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## ACCOMMODATING LABOR AND ANTITRUST

Stephen F. Ross\*

One of the joys of the academic life is being paid a good salary to read important and provocative articles, such as Michael LeRoy's latest contribution to the debate about the extent to which antitrust law should constrain owners in monopoly sports leagues from limiting competition among themselves for the services of players.<sup>1</sup> This particular article reminded me of a prior job as an attorney for the Senate Judiciary Committee. My first assignment was to participate in negotiations on amendments to shipping laws that granted antitrust exemptions for agreements in that industry. An attorney for the Senate Commerce Committee kept referring to the Shipping Act as "our law" and, sneering at me and my Judiciary Committee colleagues, referring to the Sherman Act as "your law." Professor LeRoy, a distinguished scholar of labor law and empirical research on the effect of labor law on labor relations, clearly prefers that "his law" should govern sports league labor disputes, and that "my law" should stay out. Although his empirical work is a useful contribution to the literature that will serve as a valuable reference for other scholars, the evidence about what *is*—that federal courts often grant antitrust remedies in sports labor disputes—tells us nothing about what *should be*. Namely, in Professor LeRoy's words, whether "federal jurisdiction *properly* extends to antitrust lawsuits filed by union-represented athletes who challenge labor market restrictions imposed by their league."<sup>2</sup>

Professor LeRoy writes that "once players chose collective bargaining to negotiate changes to the reserve system, their decision divested courts of antitrust jurisdiction."<sup>3</sup> This accurately states the law after *Brown v. Pro Football, Inc.* ("*Brown II*").<sup>4</sup> For this reason, an empirical critique of lower courts' antitrust decisions prior to 1996 may be less valuable for ongoing doctrinal analysis.

Professor LeRoy, however, aims to do more than simply describe *what is*. The logical link between Professor LeRoy's empirical evidence and his claim that federal courts *improperly* invoke the Sherman Act in sports labor disputes seems based on two fundamental claims that he asserts without further support or explication, both of which are highly contested. First, he asserts that the sports league labor rules that are the subject of these improper antitrust challenges are adopted by league owners with the purpose of making "their sport entertaining" and with the effect of "spread[ing] athletic talent among [their] teams."<sup>5</sup> Second,

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<sup>1</sup> See Michael H. LeRoy, *Federal Jurisdiction in Sports Labor Disputes*, 2012 UTAH L. REV. 815.

<sup>2</sup> *Id.* at 818 (emphasis added).

<sup>3</sup> *Id.* at 831.

<sup>4</sup> 518 U.S. 231 (1996) (holding that federal labor laws protect agreements among employers bargaining collectively from antitrust attacks).

<sup>5</sup> LeRoy, *supra* note 1, at 820–21.

he echoes the views of another labor law scholar, Judge Harry Edwards, who wrote for the D.C. Circuit in *Brown v. Pro Football, Inc.* (“*Brown I*”),<sup>6</sup> that an implied exemption to the Sherman Act with regard to labor relations must protect “the entire collective bargaining process.”<sup>7</sup> The Supreme Court affirmed Judge Edwards’ holding in *Brown II*.

I suspect the editors of the *Utah Law Review* asked me to comment on Professor LeRoy’s article because my previous work explains why I believe both these fundamental claims are wrong. Contrary to the first claim, sports league labor rules are usually adopted by league owners to enhance their own profits, and indeed often reduce competitive balance among teams, reducing fan appeal.<sup>8</sup> Second, the Court’s decision in *Brown II* does not reflect the appropriate accommodation of labor and antitrust law set forth by the plurality of the Court in *Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*<sup>9</sup>

My disagreements with Professor LeRoy’s foundational assumptions are best explicated in reverse order. *Jewel Tea* involved an antitrust challenge to a collective bargaining agreement between union butchers and a multiemployer bargaining group of retail meat sellers, including butcher shops, grocery stores, and newly emerging supermarket chains.<sup>10</sup> One of the latter objected to a provision requiring employers not to sell meat after 6:00 p.m. Jewel Tea claimed it was not alone in being disadvantaged by this product market restraint; consumers were too.<sup>11</sup> The Meat Cutters Union had likely sought the provision to protect its members who worked for smaller butcher shops that could not afford to remain open in the evening. The Meat Cutters Union claimed, however, their prime concern was a long-standing goal of limiting exploitation of its butchers employed by supermarkets, who might have to work longer or inconvenient hours.<sup>12</sup> A sharply divided Supreme Court rejected the antitrust claim.

Consistent with the views of labor law scholars Harry Edwards and Michael LeRoy, Justice Arthur Goldberg (formerly Secretary of Labor and General Counsel

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<sup>6</sup> 50 F.3d 1041 (D.C. Cir. 1995), *aff’d*, 518 U.S. 231.

<sup>7</sup> *Id.* at 1051.

<sup>8</sup> See Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519. Even Professor LeRoy cites the conclusion of labor law scholar Roger Abrams that the National League initially developed the reserve clause “in 1879 in response to increasing player salaries.” Leroy, *supra* note 1, at 821 n.38 (citing ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 15 (1998)). Significantly, sports league officials began to offer competitive balance as a public justification for the reserve clause only after the Sherman Act was enacted in 1890. STEPHEN F. ROSS & STEFAN SZYMANSKI, *FANS OF THE WORLD, UNITE!: A (CAPITALIST) MANIFESTO FOR SPORTS CONSUMERS* 57–58 (2008).

<sup>9</sup> See Stephen F. Ross & Robert B. Lucke, *Why Highly Paid Athletes Deserve More Antitrust Protection than Unionized Factory Workers*, 33 ANTITRUST BULL. 641, 671 (1997) (discussing *Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965)).

<sup>10</sup> See *Jewel Tea*, 381 U.S. at 680–84.

<sup>11</sup> See *id.* at 682.

<sup>12</sup> See *id.* at 692–94.

to the United Steelworkers of America) wrote a concurring opinion in *Jewel Tea*. Justice Goldberg concluded that the Sherman Act should not constrain the results of lawful collective bargaining between unions and management over labor market restraints that relate directly to wages, hours, and working conditions—topics that are “mandatory subjects of bargaining” under the National Labor Relations Act.<sup>13</sup> In Justice Goldberg’s view, the sad history of antiunion attitudes by federal judges meant that the only proper “accommodation” was to keep the Sherman Act out of labor disputes.<sup>14</sup> Any other approach represented “refusals by judges to give full effect to congressional action designed to prohibit judicial intervention via the antitrust route in legitimate collective bargaining.”<sup>15</sup> However, this opinion did not secure the assent of a majority of the Court. Three justices dissented from the judgment rejecting antitrust liability, and concluded that in cases like these the Sherman Act should govern.<sup>16</sup> Thus, the critical plurality opinion and judgment was that of Justice Byron White, who also garnered three votes for his view that a balanced approach was required in “accommodating the coverage of the Sherman Act to the policy of the labor laws.”<sup>17</sup>

The prime purpose of the Sherman Act is to protect consumers from economic exploitation by monopolists or by firms who gain economic power through anticompetitive agreements.<sup>18</sup> Congress declared that the purposes of the National Labor Relations Act (Wagner Act)<sup>19</sup> are to prevent economic exploitation of workers, minimize industrial disruptions through collective bargaining and regulated strikes and lockouts, and to provide a macroeconomic boost to purchasing power by enhancing incomes of working people.<sup>20</sup> Accommodating these concerns led Justice White to reject the call, later articulated in *Brown I* by Judge Edwards, for a wholesale immunity for “the entire collective bargaining process.”<sup>21</sup> Rather, the plurality judgment concluded that a judicially created “nonstatutory” labor exemption should indeed shield the ban on night meat sales from an antitrust challenge, but only after the Court balanced the Sherman Act’s concern for consumer exploitation (no ability to purchase meat at night) against the Wagner Act’s concern for workers and the industrial process.<sup>22</sup> The Court ultimately favored the latter. Although the anticonsumer effect was indeed severe,

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<sup>13</sup> *Id.* at 727 (Goldberg, J., concurring).

<sup>14</sup> *Id.* at 700–09.

<sup>15</sup> *Id.* at 697.

<sup>16</sup> *Id.* at 735–36 (Douglas, J., dissenting).

<sup>17</sup> *Id.* at 689 (plurality opinion).

<sup>18</sup> See *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979) (describing the purpose of the Sherman Act as “consumer welfare prescription”); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 107 (1984) (requiring justification for agreements that are “unresponsive to consumer preference”).

<sup>19</sup> 29 U.S.C. § 151 (2006).

<sup>20</sup> James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 948–49 (1996).

<sup>21</sup> 50 F.3d 1041, 1050 (D.C. Cir. 1995), *aff’d*, 518 U.S. 231 (1996).

<sup>22</sup> See *Jewel Tea*, 381 U.S. 689–93.

the restriction was sought by the union, it clearly promoted the interests of union butchers, and it minimized disruption (presumably, collective bargaining agreements would be more difficult to achieve if antitrust law precluded the bargain most amenable to workers and employers).<sup>23</sup>

Jewel Tea argued the nighttime sales ban would not adversely affect union butchers because meat could be prepackaged and sold at night without the presence of union butchers. This claim was irrelevant to Justice Goldberg because in his view any mandatory subject of bargaining was exempt from the Sherman Act. It was likewise irrelevant to Justice Douglas because in his view the harm to the public from the restraint on the sale of meat rendered the agreement illegal. This claim was critical, however, to Justice White (and Justices Stewart and Brennan). Justice White opined that if true, Jewel Tea's position "would have considerable merit . . . [f]or then the obvious restraint on the product market . . . would stand alone, unmitigated and unjustified by the vital interests of the union butchers which are relied upon in this case."<sup>24</sup> But the district court concluded that butchers would be disadvantaged, so the *workers' vital interests* needed to be accommodated by exempting the agreement from the labor exemption.

Now suppose that it had been management, not labor, that wanted to ban night meat sales. Suppose further that management had offered a variety of concessions to the Meat Cutters union to secure its support, but the union members wanted the opportunity to work at night (either for the flexibility of hours this would permit or the higher wage rates that supermarkets would be willing to offer). Suppose further that to pressure the union into acceding to the nighttime sales ban, the multiemployer bargaining group locked out the union until it caved. No one can read Justice White's plurality opinion and conclude that, with these factual differences, the Court would have applied the labor exemption. That is, of course, exactly what the Court did thirty-one years later in *Brown II* in a decision written by Justice Stephen Breyer, who was Justice Goldberg's clerk when *Jewel Tea* was decided. But that does not really answer the question Professor LeRoy asks about the "proper" scope of federal jurisdiction.

As Justice John Paul Stevens explained in his lone dissent to *Brown II*,<sup>25</sup> the facts of *Jewel Tea* are fundamentally different from that of the typical sports labor dispute, where the anticompetitive restraint is sought by *employers*. In *Brown II*, the goals of the Sherman Act were subverted due to the economic exploitation by those with market power, but the goals of the Wagner Act were not promoted. *Brown II* thus fails to accomplish what courts are supposed to do when interpreting conflicting provisions of coequal statutes—in Justice White's words, "accommodat[e] . . . the Sherman Act to the policy of the labor laws."<sup>26</sup>

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<sup>23</sup> See *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 962 (2d Cir. 1987) (explaining that if a section of a collective bargaining agreement was struck for antitrust violations, "the entire agreement would unravel").

<sup>24</sup> *Jewel Tea*, 381 U.S. at 692.

<sup>25</sup> 518 U.S. 231, 261–63 (2006) (Stevens, J., dissenting).

<sup>26</sup> *Jewel Tea*, 381 U.S. at 689.

This is particularly problematic in sports because, contrary to Professor LeRoy's claim, challenged labor restraints often have neither the purpose nor effect of enhancing fan interest in the sporting entertainment on offer. First, the economic evidence that fans actually prefer the level of competitive balance that owners claim to seek is incredibly weak.<sup>27</sup> Second, competitive balance is a process that is achieved by making the strong teams weaker and the weak teams stronger.<sup>28</sup> There is little evidence that the labor restraints challenged in the litigation that Professor LeRoy studied actually served this purpose. Indeed, it stands to reason that, all else equal, at the end of each season strong teams will find it difficult, absent labor restraints, to retain the services of all their high-performing players, and weak teams will be desirous of obtaining fresh talent to improve.

Consider the appropriate result if, contrary to Professor LeRoy's unsupported assumption, sports league owners conspire to put on a less attractive, less balanced product in order to economically exploit players.<sup>29</sup> It is not clear that barring antitrust intervention to protect both players and consumers from this sort of economic exploitation serves any Wagner Act goals.

The "my law" versus "your law" theme is also reflected in several other criticisms that Professor LeRoy launches against antitrust litigation with regard to sports league restraints. He argues, as a seemingly self-evident criticism of courts who fail to apply the nonstatutory labor exemption, that the result "substitutes antitrust settlement talks for traditional labor negotiations, even though the bargaining subjects are the same."<sup>30</sup> Certainly to a reader who agrees with Justice White's view that the nonstatutory labor exemption should reflect a balanced accommodation of potentially conflicting federal statutes, it is not exactly clear why this matters. Professor LeRoy strongly believes that negotiations should take place with NFL Commissioner Roger Goodell seated at the center of a table with his chief counsel Jeffrey Pash to his right, as they engage in collective bargaining negotiations with NFLPA Executive Director DeMaurice Smith seated across the table with his chief outside counsel Jeffrey Kessler to his left.<sup>31</sup> The significant problem with the antitrust alternative—where Kessler is seated at the center of the

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<sup>27</sup> See Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. ECON. LIT. 1137, 1156 (2003) (concluding that empirical studies do not support claim that labor market restraints improve competitive balance that fans desire).

<sup>28</sup> See *United States v. Nat'l Football League*, 116 F. Supp. 319, 323–25 (E.D. Pa. 1953) (presenting devices that "a league theoretically might use" to keep its teams "at approximately equal strength and to protect weaker teams from stronger teams").

<sup>29</sup> In the period following the abolition of the strict reserve clause limiting any competition for player services in 1976, competitive balance improved, Major League Baseball attendance increased by 57%, and player salaries increased by 316%. Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 676 (1989); see also Brief of Amicus Curiae Sports Fan Coalition in Support of the Appellees at 25, *Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011) (No. 11-1898), 2011 WL 2129892, at \*25.

<sup>30</sup> LeRoy, *supra* note 1, at 818.

<sup>31</sup> See *id.* at 833.

table representing a class of NFL players in an antitrust class action with Smith to his right, while Pash, representing the NFL, is seated at the center with Goodell to his left—is not clear.

The zeal for the typical way that labor law functions (through collective negotiation leading to agreement and subsequent interpretation and enforcement by arbitrators outside the federal judicial process) and the hostility to the ways “other laws” function (through litigation leading to settlement and subsequent interpretation and enforcement by federal judges interpreting the settlement decree) are also apparent in the criticism of ongoing federal court jurisdiction to enforce settlements in the NFL and NBA.<sup>32</sup> It is true that the attorneys representing the class of players in these cases insisted, as part of the antitrust settlement, that the decree would be interpreted by a federal court and not an arbitrator. But it is also true, although rare, that attorneys representing a labor union could insist that the collective bargaining agreement contain “forceful evidence” of the parties’ intention to exclude portions of the agreement from labor arbitration. As the Supreme Court noted in its landmark judgment requiring federal judges to stay out of labor disputes, judicial forbearance is premised on the enforcement of the parties’ actual or inferred agreement to arbitrate rather than litigate; thus courts have limited powers “when the parties have agreed to submit all questions of contract interpretation to the arbitrator.”<sup>33</sup>

Short of its two critical premises—that sports labor restraints may harm players but benefit fans and the sport’s popularity, and that the Sherman Act must always step aside to protect the “entire collective bargaining process”—Professor LeRoy’s thorough research loses much of its normative force. This provocative contribution is particularly revealing in one respect that he does not explicitly mention, however, akin to Sherlock Holmes’ famous insight that the telling clue was that the sleeping dog did not bark.<sup>34</sup> All of the lawsuits Professor LeRoy studied involved challenges by union-represented players; none involved challenges by the principal beneficiaries of the Sherman Act (sports fans)<sup>35</sup> or, on their behalf, federal or state attorneys general. Even Judge Edwards, whose lower court opinion in *Brown I* was affirmed by the Supreme Court, acknowledged that under *Jewel Tea* a “crucial determinant” in a balanced accommodation of labor and antitrust is the “relative impact on the product market and the interests of union members.”<sup>36</sup> This perhaps suggests that the accommodation that *Jewel Tea* requires would be relevant in litigation brought by consumers, who would be required to show (as was true in that landmark case) an actual anticompetitive effect in the product market—the content of sports league championship series.

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<sup>32</sup> *Id.* at 834–42.

<sup>33</sup> *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960).

<sup>34</sup> See ARTHUR CONAN DOYLE, *THE MEMOIRS OF SHERLOCK HOLMES* 27 (Christopher Roden ed., Oxford Univ. Press 1993) (1894).

<sup>35</sup> See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (addressing the Sherman Act as a consumer protection measure).

<sup>36</sup> *Brown I*, 50 F.3d 1041, 1050 (D.C. Cir. 1995) (citing *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, at 690 n.5 (1965)).