuit in 1972 to challenge the NFL’s Rozelle Rule in Mackey v. National Football League. The rule required a team that signed a free agent to provide fair and equitable compensation to the player’s previous team. Judge Larson agreed with the players, holding that the Rozelle Rule was an antitrust violation, because the rule deterred free agent signings.

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95 Id. at 67. The settlement eliminated the reserve clause, and provided players an antitrust settlement fund $4.3 million. Id.
96 Id.
97 Id. at 71.
98 Id. at 67.
99 Id.
100 Id.
102 Id. at 1004, referencing Article 12.1(H) of the NFL Constitution and By-Laws.
103 Id. at 1006. In Ruling 4.3.1, Judge Larson found: “The extreme reluctance of clubs to sign such a player without a prior agreement on compensation is clearly evidenced by the few isolated instances in which it has occurred since the adoption of the Rozelle Rule in 1963.” Id. He added in Ruling 4.3.2:
Applying the rule of reason test, the Eighth Circuit affirmed. The court reasoned that an antitrust exemption would apply if (1) the restraint primarily affected only the parties to the collective bargaining relationship, (2) the disputed practice involved a mandatory subject of collective bargaining, and (3) the underlying labor agreement resulted from bona fide arm’s length bargaining. Although the Rozelle Rule satisfied the first two prongs of the test, the court said it did not result from arm’s-length bargaining. The NFL later settled the class action for $13 million in damages.

A separate antitrust lawsuit, which also occurred early in the collective bargaining relationship, challenged the college draft. The district court in Smith v. Pro-Football ruled for a player who claimed that the college draft was a per se violation of the Sherman Antitrust Act. The player, whose career was cut short by a neck injury at the end of his first year as a professional, persuaded the court that the draft unlawfully limited him to a one year contract as a rookie, and therefore precluded him from negotiating a three year contract that was commensurate with his talents. Finding that the NFL draft was a “group boycott,” the court concluded that the NFL committed a per se violation of the Sherman Act. On appeal, the D.C. Circuit disagreed with parts of

“Numerous witnesses have testified that the Rozelle Rule has a chilling effect on negotiations between free agents who have played out the option and other clubs.” Id.
105 Id. at 614-615.
106 Id.
107 This information is reported in Brady, supra note 20, at *1.
109 The court did not accept the NFL’s argument that its labor agreements immunized the draft from antitrust liability. Id. at 743. The 1968 CBA, and subsequent labor agreements with the NFLPA, incorporated the NFL Constitution and bylaws, both of which contain rules for the draft. But the court was unconvinced: “Once it has been established that the draft flows from mandatory subjects of bargaining, the cases cited above also require that it have been arrived at as a result of genuine, arms-length bargaining, and not have been ‘thrust upon’ a weak players union by the owners.” Id.
110 Id. at 745.
the district court’s reasoning, but agreed that the draft was an antitrust violation.\textsuperscript{111}

A subsequent antitrust court noted that the player victories in \textit{Mackey} and \textit{Smith} were short lived because the “owners used their leverage in collective bargaining to reestablish the status quo, exchanging the Rozelle Rule for similar collectively bargained provisions.”\textsuperscript{112} I resume the basketball chronology later in the context of exploring how antitrust court rulings affected collective bargaining beyond its early stages.\textsuperscript{113}

\textit{Hockey:} The reserve clause was in effect since at least 1952.\textsuperscript{114} Following a minor antitrust case,\textsuperscript{115} \textit{Philadelphia World Hockey Club v. Philadelphia Hockey Club} enjoined the NHL from enforcing its reserve clause.\textsuperscript{116} The suit was brought by a team from a rival league.\textsuperscript{117} As a result of this ruling, the NHL was vulnerable to player defections to the upstart league. The court believed there was a substantial likelihood that the reserve clause violated the Sherman Act.\textsuperscript{118}

This ruling paved the way for Gerry Cheevers and Derek Sanderson, NHL

\begin{footnotes}
\item[111] Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C.Cir. 1978). The appellate court acknowledged that the draft had pro-competitive benefits—meaning that the practice enabled the league to field teams that were in some balance with each other. But this effect was outweighed by the draft’s anti-competitive impact on the labor market for player services: “It was severely anticompetitive in effect. It was not shown to have any significant offsetting procompetitive impact in the economic sense.” \textit{Id.} at 1187.
\item[112] This bargaining history is in White v. NFL, 585 F.3d 1129, 1134 (8th Cir.2009).
\item[113] \textit{Infra} notes 232-235, and 252-255.
\item[114] \textit{Philadelphia World Hockey Club, supra} note 83.
\item[115] Neeld v. National Hockey League, 439 F.Supp. 446 (D.C.N.Y. 1977), dismissing an antitrust challenge to the NHL’s Bylaws Section 12.6, which stated: “A player with only one eye, or one of whose eyes has a vision of only three-sixtieths (3-60ths) or under, shall not be eligible to play for a Member Club.” The league ruled that Neeld, a one-eyed hockey player who was drafted by an NHL Team, was ineligible. In a separate action, Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979), a court found that the eligibility bylaw did not violate the Sherman Act. The court reasoned that the law did not have an anti-competitive intent or effect, but instead, was designed to promote player safety. \textit{Id.} at 1300.
\item[116] \textit{Id.} The court explained why it enjoined the NHL from enforcing its reserve clause: “In sum, the National Hockey League, as it stands before me in the instant action, is not the most ideal candidate to be a beneficiary of the labor exemptions. The National Hockey League itself was primarily responsible for devising and perpetuating a monopoly over the product market of all professional hockey players via the reserve system.” \textit{Id.} at 499.
\item[117] \textit{Id.} at 466-67.
\item[118] \textit{Id.} at 518.
\end{footnotes}
superstars for the Boston Bruins, to sign multi-million contracts with the rival league. The players had played out their contracts. But the Bruins renewed their agreements under a reserve clause, paying $80,000 to Sanderson and $70,000 to Cheevers. Their expired contracts prohibited them from playing for any other team, and specifically granted the Bruins a right to sue for an injunction. In Boston Professional Hockey Association, Inc., the Bruins sued to enjoin the players from defecting.

The Bruins lost. They contended that antitrust law did not apply to hockey player contracts. They also argued that a collective bargaining relationship immunized restrictive employment practices in pro sports. The court disagreed, citing evidence that teams controlled the professional fate of players from start to finish.

III. THEORIES FROM ANTITRUST, LABOR LAW AND INDUSTRIAL RELATIONS

A. Legal Theories: Defining the Boundary for Labor and Antitrust Law

There remains an unresolved conflict between antitrust and labor law. The Sherman and Clayton Acts prohibit contracts and conspiracies in restraint of trade. The

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120 Id.
121 Id. The players’ standard form contract, after specifying that the player had exceptional and unique skill and ability as a hockey player, also provided that “the Club shall have the right, in addition to any other rights which the Club may possess, to enjoin him by appropriate injunction proceedings from playing hockey for any other team and/or for any breach of any of the other provisions of this contract.” Id.
122 Id. at 263.
123 Id. at 265.
124 Id.
125 Id. at 267, noting that “the record establishes that this integrated group of contracts, constitutions, by-laws, and agreements, all of which are in evidence, and which in their totality run to hundreds of pages of legal verbiage, effectively and totally control the careers of any hockey player in the United States or Canada. . . .”
126 Douglas L. Leslie, Principles of Labor Antitrust, 66 VA. L. REV. 1183, 1184 (1980), reasoning: “Accommodating antitrust policy and labor policy is not an easy task. The conflict between the two is fundamental: the antitrust statutes promote competition and economic efficiency, while the federal labor statutes sanction activity that is arguably anticompetitive.”
127 15 U.S.C.A. § 1 (2004), providing that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign
National Labor Relations Act, on the other hand, confers a right among employees to form a union and negotiate wages and terms of employment. In various ways, lawful union activities such as picketing or striking restrain trade. Collective bargaining aggravates the tension between antitrust and labor because of the tendency by unions to bargain rules that raise wages artificially. The Supreme Court summarized the public policy paradox posed by these conflicting legal regimes: “As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work.”

The fault line between labor and antitrust law is most observable when courts issue injunctions during labor disputes. This behavior peaked in the early 1900s, when federal courts ignored congressional intent to exempt labor from antitrust law. Section 128 U.S.C. § 157 (2011), providing that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . . .” 129 The Pullman Strike of 1894 crippled national commerce. For a contemporaneous account, as well as a criticism of judicial over-reaction to the work stoppage, see William Draper Lewis, A Protest Against Administering Criminal Law by Injunction—The Debs Case, 33 AM. L. REG. (N.S. 1) 879, 883 (1894). A more current illustration appears in BE & K Const. Co. v. N.L.R.B., 536 U.S. 516 (2002), involving a contractor’s suit against unions who protested hiring of non-union labor by hand billing and picketing at the work site, and causing delay and rising costs for the construction project. In an earlier phase of the case, the contractor unsuccessfully sued the unions under the Sherman Act. Id. at 521-22.

128 See Justice John Paul Stevens’s dissenting opinion in Brown v. Pro Football, Inc., 518 U.S. 231, 253 (1996): “The basic premise underlying our national labor policy is that unregulated competition among employees . . . for employment produces wage levels that are lower than they should be. Whether or not that premise is true. . . . it is surely the basis for the statutes that encourage and protect the collective bargaining process.”

129 Id. at 238 (1996).

130 EDWIN E. WITTE, THE GOVERNMENT IN LABOR DISPUTES 69-70 (1932), observing: “In the fifteen years’ history of the Clayton Act, there have been a great many more cases against labor under the federal antitrust laws than during the previous twenty-two years.” By 1932, Congress concluded that Clayton Act’s labor exemption “was denatured, emasculated, and tortured into an instrument for further oppression of those whom we sought to relieve.” 75 Cong.Rec. 5470 (1932)(testimony of Rep. Browning).
6 of the Clayton Act was designed to move a wide range of union activities beyond antitrust enforcement, but federal courts continued to issue injunctions in labor disputes. To remedy a problem that lawmakers thought they had fixed, Congress stripped federal courts of jurisdiction over labor disputes in the Norris-LaGuardia Act.

Passage of this law in 1932, and the National Labor Relations Act in 1935, did much to quiet the tension between labor and antitrust law. But in the arena of professional sports, where competition among relatively balanced teams is necessary to sustain fan interest, the tectonic plates of antitrust and labor law collide anew. Framing the antitrust paradox, Robert Bork aptly said that “some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground


133 E.g., American Steel Foundries v. Tri-City Central Trade Council, 257 U.S. 184 (1921). A district court enjoined a union from preventing an employer during a strike from hiring replacement workers. The Court recognized that “[i]t is clear that Congress wished to forbid the use of federal courts of their equity arm to prevent peaceable persuasion by employees . . . in promotion of their side of the dispute and to secure them against judicial restraint in obtaining or communicating information . . . .” Id. at 203. But where “those of the labor side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the court’s duty which the terms of § 20 do not modify, so to limit what the propagandists do as to time, manner, and place. . . .” Id. at 203-04. This reasoning appeared to conflict with the Clayton Act’s jurisdictional limits on courts adjudicating labor disputes, which provided that “no restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees. . . . or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property . . . for which injury there is no adequate remedy at law. . . .” Clayton Act ch. 323, 38 Stat. 731, § 20 (1914).

134 See § 113(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113 (2011), divesting federal jurisdiction in a “labor dispute” broadly defined as “any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.” Rep. Fiorello LaGuardia, the bill’s author, justified this unusual restriction on federal jurisdiction by pointing to the failure of courts to adjudicate labor disputes even-handedly: “Gentlemen, there is one reason why this legislation is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized labor? No. Disobedience of the law on the part of a few Federal judges.” 75 Cong. Rec. 5478 (1932).
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that there are no other professional lacrosse teams.”

These conflicts pose theoretical questions for my analysis. Consider the reserve clause. This is a perpetual option clause, renewable only by the team. It binds a valuable player to one team. The option is exclusively for the benefit of that team. From the standpoint of the league, the reserve clause, when combined with a no-tampering rule, spreads talent across every team and makes them competitive.

The player, however, is deprived of labor market mobility. Even if the player prefers to remain with the team, he still suffers because he cannot establish his market value by competitive bidding for his services. Even today, some wealthy players who are subject to the reserve clause complain that their employment is a modern-day form of slavery. Despite their hyperbole, the players are correct that if they were able to choose their employer—like everyone else who works for a living—the labor market would enable them to earn more money.

The question is: How should courts strike a balance between antitrust law, which prohibits anti-competitive contracts, and labor law, under which players and teams

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136 See Robertson, supra note 2.
137 See Flood, supra note 11, at 260, n.1, for a thorough statement of the reserve clause in the modern era. Major League Baseball states, in its contract with players that the intent of its tampering rule and reserve clause is “[t]o preserve discipline and competition, and to prevent the enticement of players.” Accordingly, “there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved. . . .” Id.
138 Bruce Tomaso, Rashard Mendenhall, Social Historian, Has His Doubts About 9-11, The DALLAS MORNING NEWS (May 3, 2011), at http://thescoopblog.dallasnews.com/archives/2011/05/rashard-mendenhall-historian-a.html. The Steelers’ running back said that “[a]nyone with knowledge of the slave trade and the NFL could say that these two parallel each other.” He was apparently upset about his $527,000 salary. Id. He echoed the views of another Adrian Peterson, a Minnesota Viking. Having earned $1.14 million in 2010, he compared the NFL to “modern-day slavery.” Id. Because these young stars were still subject to the NFL’s reserve clause, they were locked into these salaries.
139 For empirical support of their view, see NOLL, THE ECONOMICS OF SPORTS LEAGUES, IN LAW OF PROFESSIONAL AND AMATEUR SPORTS § 17.03, at 17-1, 17-23 to 17-24 (G. Uberstine ed. 1988) (player restraints reduce player salaries to about half their value in a competitive market; however, salaries jump during periods of full-fledged free agency and interleague competition).
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negotiate these restrictive employment practices and codify them in a collective bargaining agreement? Inevitably, courts need a theory to resolve disputes that involve anti-competitive practices such as the reserve clause, salary caps, the draft, the uniform player contract, and similar player restrictions.

Judges and scholars have puzzled over how to draw this antitrust-labor law boundary problem in unionized sports. I describe judicial treatment of the issue later, but for now I consider three scholarly approaches. One approach equates anti-competitive labor practices to cartel behavior. This school of thought posits that these employer-imposed rules create artificial ceilings on player salaries, and are therefore per se antitrust violations. McCormick and McKinnon subscribe to this viewpoint when they theorize that the NFL’s draft eligibility rules are an unreasonable restraint of trade.140 A second view tries to balance the conflicting aims of antitrust and labor policies. It focuses on the extensiveness on the collective bargaining process engaged in by owners and players. As long as a CBA is in effect, anticompetitive practices are exempt from antitrust enforcement. But, according to Lock, the antitrust exemption ends when a labor agreement expires.141 This is important because a league can impose a lockout—a form of bargaining leverage under the NLRA—when an agreement expires to pressure a player’s union to agree to terms.142 Lock believes that players should be able to take their unresolved bargaining disputes to court in an antitrust lawsuit, and avoid the league’s bargaining pressure. A third view takes a public interest perspective. Ross reasons that

142 *E.g.*, Brady, *supra* note 20.
antitrust law broadly applies to the four major professional sports because the monopoly structure of these leagues deprives consumers of entertainment alternatives when a labor dispute interferes with “output.”\(^\text{143}\)

While each view is justified, a common problem is their narrow conception of the so-called “antitrust labor exemption” in professional sports. My theory derives from an opposing perspective, advanced by Jacobs and Winter.\(^\text{144}\) They said that anticompetitive restrictions such as the reserve clause are “miscast as an antitrust problem in those sports where players’ unions are recognized.”\(^\text{145}\) This is because their unions are able to bargain with leagues, or they can lobby Congress to end these labor market restraints.\(^\text{146}\) Jacobs and Winter reason that “if professional athletes are to engage in collective bargaining and have the right to strike, the usual principles of labor law should apply.”\(^\text{147}\)

Like Jacobs and Winter, I theorize that courts should create a distinct boundary between antitrust and labor law. I add an empirical contribution to their theory. Using data, I show that players use antitrust courts when their collective bargaining power as a union is inferior to the economic power of their employers.\(^\text{148}\) To put it bluntly, the players want two bites at the apple: collective bargaining, as long as it suits them; and when that fails, class action bargaining in an antitrust lawsuit. While this two-pronged bargaining approach is often effective for players, it subverts collective bargaining.

\(^\text{143}\) Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 137 (2001), concluding: “The monopoly structure of leagues also deprives consumers of realistic options when, as is frequent in some sports, labor strife results in disruption of the provision of desired services.”


\(^\text{145}\) *Id.* at 28.

\(^\text{146}\) *Id.* at 29.

\(^\text{147}\) *Id.*

\(^\text{148}\) *Infra* note 200 and related text.
My theory of total separation between antitrust and labor law in professional sports is also rooted in a broader conceptual stream. I subscribe to Cox’s view that “the antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor—its compensation or hours of service or the selection and tenure of employees.”149 This thesis was updated by Leslie following a Supreme Court ruling that broadly exempted anticompetitive labor practices in the NFL from antitrust enforcement.150 I also agree with Jerry and Knebel, who theorized that Congress created a boundary between antitrust and labor law. They cited Sen. Jones’s floor speech during passage of the Clayton Antitrust Act in 1914. He told courts to apply the Sherman Act only to product markets, and allow labor laws to establish a national labor policy.151

B. Legal and Industrial Relations Theories: How Economic Weapons under the National Labor Relations Act Contribute to Labor Agreements

I have explained why the legal boundary between antitrust and labor law should be drawn to exempt labor restrictions in professional sports. I reinforce this argument by showing how the National Labor Relations Act provides economic weapons to help unions and employers bargain labor agreements. As I show later, when antitrust law is

151 Robert H. Jerry, II & Donald E. Knebel, Antitrust and Employer Restraints in Labor Markets, 6 INDUS. REL. L.J. 173 (1984), quoting Sen. Jones: Let the Sherman law affect trade and commerce and those who deal in and with trade and commerce as it, in fact, was intended when it was passed. Take labor and labor organizations out from under the law entirely, and let us formulate a statute governing labor and its organizations . . . we should treat labor and its relations to interstate trade as really an independent proposition . . . we must define the rights of labor so far as it affects commerce . . . we should separate it and legislate for it, of course in its relation to interstate trade and commerce, but not treat it . . . as an article of commerce, because it is not an article of commerce. It is no part of commerce. It is not a commodity at all.
Id. at 195, n. 84, quoting 51 Cong.Rec. 13979-80 (1914).
invoked, this precludes the use of strong bargaining levers under the NLRA.152

Congress articulated two main premises in the NLRA. First, when an employer and union negotiate terms and conditions of employment, government should not interfere.153 Second, there should be equality of bargaining power.154 Unless the law reserved economic weapons to the parties, unions and employers would have less economic incentive to bargain in good faith.155 Justice Brennan explained in NLRB v. Insurance Agents’ Int’l Union that the “presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.”156 Many courts agree that economic weapons held in reserve induce agreements between unions and employers.157

152 Infra notes 256 - 261.
153 See 79 Cong. Rec. 7660 (daily ed. May 16, 1935). During debate of the Wagner Act, Sen. Walsh said: “All the bill proposes to do is to escort (employee representatives) to the door of their employer. . . . What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.”

154 Sen. Robert Wagner, architect of the NLRA, believed: “The primary requirement for cooperation is that employers and employees should possess equality of bargaining power.” 78 Cong. Rec. 3679 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 20 (1985). Twelve years later, his Republican counterpart, Sen. Robert Taft, stated the same view: “It seems to me that our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels that it can make an unreasonable demand and get away with.” See S. Minority Rep. No. 105, 80th Cong., 1st Sess., § 2, at 10 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, at 1005-1006 (1948).

155 Jerry II & Knebel, supra note 151, at 195, n. 84, quoting 51 Cong.Rec. 13979-80 (1914).
156 361 U.S. 477, 488-89 (1960) (referring to the 1935 name of the NLRA, and legislation that amended the NLRA in 1947). Justice Brennan noted: “Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. Id. at 489. He concluded, however: “But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors— necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one’s terms— exist side by side.” Id.

157 In examining the main weapon for employees, the Court believes that the “right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.” N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 234 (1963). The Court takes a similar view concerning an employer’s main offensive weapon, a lockout, concluding that an employer “may in various circumstances use the lockout as a legitimate economic weapon.” N.L.R.B. v. Brown (Brown Food Store), 380 U.S. 278, 283
Social science research confirms the judicial view. As the employees’ primary weapon, strikes can cost employers. As strike costs mount, the employer may accede to worker demands. By another view, strikes are caused by faulty information among union and employer bargainers. Hicks theorizes that “adequate knowledge will always make a settlement possible.” Other industrial relations scholars theorize that negotiations cannot fail if parties are represented by rational bargainers—strikes or lockouts result when bargainers are irrational about their relative bargaining positions.

Ashenfelter and Johnson add a political dimension to their theory of how labor agreements are negotiated. Success depends on three parties reaching a consensus—the employer, union, and also union constituents. Union leadership is capable of rational bargaining, and its goal is institutional: to preserve and grow the membership. The membership, however, is out of touch with business realities or overestimates what bargaining can achieve. Union leaders must convince their members to accept less than they desire, or acquiesce to their members’ unrealistic bargaining aspirations. Strike

159 For empirical estimates of strike costs, see Brian E. Becker & Craig A. Olson, The Impact of Strikes on Shareholder Equity, 39 INDUS. & LAB. REL. REV. 435 (1986).
160 Id.
conditions occur when “the leadership may at least appear as adversaries against management in a crusade which may even raise their political ‘stock’ and will unify the workers.” The theory continues: “The outbreak of a strike, however, has the effect of lowering the rank and file’s expectations due to the shock effect of the firm’s resistance.” This helps to induce a settlement because the union’s leadership “can safely sign with management” without losing political capital.

My research applies an industrial relations theory called the “narcotic effect” of arbitration. It developed in response to compulsory interest arbitration, a strike substitute that authorizes an arbitrator to end a bargaining impasse over terms for a new contract. Baseball uses a version of this process called final offer salary arbitration. The process is invoked when an eligible player and his team fail to reach terms for a salary, and present their final offer and supporting rationales to the arbitrator.

Under final offer arbitration, the arbitrator has no discretion and must choose one or the other bargaining proposal. This contrasts with another form of arbitration that serves as a strike substitute during impasse: conventional arbitration. Under this system, the arbitrator is not required to choose either of the party’s final offer and has

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164 Id. at 37.
165 Id.
166 Id.
169 Id. at 128-29, explaining how a team and player present comparability arguments to the arbitrator.
discretion to modify offers to resolve the dispute. The arbitrator may be inclined to compromise the offers, granting a middle-ground award. Final offer and convention arbitration are used as strike substitutes for public safety workers, such as fire fighters. Thus, social scientists have data to test for a narcotic effect.

When employers and unions bargain with arbitration as a fallback to break impasse, they settle fewer contracts on their own. “Narcotic effect” theory posits that this process actually harms the normal collective bargaining process because the parties depend on arbitrators to resolve an impasse. First, bargainers lose an incentive to make concessions. Instead, this hard job falls to the arbitrator, who can be blamed for an unpalatable outcome. Second, the process can motivate parties to move farther apart as they anticipate impasse. A rational bargainer, perceiving that an arbitrator may split the difference, moves her position toward a favorable extreme. “Narcotic effect” theory is

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172 Id.
176 Gary E. Bolton & Elena Katok, Reinterpreting Arbitration’s Narcotic Effect, 25 Game & Eco. Behavior, 1, 2 (1998) (“arbitration tends to be ‘overused,’ and this may have undesirable consequences”). For empirical evidence, see Hoyt N. Wheeler, Compulsory Arbitration: A “Narcotic Effect?,” 14 Indus. Rel. 117, 119 (1975), finding that 37.3% of fire fighter negotiations under an state-mandated arbitration system in 1972 resulted in arbitration in the states that were studied.
177 Peter Feuille, Final Offer Arbitration and the Chilling Effect, 14 Indus. Rel. 302, 304 (1975).
thus explained: “a statutory requirement that labor disputes be submitted to arbitration has a narcotic effect on bargainers. . . . They will turn to it as an easy and habit-forming release from the . . . obligation of hard, responsible bargaining.”

I now summarize Part III by explaining how these theories can explain how labor agreements in pro sports are settled by collective bargaining or antitrust litigation. First, when courts do not define the antitrust-labor law boundary so that labor disputes are exempt from their jurisdiction, they open an alternative path to bargaining these agreements. Second, when courts entertain antitrust lawsuits, they raise the odds that economic weapons under the NLRA will not be used because of judicial inclination to protect players from irreparable harm and injury resulting from league-imposed labor market restrictions. Third, as this behavior becomes a pattern, collective bargaining is disrupted by the resulting uncertainty—or faulty information—as players, unions, and leagues guesstimate the odds that their differences will be settled at a collective bargaining table or in a court supervised negotiation. Fourth, as players negotiate better agreements in court compared to the bargaining table, they become addicted to this settlement process. In Part IV, I provide data that demonstrate a narcotic effect that subverts collective bargaining in football and basketball.

**IV. RESEARCH METHODS AND STATISTICAL RESULTS: ANTITRUST RULINGS DURING COLLECTIVE BARGAINING IN PROFESSIONAL SPORTS**

*A. Research Methodology*

The sample consists of federal court rulings on antitrust complaints involving labor market restrictions in baseball, football, basketball, and hockey. Court


opinions were included if they were decided after players formed collective bargaining relationships with the NFL, NBA, NHL and MLB. Decisions involving a rival league, such as the American Basketball Association, were included if they involved a player union, a collective bargaining agreement, and labor restrictions. The sample contained cases involving a disputed term or condition of employment—for example, the reserve clause or salary cap. Challenges to labor market restrictions by non-employees—for example, college athletes who challenged draft restrictions as a restraint of trade—were also included because this type of employment qualification is a mandatory subject of bargaining under the NLRA. The database excluded antitrust cases before a collective bargaining relationship.

My goal was to assemble a comprehensive sample of published cases. Applying the search criteria, I identified, read, and coded 58 federal district court and 24 appellate court rulings (a total of 82) from 1970 through July 2011. I developed a form to record and code data from cases. Captions were often repetitive, even when disputes involved separate court actions. White v. National Football League illustrates this situation.

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185 Denver Rockets v. All-Pro Management, Inc., 1971 WL 3015 (9th Cir. 1971). Also see Caldwell v. American Basketball Ass’n, Inc., 66 F.3d 523 (2d Cir. 1995).


189 Toolson, supra note 14, and Molinas v. National Basketball Association, 190 F.Supp. 241 (S.D.N.Y. 1961) (dismissing antitrust lawsuit by professional player who was ruled ineligible due to his violation of the league’s gambling rules). Compare Flood v. Kuhn, 316 F. Supp. 271, 283, n. 18 (S.D.N.Y. 1970). This case, included in the sample, was an antitrust lawsuit that was commenced shortly after the player’s association entered into a collective bargaining relationship with the league.

190 This complex litigation led to a stipulation and settlement agreement that continued the
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I also counted appellate decisions as separate cases— for example, the recent case of *Brady v. National Football League*. The cases were coded separately because the passage of time changed the legal arguments, motions, and type of court rulings. For example, some cases involved a temporary restraining order, or a preliminary restraining order, or a permanent restraining order. These are issued at different points in a dispute, and require different proofs and arguments. To illustrate my point, consider the Eighth Circuit’s response on May 16, 2011 to the district court’s issuance of a temporary restraining order three weeks earlier. By treating each case as unique, I developed a more complete image of the changing complexion of economic and legal arguments.

Moreover, because these cases involved collective bargaining, they were time-


191 *Brady v. National Football League*, 638 F3d 1004 (8th Cir. 2011); and *Brady*, *supra* note 21.
192 *Brady v. National Football League*, 640 F.3d 785, 793 (8th Cir. 2011):

The League contends that it is irreparably harmed by the district court’s injunction, because its ability to maintain the lockout is essential to the League’s negotiating position in an ongoing dispute with the Players, and that there is no way to measure and compensate the League for its loss of leverage and consequent delay if the injunction is not stayed (citation omitted). The NFL observes that this court, in a different context, has recognized irreparable harm based on the impossibility of recreating a negotiating environment that a stay pending appeal was designed to preserve (citation omitted). The League also maintains that player transactions that will occur under the injunction—trades, free agent signings, and roster cuts of players under contract—will cause irreparable harm to the League if the district court’s order is not stayed, because it will be impossible to restore the status quo as of April 25 after contracts are formed and transactions completed during the processing of an appeal.
Consider the passage of just one month from issuance of an injunction to an appellate order staying the order. In *Brady*, the NFL held its annual draft during a lockout. This put veterans and new rookies in direct competition for roster spots as the NFL overstocked itself with new talent.

**B. Statistical Results**

1. **Table 1: Data**

Table 1 (below) shows how often professional athletes and leagues have used economic weapons under the National Labor Relations Act. Columns 2 (strike frequency) and 3 (lockout frequency) show the use of union and employer economic weapons since the advent of collective bargaining in sports. These data are not reported in a single, authoritative source. I derived this information from several scholarly publications.

Column 4 identifies the first pivotal antitrust ruling for each collective bargaining relationship. Column 5 is my assessment of the degree to which antitrust courts have

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193 *Id.* at 787, reporting that when the NFL filed a motion with the appellate court to stay the district court’s injunction, it also petitioned for an expedited hearing of the appeal. On April 29, the appellate court granted an administrative stay of the injunction, and on May 3 the appellate court granted the league’s motion for an expedited appeal.


195 To a degree, my entries are subjective. But a close reading of the cases provides tangible support for their selection. Flood v. Kuhn, *supra* note 11, dealt with a restrictive employment practices that continued after the formation of a collective bargaining relationship. *Id.* at 294. Flood was pivotal because the Supreme Court continued baseball’s complete exemption from antitrust law. *Id.* at 282, reasoning: “With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly.”

For basketball, Robertson v. NBA, 556 F.2d 682 (2d Cir. 1977) was similarly pivotal—though, in contrast, the decision allowed an antitrust lawsuit to forge a settlement agreement involving issues that were already part of the CBA. The culminating nature of this decision appeared in the appellate court’s recitation of the six-year history of litigation and negotiation, during which 479 players approved a settlement and only three players opposed it. *Id.* at 684.
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become involved with the collective bargaining process after these pivotal cases.

Figure 1.1 and 1.2 follow Table 1. These charts tease out data in Table 1 to provide sharper focus for my analysis. For example, Table 1 shows the years that strikes and lockouts occurred. They also show the years of pivotal antitrust rulings. But the presentation of data in Table 1 does not clearly indicate a possible connection between the timing of a court ruling, and change in strike or lockout frequency.

Thus, in Figure 1.1, I sub-divide time into ten year blocks beginning in 1966, the approximate point when these player unions began to bargain with leagues. Figure 1.1, therefore, provides visual evidence of constancy or change in the use of economic weapons by leagues and player unions. Figure 2 also sub-divides the information in Table 1, but breaks out the work stoppages data in Figure 1.1 into strikes and lockouts. This portrays constancy or change in the type of economic weapon employed over time.


Shortly after that September 1992 verdict, a group of players seeking to become free agents brought suit complaining that the same restraints injured them. Jackson v. NFL, 802 F.Supp. 226, 228 (D.Minn.1992). Based on the McNeil verdict, the court granted their motion for a temporary restraining order, finding that they would suffer irreparable injury each week they remained restricted under the NFL-imposed system of player restraints. Id. at 230–31.

The result of these actions quickly led to the White v. NFL litigation. In 1992, several players brought an antitrust class action seeking an injunction requiring total or modified free agency. White v. Nat’l Football League, 822 F.Supp. 1389 (D.Minn.1993). The court then certified a settlement class for damages and injunctive relief.

For hockey, McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) was pivotal. Earlier cases in the collective bargaining relationship resulted in narrow rulings—for example, whether a player’s contract clause was enforceable when it allowed a team to sue for an injunction (Boston Professional Hockey Ass’n, Inc., supra note 119.). McCourt was an appellate court antitrust ruling, occurring relatively early in the collective bargaining relationship, that involved the NHL’s authority to enforce its reserve system (id. at 1194–95), its version of the “Rozelle Rule” (id. at 1196), and the labor exemption under the Sherman Antitrust Act (id. at 1197-1203).
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Whether the “strike weapon” or “lockout weapon” is used implies which party believes it has a bargaining advantage. The data suggest whether a union or employer is committed to the ordinary tools of collective bargaining.

Table 1 shows that since the inception of collective bargaining in sports, 21 work stoppages occurred. The players struck 12 times, while owners imposed 9 lockouts. Baseball had the most strikes (5), while basketball experienced the fewest (0). Lockouts— work stoppages initiated by employers to put pressure on unions to agree to management proposals— have been evenly distributed across all sports (either 2 or 3).

Figure 1.1 shows that the 21 work stoppages in major league sports peaked in two periods, 1966-1975 (7) and 1986-1995 (6), with a dip during 1976-1985 (4). From 1966-1995, the frequency of work stoppages was fairly constant—about once every two years across all the leagues. In the most recent periods, work stoppages fell markedly— to two in 1996-2005 and two in 2005-2011 (note, however, that this period is shorter). In other words, from 1996-2011, the frequency of work stoppages has dropped to about one every four years. Figure 1.2 shows that during the first 25 years of collective bargaining in major league sports, there were 10 strikes— about once every two and-a-half years. This dropped to 2 over the next 20 years—or, once a decade. Meanwhile, the number of lockouts remained fairly constant. There were 4 lockouts in the first 25 years of collective bargaining, and 4 more lockouts in the next 20 years.
### Table 1


<table>
<thead>
<tr>
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<td>Basketball</td>
<td>0</td>
<td>2</td>
<td><em>Robertson v. NBA</em>, 556 F.2d 682 (2d Cir. 1977)</td>
<td>High</td>
</tr>
<tr>
<td></td>
<td>(1998, 2011)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hockey</td>
<td>1</td>
<td>2</td>
<td><em>McCourt v. California Sports, Inc.</em>, 600 F.2d 1193 (6th Cir. 1979)</td>
<td>Low</td>
</tr>
<tr>
<td>Total</td>
<td>12</td>
<td>9</td>
<td>21</td>
<td></td>
</tr>
</tbody>
</table>

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\(^{196}\) The table does not include work stoppages involving unionized umpires and referees. Unlike players, these employees were not subject to restrictions such as the draft, reserve clause, and similar practices.
Figure 1.1
Work Stoppages in MLB, NFL, NBA, and NHL (1968-2011)

Figure 1.2
Work Stoppages in MLB, NFL, NBA, and NHL (1968-2011)
2. Table 1: Meaning and Implications

Data in Table 1 and Figures 1.1 and 1.2 have the following significance:

1. **Leagues are more committed to collective bargaining than player unions.** This inference derives from the occasional but regular use of lockouts. From 1965-2011, every league used a lockout. Basketball players, however, never went on strike. Why are leagues more committed to their economic weapon? Lockouts occur in the off-season.  

Individual player contracts—even multi-year deals—end early in the off-season. This leaves players vulnerable to league pressure due to an interruption in their income. In basketball and football, the draft occurs in the off-season. The infusion of new talent may cause marginal, average, injured or aging players to feel insecure about renewing their personal contracts. This would divide the player’s union between star performers who are immune from income interruption and roster replacement, and fringe players who prefer speedy settlement of a labor agreement to enhance their employment prospects. A player’s short career might increase bargaining confidence among sports leagues, and account for the consistent use of the lockout.

2. **The MLBPA relies more on collective bargaining than other player unions.**

Data in Table 1 support this conclusion. Baseball players went on strike five times from

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197 See Brady, supra note 20, at *8, stating: “As a result, the Players—having made the decision to dissolve the NFLPA as their collective bargaining agent—allege that they immediately began to suffer the consequences of the NFL’s lockout.”

198 Id. at *30, reporting that under “a lockout, however, these five free agent players are in a state of contractual limbo, unable to negotiate a contract with any team.”

199 See Marc Stein, NBA Union Vote Draws Big Turnout in Westwood, L.A. DAILY NEWS, Aug. 31, 1995, at S1, 1995 WLNR 1423512. One NBA player said:

I hope everyone comes to the realization that we can’t afford a work stoppage…. We have so many guys who don’t know what’s going on. They’re just following Michael [Jordan], Patrick [Ewing] and Alonzo [Mourning]…. To hell with them. Michael can afford a work stoppage. Michael doesn’t need to play sports again. We’re not in the same position.

Id. (quoting Olden Polynice).
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1972 and 1994. Owners locked them out only once in the past 40 years (1991). The fact that baseball players have relatively long careers would explain their commitment to the weapons of collective bargaining—career longevity allows them to weather a strike.

3. The NFLPA relies the least on collective bargaining. Table 1 shows that the football player’s union abandoned its frequent use of strikes after 1987. Players suffered a serious defeat when the NFL resumed games by persuading many strikers to return and by hiring striker replacements.\(^{200}\) Data in Table 1 imply that the player’s association never recovered its preference for collective bargaining after this miscalculated strike.

4. Pivotal antitrust rulings reduced union use of economic weapons. The experience in baseball and football offer the clearest support for this inference. In baseball the union played hardball by going on strike five times in 22 years to secure gains at the bargaining table. But they had no other recourse because the Supreme Court ruled nearly 90 years ago that their sport was not in interstate commerce. Subsequent rulings in Toolson and Flood (Table 1, Column 5) blocked the path to the courthouse. Thus, courts did not interfere with the development of a mature bargaining relationship in this sport (see “None” for antitrust court involvement, Table 1, Column 5, Baseball).

In contrast, the NFL routed football players during the 1987 strike. Twice, players decertified their union, running from the bargaining table to the shelter of federal courts.\(^{201}\) Key to note, the McNeil ruling in the district court of Minnesota validated the players’ adoption of a negotiated settlement strategy in federal court (see Table 1, Column 5, Football, showing a high level of antitrust court involvement).


Table 1 does not tell a clear story for basketball or hockey. The *Robertson* case in 1977 was pivotal because it settled a broad range of antitrust claims.\(^{202}\) The only event in Table 1 is the 1998 lockout. One might infer that the league and player’s union engaged in fruitful collective bargaining. While this may be true, my textual analysis of cases shows that these parties made mutual adjustments to their collective bargaining relationship in antitrust actions. Thus, I conclude that antitrust courts had a high level of involvement in basketball’s collective bargaining relationship (Table 1, Column 5).

Like basketball, hockey had a pivotal antitrust court ruling in the late 1970s. Unlike *Robertson*, the *McCourt* decision vacated an antitrust injunction and immunized hockey’s version of the Rozelle Rule.\(^{203}\) This pivotal ruling exposed the NHL player’s union to the threat of economic weapons under the NLRA. This may explain why the sport had just one strike, and two lockouts: situated as the smallest of the four sports, owners and players may have feared loss of fan interest from a work stoppage. This explanation supports my classification of “low” for the level of antitrust court involvement in that sport’s collective bargaining relationship in Table 1.

### 3. Table 2: Data

Who initiates an antitrust action over a labor practice that is part of a collective bargaining agreement? For the sample of 58 district court decisions in Table 2A, I grouped four types of plaintiffs who represent player interests. Arranged at the left-hand side of Table 2A, these plaintiffs were unions, players, college amateurs, and retirees. To the right, I grouped two types of employer litigants: leagues and teams. Individual players

\(^{202}\) *Robertson*, supra note 195.

\(^{203}\) *McCourt*, supra note 183, at 1203, concluding that “it is apparent that the inclusion of the reserve system in the collective bargaining agreement was the product of good faith, arm’s-length bargaining, and that what the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the contract.”
were the most common plaintiff, suing in 65.5% (38) of these antitrust cases. Amateurs were plaintiffs in 8.6% (5) of cases, followed by unions (8.6%, 5 cases) and retirees (6.9%, 4 cases). Leagues were plaintiffs in 25.9% (15) of cases, followed by teams (1.7%, 1 case). Some cases had joint plaintiffs. Thus, the figures do not sum to 100%.

In Table 2B, I ask: How often did each type of plaintiff win a ruling? Here, the sample combined the 82 district and appellate court rulings because the focus was not on who initiated the antitrust action, but instead, who won each ruling. When players and leagues won separate issues in the same case, these outcomes were scored as a win for each party. Thus, the total does not sum to 100%. Players won rulings in 43.9% (36) cases, and leagues won in 46.3% (38) cases. Amateurs won 4.9% (4) of the rulings, followed by unions (3.7%, 3 cases), retirees (3.7%, 3 cases), and teams (6.1%, 5 cases).
4. Table 2A and Table 2B: Meaning and Implications

The data in Table 2A and Table 2B have the following significance.

1. **The fact that antitrust plaintiffs are far more likely to be individual players than unions signifies a profound shift from the labor law paradigm.** The finding that individual players were the most common plaintiff (65.5%) compared to player unions (8.6%) shows that the dispute resolution processes of collective bargaining have been replaced by the adjudication features of federal courts. When this finding is related to textual evidence showing that union officers participate in antitrust proceedings,\(^{204}\) this implies that players and unions use a double-barrel strategy in dealing with teams and leagues. First, unions engage in traditional collective bargaining, and in parallel course, players invoke federal judicial power to supplement their collective bargaining strength.

2. The fact that leagues are antitrust plaintiffs in about 25% of all cases indicates the extent to which they are captives to long-running antitrust agreements that require judicial administration. Only one case in the sample involved a true antitrust complaint by teams. NFL teams alleged that when the players decertified their union decertified, sports agents conspired with union officials to share salary information and coordinate negotiating strategy. The more typical case involved a league that sued to enforce its decision to invalidate a player’s contract. Such a case might involve, for example, a multi-year contract where a player accepted an unrealistically low first year of pay to allow the team to fit within the bargained-for salary cap, with the remaining years of the contract grossly lopsided in the player’s favor. These league actions were subject to review by a special master who was appointed by a federal judge to administer antitrust settlements. The 25.9% league-as-plaintiff figure in Table 2A shows how often leagues sued to enforce their authority to reject or restructure non-conforming player agreements.

3. The nearly equal win-rate in antitrust cases for players and leagues represent a large strategic advantage for players who initiate antitrust lawsuits. With the exception of baseball players, pro athletes often lose labor disputes when economic weapons are used. This dismal experience substantially improves, however, when they sue under the Sherman Act. Then, players win 44.4% of the disputes, compared to 45.7% for leagues. Even if players and leagues do not keep exact score of these outcomes, it is

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205 Five Smiths, Inc., infra note 216.
206 Bridgeman, infra note 232, at 174.
likely that their lawyers can reasonably predict litigated outcomes. Given the near equality of winning outcomes for players and leagues, the findings in Table 2B mean that antitrust courts give players an artificial equality in bargaining power.

**V. Textual Analysis of Cases: Support and Elaboration for Empirical Findings**

In Part V, I repeat the main empirical findings that can be supported and more fully developed with extensive textual analysis of cases. Certain findings were purely statistical inferences, or the cases in the database did not shed light on these points.

*The NFLPA relies the least on collective bargaining:* From the 1987 strike until the 2011 lockout, pro football experienced 24 years without a work stoppage. But again, this low frequency of labor strife is misleading. Players simply moved their bargaining from the labor-management realm to the federal courthouse. Defeated in collective bargaining after the 1987 strike, they filed multiple antitrust lawsuits. *Powell v. NFL* presented a series of player challenges to the college draft, NFL’s Right of First Refusal/Compensation System (RFR/CS), and uniform player contract. In May 1989 the Eight Circuit ruled that the non-statutory labor exemption to the antitrust laws continues after the parties reach a bargaining impasse after a CBA expires.

Another Eighth Circuit opinion in *Powell*, decided in November 1989, unwittingly opened a new chapter in the relationship between the players and the NFL. The court repeated the NFL’s argument that the Sherman Act would apply, for example,

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208 See Table 1. The timeline is also established in Brady, *supra* note 20, *2 - *7.
210 *Powell v. National Football League*, 888 F.2d 559, 567 (8th Cir. 1989), reasoning: “To now allow the Players to pursue an action for treble damages under the Sherman Act would, we conclude, improperly upset the careful balance established by Congress through the labor law.”
if the players ceased to be represented by a union.\textsuperscript{212} A month later, the players took this as a cue, and decertified their union.\textsuperscript{213} Then, in 1990, eight individual players challenged the NFL’s restrictions on free agency as Sherman Act violations.\textsuperscript{214} At the same time, the NFL argued to the court that the union engaged in a sham decertification.\textsuperscript{215} Also, an NFL team tried to turn the tables on the players with its own antitrust lawsuit that claimed that player agents conspired to fix wages, but the complaint was dismissed.\textsuperscript{216} The district court in \textit{McNeil} granted the players’ motion for summary judgment, concluding that the antitrust labor exemption ended because there was no ongoing collective bargaining relationship after the union dissolved itself.\textsuperscript{217} Following a jury trial, the \textit{McNeil} court

\begin{itemize}
\item \textsuperscript{212} \textit{Id.} at 1303, n.12.
\item \textsuperscript{213} Powell v. National Football League, supra note 201 at 1354 (D. Minn. 1991), explaining that the Executive Committee of the player’s union, after considering the Eighth Circuit’s earlier decision in Powell, decided to abandon collective bargaining. Players formally approved decertification on December 5, 1989.
\item \textsuperscript{215} See Powell v. National Football League, supra note 201, at 1354, where the NFL argued that the players engaged in a sham decertification to gain standing as antitrust plaintiffs. In a later phase of this litigation, the NFL observed behaviors by former NFLPA officers, such as requesting salary data from the league, advising players to adhere to licensing agreements, and using player agents to act as surrogate union officers. \textit{Also see} McNeil v. National Football League, 777 F.Supp. 1475, 1479 (D.Minn. 1991) (NFL contended that union’s documents showed that the NFLPA was using player agents as a surrogate for the defunct union).
\item \textsuperscript{216} Five Smiths, Inc. v. National Football League Players Ass’n, 788 F.Supp. 1042 (D.Minn. 1992). NFL teams contended that the player’s association were a combination and conspiracy with player agents to set pay for the players. Allegedly, agents acted in combination with the former union to collect and disseminate information on settled contracts and on-going negotiations; fixed minimum compensation for contracts in the 1990 season; and urged players to delay signing contracts to increase pay to levels that the former player’s union set as the appropriate standard. Judge Doty found no specific proof that suggested that the NFLPA engaged in price fixing.
\item \textsuperscript{217} McNeil v. Nat’l Football League 764 F.Supp. 1351, 1358 (D.Minn. 1991). In a subsequent ruling on NFL defenses, the players were largely victorious. McNeil v. Nat’l Football League 790 F.Supp. 871 (D.Minn. 1992). Judge Doty rejected the NFL’s defense that it was a single economic entity and therefore incapable of conspiring within the meaning of § 1 of the Sherman Act. \textit{Id.} at 878-881. The NFL also argued unsuccessfully that antitrust laws do not apply to restraints that operate solely within a labor market. \textit{Id.} at 880-81. Completing the rout of the NFL’s defenses, Judge Doty ruled that the labor exemption ended when the parties’ collective bargaining relationship was terminated. The NFL had argued that the liability period started on May 23, 1991; instead the court said the period began much earlier, when the collective bargaining relationship ended in December 1989. \textit{Id.} at 883-884.
\end{itemize}
found that the NFL violated the Sherman Antitrust Act.\textsuperscript{218} This prompted another player to sue to enjoin Plan B free agency rules.\textsuperscript{219} Citing \textit{McNeil, Jackson v. Nat’l Football League} temporarily enjoined this restriction.\textsuperscript{220} Other NFL players sued for an injunction to achieve total free agency in \textit{White v. Nat’l Football League}.\textsuperscript{221}

This web of antitrust lawsuits achieved far more for the players than the 1987 strike. In a later phase of the \textit{White} litigation, the league entered into a class settlement with players.\textsuperscript{222} Interesting to note, the player’s union participated in the settlement negotiations as a consultant to the plaintiffs’ class counsel.\textsuperscript{223} In addition, the settlement retained the district court’s jurisdiction to enforce the agreement.\textsuperscript{224} Once the dust cleared from this complex litigation, the reconstituted player’s association entered into a new collective bargaining agreement with the league.\textsuperscript{225} From 1993 until 2011, the \textit{White}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{219} \textit{Jackson v. Nat’l Football League}, 802 F.Supp. 226, 228 (D. Minn. 1992). The NFL implemented Plan B free agency in February 1989. This gave NFL teams a right of first refusal if any of the designated players signed an offer sheet with another team. \textit{Id.} at 228, n.1.
  \item \textsuperscript{220} The court ruled that players who were subject to Plan B restrictions were irreparably injured due to the “undisputed brevity and precariousness of the players’ careers in professional sports, particularly in the NFL.” \textit{Id.} at 231.
  \item \textsuperscript{221} \textit{White, supra} note 204, reporting that these plaintiffs filed their lawsuit less than two weeks after a jury rendered its verdict in the McNeil case. In this action, the players challenged a variety of NFL rules and restrictions— the right of first refusal/compensation component of Plan B, the college draft, the NFL Player Contract and preseason pay rules. \textit{Id.} at 1394.
  \item \textsuperscript{223} \textit{Id.} at 1499.
  \item \textsuperscript{224} \textit{Id.} at 1473 (“the court has agreed to retain jurisdiction over this action during the express term of the Settlement Agreement, and thus the court will be in a position to ensure that all class members’ interests will be protected throughout the life of the settlement.”).
  \item \textsuperscript{225} \textit{White v. National Football League}, 41 F.3d 402, 406-07 (8th Cir. 1994) contains a complete but brief summary of how the antitrust action was settled, and then rolled into a new CBA with continuing court supervision. This summary is quoted at length for a critical reason—it shows how antitrust procedures functioned as a surrogate for a normal collective bargaining process:
    \begin{quote}
    The parties then entered into a settlement agreement, which received preliminary approval from the district court. \textit{White v. NFL}, Civ. No. 4-92-906 (D.Minn.1993). In accordance with the district court’s instructions, the White plaintiffs notified class members of the proposed settlement by mail and by publication of a summary in a national newspaper. Several weeks later the district court convened a hearing to provide those who objected to the proposed settlement with an opportunity to present their views.
    \end{quote}
\end{itemize}
\end{footnotesize}
settlement formed the backbone of the NFL-NFLPA labor agreements.\textsuperscript{226}

\textit{The fact that leagues are antitrust plaintiffs in about 25\% of all cases indicates the extent to which they are captives to long-running antitrust agreements that require judicial administration.} The 1993 antitrust settlement in \textit{White} lasted indefinitely, and left the NFL and player’s union constantly dependent on a federal court to adjust their relationship. The 2000 case, \textit{White v. National Football League}, is a case in point.\textsuperscript{227} By agreement, teams were entitled to designate one free agent as a franchise player, provided that they paid the star player a premium salary for a one year contract.\textsuperscript{228} The reconstituted player’s union brought an action before the court’s special master, alleging that Arizona Cardinals violated the settlement agreement by applying the franchise tag to one player, while signing him late in the contract negotiation cycle to a multi-year deal so that the team could designate another player in the upcoming salary cycle as a franchise player.\textsuperscript{229} The special master ruled that the Cardinals’ contract with the first player did not circumvent the antitrust settlement, and therefore the franchise tag could be applied to

\begin{scriptsize}
\textsuperscript{226} The district court then issued a lengthy order overruling these objections and enjoining individual lawsuits by class members with similar claims. \textit{White v. NFL}, 822 F.Supp. 1389 (D.Minn.1993). Approximately one week later, the NFL and the National Football League Players Association entered into a new collective bargaining agreement incorporating the terms of the settlement agreement as well as other rules regarding NFL player-employees. Upon motion to amend the original settlement to conform to the terms of the new collective bargaining agreement, the district court agreed to repeat the settlement approval process as well as to make additional factual findings. \textit{White v. NFL}, 836 F.Supp. 1458 (D.Minn.1993). The process of notification, reviewal of objections, and hearings culminated on August 20, 1993, with the district court’s entry of an order approving the settlement agreement, id., and final consent judgment. \textit{White v. NFL}, 836 F.Supp. 1508 (D.Minn.1993).


\textsuperscript{227} \textit{Brady v. National Football League}, supra note 21, at 788 (“The agreement was amended and extended several times, and each time, the enforcement jurisdiction of the district court was retained as part of the agreement.”).


\textit{Id.} at 994.

\textit{Id.} at 994-95.
\end{scriptsize}
the second player. The district court affirmed this ruling. The case shows how deeply the antitrust settlement intruded on the collective bargaining relationship.

Basketball was similarly regulated by federal courts in the early 1990s, as judges refereed disputes over terms in the Robertson settlement and a later antitrust settlement, called the Bridgeman Settlement Agreement. Under the BSA, which became part of the CBA, the league capped player compensation at 53% of annual gross revenues. Some teams and players creatively worked around the annual cap. The Portland Trail Blazers had too little room under the salary limit to sign Chris Dudley, a valuable free agent. But they enticed him with a low salary in the first year, much higher pay in later years, and an “opt-out” after the first year so that he could play the market sooner rather than later. The league complained that this contract violated the intent of the settlement. The judge’s disagreement with the NBA sounded like a labor arbitrator’s decision, with emphasis the intent of the bargainers. It did not apply antitrust law.

**Pivotal antitrust rulings reduced union use of economic weapons.** As expiration of the CBA approached in 2011, the football player’s union sued to enforce the 1993 White settlement agreement that had been renewed over 18 years. The expiring CBA

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230 *Id.* at 997.
231 *Id.* at 999.
233 *Id.* at 176-77.
234 *Id.* at 174.
235 *Id.* at 183, stating: “It is quite possible that the widespread use of such contracts would have a devastating impact upon the teams’ salary cap objectives.” The judge continued: “However, . . . it cannot be said that entry into a contract having such terms was designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by the salary cap provisions.” *Id.* Accordingly, the judge ruled: “A contract such as Dudley’s finds authorization in the BSA [Bridgeman Settlement Agreement].” *Id.*
obligated the NFL to use its best efforts to maximize TV revenues.\textsuperscript{237} Players claimed that the league violated the settlement when it bargained for TV contracts that offered the networks concessions in exchange for higher payments to the NFL if a lockout occurred.\textsuperscript{238} The new TV deals gave the NFL $4 billion as insurance against a lockout.\textsuperscript{239}

After the special master dismissed the players’ claim, Judge Doty reversed this ruling.\textsuperscript{240} As a result, players petitioned the judge to escrow the provisional lockout money from TV agreements, and enjoin the lockout.\textsuperscript{241} Frustrated with the settlement agreement he guided for 18 years, Judge Doty lamented in court: “I didn’t think we would have this hearing. . . By now, I thought this would be decided by the parties.”\textsuperscript{242}

*Leagues are more committed to collective bargaining than player unions.* The Taft-Hartley Act, which amended the NLRA, provided for decertification of a union as a bargaining representative. The Act provided separate methods for employees\textsuperscript{243} and

\textsuperscript{237} Id. at *6.
\textsuperscript{238} Id. at *5.
\textsuperscript{239} Id.
\textsuperscript{240} Id. at *12.
\textsuperscript{241} Trial Motion, Memorandum and Affidavit, Class Counsel’s and the NFLPA’s Memorandum of Law in Support of Money Damages and Equitable Relief Pursuant to the Court’s Order of March 1, 2011, 2011 WL 1204848 (D.Minn. 2011).
\textsuperscript{243} Section 9(c)(1) of the Taft-Hartley provides:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative. . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

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employers. Not a single league or team petitioned to decertify a player’s union since the inception of collective bargaining relationship. But players filed to decertify their unions in basketball and football. This history supports my conclusion that leagues are more committed to collective bargaining than players.

Support for this conclusion is also derived by comparing the outcome of collectively bargained agreements between players and leagues, and antitrust settlement agreements involving the same parties. These agreements involve the same subjects of bargaining. The difference is that leagues prefer collective bargaining, where they usually enjoy an advantage in bargaining power.

The Robertson antitrust settlement looked like a collective bargaining agreement. By eliminating the reserve clause and limiting a drafting team’s hiring rights to one year, it settled issues that are mandatory subjects of collective bargaining. The settlement also provided a framework for a CBA that ran from 1988 through the 1994-95 season. As this labor agreement was expiring, the player’s union

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244 Section 9(c)(1) provides:
Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(B) by an employer alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition. . . .

Id. § 9(c)(1) at 9.

245 Staudohar, Labor Relations in Basketball, supra note 82, at 4, reporting that basketball players filed for a decertification election with the NLRB in 1995. They sought to defeat the NBA’s labor exemption, and thereby create standing to achieve their bargaining goals in antitrust court.


247 Robertson, supra note 93, at 66.

248 Id. at 67.

249 See Clarett v. National Football League, 369 F.3d 124, 139-40 (2d Cir. 2004), noting for example, that “[T]hough tailored to the unique circumstance of a professional sports league, the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject.” Also see Silverman v. Major League Baseball Player Relations Comm., Inc., 67 F.3d 1054, 1061 (2d Cir.1995) (CBAs in professional sports usually involve a mix of free agency, reserve clauses, provisions for a rookie draft and salary caps).

250 Williams, supra note 19, at 686.
told the NBA to end the college draft and salary cap or face another antitrust lawsuit.  

After the NBA refused to budge, the players sued for a temporary restraining order and prevailed. But two weeks later, Judge Duffy took a different approach: “I am convinced that this is a case where neither party cares about this litigation or the result thereof. Both are simply using the court as a bargaining chip in the collective bargaining process.” The Second Circuit Court of Appeals also ruled for the NBA, noting that “the soup-to-nuts array of rules and remedies afforded under the labor laws” applied to this situation, and “application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it.” These court decisions show that the NBA preferred collective bargaining, while the players sought to avoid it.

Football had a similar experience with players preferring litigation to collective bargaining, and the league taking the opposite tack. In a 2011 antitrust action that emanated from the White settlement, Judge Susan Nelson enjoined a lockout following expiration of the CBA in Brady v. National Football League. The NFL argued that its lockout was permitted by law; antitrust did not apply to this dispute; the union engaged in a sham decertification and therefore violated the NLRA; and the NLRB, not the federal district court, had jurisdiction. The judge rejected all of these

251 Id.
254 Williams, supra note 19, at 693.
255 Id.
256 Brady, supra note 20.
257 Id. at *28.
258 Id.
259 Id. at *15.
260 Id. at *8.
arguments.\textsuperscript{261} Again, the NFL took the position that collective bargaining was the proper method to resolve its contract dispute with players.

\textit{The fact that antitrust plaintiffs are far more likely to be individuals players than unions signifies a profound shift from the labor law paradigm.} This point is underscored by the fact that antitrust courts behaved at times like labor arbitrators. Labor arbitration has developed as a unique and comprehensive institution to resolve contract disputes that arise between a union and employer. The Supreme Court has significantly curtailed the role of courts in adjudicating these contract disputes. \textit{United Steelworkers of America v. American Manufacturing} noted that the “function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator,”\textsuperscript{262} because it is “the arbitrator’s judgment . . . that was bargained for.”\textsuperscript{263} \textit{United Steelworkers of America v. Warrior & Gulf} noted that the arbitrator “is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept . . . . He is rather part of a system of self-government created by and confined to the parties.”\textsuperscript{264} The decision emphasized that arbitrators have special competence to resolve labor-management disputes.\textsuperscript{265}

In light of this background, consider how antitrust settlements have replaced the normal grievance arbitration process with a court-administered on system. In a 2008 case, \textit{White v. National Football League},\textsuperscript{266} the Atlanta Falcons sought to recover $19.97

\begin{itemize}
  \item \textsuperscript{261} \textit{Id.} at *37. Judge Nelson’s injunction was stayed in Brady, \textit{supra} note 21.
  \item \textsuperscript{263} \textit{Id.} at 568.
  \item \textsuperscript{264} \textit{Id.} at 581 (“The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.”).
  \item \textsuperscript{265} \textit{White}, \textit{supra} note 204.
  \item \textsuperscript{266} 533 F.Supp.2d 929 (D.Minn. 2008).
\end{itemize}
million in signing bonuses from Michael Vick, its star quarterback. The demand for repayment occurred on August 20, 2007, a week after Vick pleaded guilty to a felony dog fighting charge, and three days after the commissioner suspended him under the NFL’s misconduct rules. The NFL filed a grievance for the Falcons to enforce the default provisions in Vick’s contract. Vick’s attorneys joined the union to challenge the proposed pay forfeitures. Instead of going to arbitration, the matter was submitted to Stephen Burbank, a court-appointed special master to administer the ongoing White settlement.

Burbank reasoned that once the Falcons guaranteed Vick’s roster bonus for skill, this promise was subject to the CBA’s “years already performed” test. This section did not prohibit bonus forfeitures, and therefore, the Falcons were entitled to repayment of $19.97 million. On review, the district court sided with Vick and ruled that the Falcons could not recover this bonus money.

Compare the court’s heavy hand in the Vick matter to Major League Baseball Players Ass’n v. Garvey. In this baseball dispute, a former star first baseman, Steve Garvey, filed a grievance under the CBA alleging that Ballard Smith, CEO of the San Diego Padres, colluded with other baseball executives to deny him a contract. Garvey

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267 Id. at 931.
268 Id. The team’s demand for repayment included $3.75 million of a $7.5 million signing bonus paid to him in 2004 and 2005, $13.5 million of the $22.5 million roster bonus paid to him in 2005 and 2006 and $2.72 million of the $7 million roster bonus paid to him in 2007. Id.
269 Id.
270 Id.
271 Id. at 933.
272 Id. at 932.
273 Id. at 934. Judge Doty based his ruling on Vick’s contract, which guaranteed the bonus upon his making the team’s 80-man roster in the year in which the bonus was payable. “With the skill and injury guarantees in place, there was little to keep Vick from satisfying that condition,” according to the judge. Id. at 933.
274 532 U.S. 504.
275 Id. at 505.
presented a June 1996 letter from Smith stating that, before the end of the 1985 season, Smith offered to extend Garvey’s contract through the 1989 season, but the Padres refused to negotiate with him thereafter due to collusion.\textsuperscript{276} The arbitrator did not find this 11 years-removed letter credible, however, because of it contradicted Smith’s testimony at an earlier hearing.\textsuperscript{277} This factual determination led the arbitrator to deny Garvey’s grievance for $3,000,000.\textsuperscript{278} By rejecting the Ninth Circuit’s intrusive review of the arbitrator’s award, the Supreme Court emphasized that “courts . . . have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim.”\textsuperscript{279}

Let us compare: courts that adjudicated the Garvey and Vick employment disputes involved star athletes whose claims were grounded in antitrust or collusion theories. Vick was able to keep nearly $20 million as a result of a federal judge who weighed the merits of his contract arguments, and overturned a special master’s ruling. Garvey lost a claim for $3 million after the Supreme Court, in so many words, said that baseball’s internal dispute resolution system should play an exclusive role in adjudicating player claims. The two cases show that when professional athletes become antitrust plaintiffs, courts tend to adjudicate their individual claims—and as a result, the labor law paradigm that should apply is diminished.

Among the four sports, hockey was closest to baseball in its insulation from antitrust litigation. Unlike baseball, however, it never enjoyed a total exemption from the Sherman Act. But the \textit{McCourt} ruling in 1979 set the sport apart from basketball and

\begin{itemize}
  \item \textsuperscript{276} \textit{Id.}
  \item \textsuperscript{277} \textit{Id.} at 506.
  \item \textsuperscript{278} \textit{Id.} at 507.
  \item \textsuperscript{279} \textit{Id.} at 510.
\end{itemize}
football by implying a robust labor exemption from the Sherman Antitrust Act.\textsuperscript{280}

The timing of this ruling, about a decade after formal collective bargaining began in hockey, was crucial. It meant that early in the bargaining relationship, the NHL and player’s union knew that antitrust lawsuits by players would probably fail. The Sixth Circuit said that while the NHL’s labor market restrictions likely violated antitrust law, they were permissible because they fell under the umbrella of collective bargaining. In effect, the court told the players they could resist the NHL’s labor restrictions by striking, boycotting, picketing, or engaging in other concerted activities.

Why, then, did hockey enjoy more labor peace than baseball? My research sheds little light. Perhaps the bi-national organization of the sport blinded players to the possibilities of seeking relief under U.S. antitrust law. Another possibility centers on the players’ extraordinary grant of power to their executive director, Alan Eagleson. \textit{Forbes v. Eagleson} shows that he was convicted for practices involving union business.\textsuperscript{281} He may have been too cozy with owners, living and socializing in Florida with the league’s lead negotiator.\textsuperscript{282} Did players trust their leader too much when he was making money in personal deals at their expense?\textsuperscript{283} Strike data for hockey in Table 1 may suggest that Eagleson sold out the players by convincing them to avoid traditional labor-management confrontations. There is no clear explanation for prolonged labor peace in hockey.

\textbf{VI. CONCLUSION:}

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\textsuperscript{280} See McCourt, \textit{supra} note 183, at 1199 (“the subject of player movement restrictions is a proper one for resolution in the collective bargaining context. When so resolved, as it appears to have been in the current collective bargaining agreement, the labor exemption to antitrust attack applies.”).

\textsuperscript{281} Forbes v. Eagleson, 228 F.3d 471, 474 (3d Cir. 2000).

\textsuperscript{282} \textit{Id.} at 485.

\textsuperscript{283} \textit{Id.} at 475, reporting that Eagleson allegedly organized international hockey tournaments from 1976-1991, thus enriching himself in various business transactions, while “these schemes reduced the net proceeds to be divided between the NHLPA and the NHL pursuant to their joint venture.” \textit{Id.}

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A. General Implication: Antitrust Subverts Collective Bargaining

This study joins two theoretical streams—a legal theory from Winter and Jacobs positing that courts should separate antitrust and labor law in professional sports,284 and the narcotic effect theory from industrial relations predicting a harmful effect on bargaining behavior when negotiators have access to an adjudicatory process to break an impasse.285 My data imply that players use antitrust courts because their collective bargaining power is inferior to their employers.286

Players want two bites at the apple: collective bargaining, when it suits them; and when it disadvantages them, court-administered negotiating with leagues during an antitrust lawsuit. My research shows that this two-pronged bargaining approach subverts collective bargaining. Schmidt and Berri view labor solidarity as vital to collective bargaining.287 Contrary to this view, basketball and football players abandon labor solidarity when they sue as individuals for damages and injunctions. Hicks theorizes that faulty information leads to a bargaining impasse.288 The data show that antitrust courts create bargaining uncertainty when some judges consistently hear antitrust complaints289

284 Supra notes 144 - 147
285 Supra note 179.
286 Even antitrust courts have remarked on the weak bargaining power of players. See Brown v. NFL, 50 F.3d 1041, 1057 (D.C.Cir.1995), noting: “We recognize that the history of bargaining between the NFL and the NFLPA, which includes a failed strike by the players during the 1987 season, has prompted some commentators to conclude that the union cannot effectively strike [internal quote omitted].” In Brady, supra note 20, the judge observed that after the Eighth Circuit’s 1989 ruling in Powell, the players had to decide between continuing to bargain collectively, or “jettisoning the entire collective bargaining apparatus—and the rights and benefits it provided to them—in order to assert claims under the Sherman Act against the League.” Id. at *3. When Judge Nelson said that the “Players elected to take the risk of the latter option and disclaimed the Union,” she appeared to agree that players have inferior bargaining power in the context of collective bargaining. Id. at *6.
287 Schmidt & Berri, supra note 158.
288 Hicks, supra note 161.
289 See the chain of litigation in White, supra note 190.
while others dismiss them.\textsuperscript{290} This unpredictability undermines collective bargaining by introducing faulty information. In sports, where there is a history of judges interfering in collective bargaining, players and management have little incentive to bargain to the point where they offer real concessions. Until they realize that antitrust is out of the picture, they posture instead of bargain.\textsuperscript{291} The antitrust experience in \textit{Robertson, McNeil,} and \textit{Brady}, where players decertified their union or litigated a settlement that mimicked a CBA, contradicts Ashenfelter and Johnson. They believe successful bargaining requires a consensus among the employer, union, and union members.\textsuperscript{292} Union leaders have an institutional interest to preserve and grow their organization.\textsuperscript{293} But in these landmark cases, class action plaintiffs and their attorneys controlled the negotiation—and at times, the union dissolved itself. This is more proof that antitrust subverts collective bargaining.

\textbf{B. Specific Implication: The Narcotic Effect of Antitrust Law in Professional Sports}

Turning to my main theoretical focus, antitrust has a narcotic effect on the way that professional athletes come to terms with their employers. This is particularly evident in football and basketball. Applying Secretary of Labor Wirtz’s theory to sports, this study shows that when judges permit these antitrust lawsuits, players find “an easy and habit-forming release from the obligation of hard, responsible bargaining.”\textsuperscript{294}

In particular, I show how antitrust gave birth to the first comprehensive collective bargaining agreement in basketball. The settlement of antitrust claims in \textit{Robertson} dealt

\begin{itemize}
\item \textsuperscript{290} See Williams, \textit{supra} note 252-255.
\item \textsuperscript{291} Gary Graves, \textit{NFL, Union Vow}, USA TODAY (June 23, 2011) (“judging from some of the information revealed in recent days, the four-month lockout was more about posturing than deep philosophical differences”).
\item \textsuperscript{292} Ashenfelter & Johnson, \textit{supra} note 163.
\item \textsuperscript{293} \textit{Id}.
\item \textsuperscript{294} Wheeler, \textit{supra} note 176.
\end{itemize}
with the draft and free agency.\textsuperscript{295} After that long term settlement agreement expired, the
\textit{Bridgeman} litigation continued the players’ addiction to antitrust.\textsuperscript{296} This habit did not
end until 1995, when the Second Circuit Court of Appeals turned aside an antitrust
complaint from players in \textit{Williams}. Using language that supports my narcotic effect
thesis, the appeals court also said that “application of antitrust principles to a collective
bargaining relationship would disrupt collective bargaining as we know it.”\textsuperscript{297} From the
time the \textit{Robertson} lawsuit was filed in 1970 until the 1995 appellate ruling in \textit{Williams},
antitrust was more important than the NLRA in labor-management relations in basketball.

Football players were not born with this addiction. They developed the antitrust
habit after they miscalculated their odds of winning the 1987 strike. To recover from their
faulty negotiation,\textsuperscript{298} they decertified their union and proceeded to the federal district
court of Minnesota as class action litigants. Ever since, antitrust has trumped collective
bargaining in football. Players have bargained at the courthouse over pay and conditions
of employment.\textsuperscript{299} My research presents statistical and textual evidence of the district
court’s role in turning football players into litigation addicts. A CBA has not been settled
once since 1993 without some form of judicial involvement.\textsuperscript{300}

The clearest sign of player addiction is their ongoing game of hide-and-seek
bargaining by decertifying their union at dire moments. The game begins when they
bargain with the NFL and realize they will not get a labor agreement to their liking,
reaches a new phase when their former union officers are seated as co-counsel before a federal district judge in antitrust proceeding, and ends successfully for players when a federal judge approves a good settlement for them.\(^{301}\) Meanwhile, they are removed from the core features that Sen. Robert Wagner envisioned as crucial to collective bargaining: economic weapons, including the right to strike, and access to the NLRB.\(^{302}\) Nothing could be better from the perspective of high-priced athletes who, by court order, are allowed to continue their careers while their lawyers debate over arcane features of the Sherman Act’s antitrust labor exemption.

This problem continued in 2011. When Judge Nelson enjoined the NFL’s lockout of players, she behaved like a doctor who over-prescribes pain pills. By her logic, to “propose, as the NFL does, that a labor dispute extends indefinitely beyond the disclaimer of union representation is fraught with peril.”\(^{303}\) But all that Judge Nelson accomplished was to encourage players to abandon collective bargaining— that is, until the Eighth Circuit vacated the injunction and paved the way to a quick settlement at the  

\(^{301}\) See White, supra note 223.  
\(^{302}\) Sen. Wagner explained the public policy rationale for providing economic weapons, such as the right to strike:  

It has been urged that the bill places a premium on discord by declaring that none of its provisions shall impair the right to strike. On the contrary, nothing would do more to alienate employee cooperation and to promote unrest than a law which did not make it clear that employees could refrain from working if that should become their only redress. But this bill will prevent strikes by the only feasible and just method; that is, by insuring fair treatment to all parties and by establishing a powerful and trustworthy agency for the settlement of disputes. Hearings before the Comm. on Educ. and Labor on S.2926, 73d Cong., 2d Sess. 10-11 (1934), reprinted in 1 NLRB, supra note 154, at 40-41.  
\(^{303}\) Brady, supra note 20, at *24. The NFL intended to pressure the players to accept a lower ceiling on gross revenues available for salaries, a rookie salary cap, an 18 game regular season, and stricter testing for performance enhancing substances. The players’ complaint is reported at Brady v. National Football League, 2011 WL 958695 (D. Minn. 2011). Judge Nelson concluded that three types of players demonstrated the likelihood of irreparable harm or injury: (a) unsigned, unrestricted free agents, (b), star college prospects for the draft, and (c) under-contract players such as Tom Brady and Drew Brees whose future marketability was damaged by the lockout.
bargaining table.\textsuperscript{304}

My historical and statistical evidence for baseball also fits the narcotic-effect theory. Recall that two Supreme Court decisions—\textit{Toolson}, and \textit{Flood}—frustrated baseball players argued that the reserve clause was legally analogous to involuntary servitude.\textsuperscript{305} The fact that they sued in antitrust shows that baseball players preferred court-ordered relief as much as their counterparts in other sports. But as two-time losers before the Supreme Court, they were left to their own devices under the NLRA. Then, Andy Messersmith won a grievance arbitration ruling that forever abolished a team’s stranglehold on a player’s career. This was remarkable considering that a labor arbitrator has less power than a federal judge. Antitrust lawsuits in \textit{Robertson} and \textit{McNeil} achieved similar gains for players, but only after much time, money and judicial resources.\textsuperscript{306}

My study shows that the fight was only beginning for baseball players. The sport endured five strikes in 22 years, as the player’s union and MLB used economic weapons under the NLRA to find common ground.\textsuperscript{307} But MLB and the player’s union developed a protocol of accommodation that has endured since 1994. The NLRA was not designed to promote strikes and lockouts. It aimed to lessen their occurrence by supplying labor and management with heavy arsenals of economic weapons that foster agreements.\textsuperscript{308}

In sum, antitrust has played too large a role in professional sports labor disputes

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{304} Brady v. National Football League, 644 F.3d 661 (8th Cir. 2011). For details on the settlement of this labor dispute, see Matthew Futterman & Lauren A.E. Schuker, \textit{NFL and Players Agree on New Deal, WAll St. J.} (July 25, 2011), at 2011 WLN 14803746 (and more fully reported at http://online.wsj.com/article/SB10001424053111903591104576467941192669806.html?mod=googlenews_wsj (tentative agreement between players and league ended the 136-day work stoppage, and reflected several significant compromises between the NFL and its players).
\item \textsuperscript{305} Flood, \textit{supra} note 11.
\item \textsuperscript{306} McNeil, \textit{supra} note 195, and Robertson, \textit{supra} note 93.
\item \textsuperscript{307} Table 1, \textit{supra}.
\item \textsuperscript{308} See Insurance Agents, \textit{supra} note 156.
\end{itemize}
\end{footnotesize}
over the past 30 or more years. Applying the “narcotic effect” theory from industrial relations, I conclude that antitrust litigation addicts players in football and basketball to the adjudicatory procedures of the Sherman Act—thereby replacing collective bargaining. This is undesirable because Congress intended, under the NLRA, to leave labor and management free from government interference as they adjust their differences.\textsuperscript{309} In contrast, baseball’s total exemption from antitrust, combined with its high frequency of work stoppages, shows what happens when the opiate of antitrust litigation is not available to players. In time, labor and management establish a more informed bargaining protocol, and settle issues by making difficult concessions on their own. As long as courts entertain these sports lawsuits under the Sherman Act, collective bargaining will be subverted.

\footnote{\textsuperscript{309} \textit{Supra} note 153 (purpose of the NLRA “is to escort (employee representatives) to the door of their employer”).}