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RESTORING MUTUALITY IN SPORTS CONTRACTS

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ABSTRACT

Contract disputes between professional athletes and sports clubs occur all the time. Historically, when a club accused one of its players of breaching its contract, the player would often use the defense that the contract "lacked mutuality." Over time, however, the mutuality defense fell out of favor and became "all but dead." What caused the demise of the mutuality doctrine? The decline can be explained by considering (1) the rise of the consideration doctrine, (2) the evolution of both unilateral and option contracts, and (3) publications from prominent secondary sources, such as restatements and treatises. Developments in contract law, combined with the movement toward fairer and more equitable dealings between sports clubs and professional athletes, call for the revival of mutuality principles in sports contracts. Such a revival would (1) restore balance in lopsided sports contracts, (2) promote interleague competition, and (3) keep sports contracts up to date with recent developments in workers' rights.

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INTRODUCTION

Contract disputes between professional athletes and sports clubs occur all the time.[1] Historically, when a club accused one of its players of breaching its contract, the player would often use the defense that the contract "lacked mutuality."[2] For example, professional athletes often raised the lack-of-mutuality defense when the club looked to enjoin the player from leaving their agreement and playing for another franchise.[3] By showing the gross imbalance between the contractual obligations of the club and the player, the player could convince a tribunal that his or her contract was "void for a lack of mutuality."[4] Over time, however, the mutuality defense fell out of the court's favor and became "all but dead."[5] The decline of mutuality in sports contracts has received little scholarly attention,[6] although it should. The decline of mutuality in sports contracts raises concerns as to the imbalance of bargaining power between players and teams[7] and as to the restriction of players' individual liberties.[8]

What caused the demise of the mutuality doctrine? What are the ramifications of the doctrine's demise in the context of

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[1] *See* Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685, 690–91 (1981).

[2] JAMES T. GRAY & MARTIN J. GREENBURG, 1 SPORTS LAW PRACTICE § 2.06[1] (LEXIS 2018).

[3] *Id.* at § 2.06[3].

[4] *Id.*

[5] *Id.*; *see also* Val D. Ricks, *In Defense of Mutuality of Obligation: Why "Both Should be Bound, or Neither"*, 78 NEB. L. REV. 491, 515 (1999).

[6] Professor Arthur Corbin provides a general overview of the fall of the mutuality doctrine. *See* 2 CORBIN ON CONTRACTS § 6.1 (2018). The Restatement (Second) of Contracts briefly explains why the mutuality doctrine is no longer essential to contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 79 (A.L.I. 1981). However, these sources do not cover the decline of the mutuality doctrine in the sports context.

[7] Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 7–8 (1971).

[8] Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law*, 16 MARQ. SPORTS L. REV. 261, 270–71 (2006).

sports? Should the doctrine be restored in light of modern developments?

The next section of this paper will begin to answer these questions by reviewing the history of the mutuality doctrine in sports. Specifically, Part I traces the history of the "mutuality of obligation" and "mutuality of remedy" doctrines, and then reviews how courts applied these doctrines to contract disputes between professional athletes and sports clubs. Part II explains the reasons for the mutuality doctrine's demise, especially how the evolution of contract law—particularly the development of the consideration doctrine, unilateral contract, and option contract—led to the fall of the mutuality doctrine. Part III reviews the fall of the mutuality doctrine in sports dealings. Finally, Part IV proposes that recent developments in contract law, combined with the movement toward fairer and more equitable dealings between sports clubs and professional athletes, call for the restoration of the mutuality doctrine in sports.

I. HISTORY OF THE MUTUALITY DOCTRINE

The mutuality doctrine generally takes two forms: mutuality of obligation and mutuality of remedy. Mutuality of obligation stands for the proposition that "both parties must be bound to a contract, or neither is."[9] A contract is void for lack of mutual obligation if each party to the contract does not have some legally enforceable obligation at the time of contract formation.[10] For example, a mere promise made by a man to a woman to marry her is not legally enforceable under the mutuality of obligation doctrine. In *Harrison v. Cage*,[11] the court rejected a woman's claim that a man's promise to marry her was binding while her promise to marry him was not. Even though the man and the woman both exchanged promises to marry, the woman argued that the exchange only imposed a legally enforceable obligation onto the man. The court denied her claim based on the doctrine of mutual obligation.[12]

In contrast, the mutuality of remedy doctrine requires that a remedy be theoretically available to both parties in a contract or

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[9] Ricks, *supra* note 5, at 493.
[10] *Id.* at 493.
[11] Harrison v. Cage (1703) 87 Eng. Rep. 736, 736 (KB).
[12] *Id.*

else neither party is entitled to a remedy.[13] If a contract is such that only one party could ever obtain a remedy for a breach by the other, then the contract is void for lack of mutual remedy.[14] For example, in *Rust v. Conrad*,[15] the court denied a lessee's request for equitable relief because an equivalent remedy was not available to the lessor. Given that the lessee had the sole power to terminate the lease and the lessor had no power to terminate the lease, the court denied the lessee's request for equitable relief because mutuality of remedy between the parties was lacking.[16]

In sports, the mutuality doctrine may also void contracts that lack either the mutuality of obligation or the mutuality of remedy.[17] For example, in *American League Baseball Club of Chicago v. Chase*,[18] a professional baseball club could not enjoin its star baseball player, Harold Chase, from playing in a rival league after Chase cancelled his contract with the club. The court reasoned that the obligations and remedies set out in the contract between the club and the player were grossly uneven. While the player was bound to play for the baseball club indefinitely, the club had the right to terminate the contract at any time upon ten days' notice.[19] According to the court, if the club were to terminate the contract, Chase would be "remediless" because he could "neither secure specific performance of the contract in an action against the [club] in a court of equity, nor damages in an action at law."[20] Since the contract constituted an "absolute lack of mutuality, both of obligation and of remedy," the court found for the player and denied the club's request for a negative injunction.[21] Courts applied similar reasoning under mutuality principles in other similarly situated sports contract cases.[22]

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[13] Ricks, *supra* note 5, at 498–99.

[14] *Id.*

[15] Rust v. Conrad, 11 N.W. 265, 266–67 (Mich. 1882).

[16] *Id.*

[17] Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6, 14 (N.Y. Sup. Ct. 1914); *see also* Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630, 630 (1914).

[18] *Chase*, 149 N.Y.S. at 14.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See, e.g.*, *Johnson*, 190 Ill. App. at 630.

II. DECLINE OF THE MUTUALITY DOCTRINE

The mutuality doctrine was considered an essential element to contracts up until the twentieth century.[23] By July 1969, the Third, Sixth, and Seventh Circuit Courts of Appeals found that mutuality of obligation was no longer essential.[24] State courts reached similar conclusions in Alaska, Arkansas, California, Illinois, Iowa, Kentucky, Ohio, Pennsylvania, Texas, Utah, Virginia, and Washington.[25] What caused the decline of the mutuality doctrine in contract law? The decline can be explained by considering (1) the development of the consideration doctrine, (2) the rise of both unilateral and option contracts, and (3) publications from prominent secondary sources, such as the restatements and treatises.

A. REPLACING THE MUTUALITY DOCTRINE WITH THE CONSIDERATION DOCTRINE

One of the main reasons for the mutuality doctrine's decline is that courts increasingly began to replace the mutuality doctrine with the doctrine of consideration.[26] The consideration doctrine generally functions in contract law to make promises legally enforceable.[27] Under the consideration doctrine, a promise by one party becomes enforceable if it was bargained in exchange for a performance or return promise by another party.[28] As long as there is a bargained-for exchange, each party need not have a legally enforceable obligation at the time of contract formation as is required under the mutuality doctrine.[29]

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[23] Ricks, *supra* note 5, at 492.

[24] Consol. Labs., Inc. v. Shandon Sci. Co., 413 F.2d 208, 212 (7th Cir. 1969); Hunt v. Stimson, 23 F.2d 447, 450 (6th Cir. 1928); Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3d Cir. 1924).

[25] 2 CORBIN ON CONTRACTS § 6.1, at 1 n.3 (2018) (listing state courts that regard "mutuality" as a nonessential component in contracts).

[26] *Id.*

[27] RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. a (A.L.I. 1981) ("[T]he phrase 'sufficient consideration' [has been used] to express the legal conclusion that one requirement for an enforceable bargain is met.").

[28] *Id.*

[29] RESTATEMENT (SECOND) OF CONTRACTS § 78 cmt. a (A.L.I. 1981) ("The fact that no legal remedy is available for breach of a promise

For example, in *Hay v. Fortier*,[30] the court found that a contract was valid between a creditor and a debtor, even though the creditor had no legally enforceable obligation when the parties signed their contract. The creditor promised to forbear suit against the debtor, who had already defaulted on her debt, in exchange for the debtor's promise to repay the entire debt balance within three months.[31] The creditor's promise to forbear suit was not a legal obligation because the creditor was already entitled to the debt repayments the debtor again promised to repay.[32] The court nevertheless found that, although the contract was "not originally binding for want of mutuality," the contract was valid because the parties bargained for their exchange of promises and partially performed each promise.[33] *Hay* represents an early example of how courts began to discredit mutuality of obligation in relation to the consideration doctrine.[34]

The mutuality doctrine faced further decline as courts began to accept the consideration doctrine's tenet that the demand for "symmetry" or equivalence in the obligations exchanged "is a species of the forbidden inquiry into the adequacy of consideration."[35] "Adequate consideration" is consideration that is equal or adequate in value to the thing being conveyed.[36] However, the role of the court is not to measure the value of consideration.[37] Under the consideration doctrine, courts do not require adequate consideration at all.[38] Consideration need only be "something which the law regards as of value" in order to be sufficient.[39]

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does not prevent it from being a part of a bargain or remove the bargain from the scope of the general principle that bargains are enforceable.").

[30] Hay v. Fortier, 102 A. 294, 295 (Me. 1917).

[31] *Id.* at 294.

[32] *Id.*

[33] *Id.* at 295.

[34] 2 CORBIN ON CONTRACTS § 6.1, at 7 (2018).

[35] Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983); Estrada v. Hanson, 10 N.W.2d 223, 225–26 (Minn. 1943); Farrell v. Third Nat'l Bank, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936).

[36] *Farrell*, 101 S.W.2d at 163.

[37] RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c (A.L.I. 1981).

[38] *Estrada*, 10 N.W.2d at 225.

[39] *Id.* at 225–26.

For example, in *Pine River State Bank v. Mettille*,[40] the court ruled that there was sufficient consideration to recognize a new employee benefit provision that was added to a previously-made valid employment contract. The employer claimed that the provision was invalid because it was added without "additional, independent consideration" to the employer.[41] The court rejected the employer's argument, however, finding that the employee's continued performance of his services—and election not to withdraw from the contract despite his freedom to do so—constituted a legally valuable consideration.[42] Although the consideration may have appeared inadequate in relation to the new employee benefit provision, the court ruled that there was "no additional requirement of equivalence in the values exchanged . . . or 'mutuality of obligation'" because the requirement of consideration was met by the employer's continued performance.[43] Mere inadequacy of consideration or mutuality was not valid grounds for setting aside the contract.[44]

Moreover, the mutuality doctrine experienced further decline as more courts outright replaced the mutuality doctrine with the doctrine of consideration.[45] In *Meurer Steel Barrel Co. v. Martin*,[46] the Third Circuit preferred the consideration doctrine to the mutuality doctrine in a patent case. Under the terms of a licensing agreement, a patent owner had the sole right to terminate the agreement with his manufacturer.[47] When the manufacturer

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[40] *Mettille*, 333 N.W.2d at 629.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*; *see also Farrell*, 101 S.W.2d at 163.

[45] Consol. Labs., Inc. v. Shandon Sci. Co., 413 F.2d 208, 211 (7th Cir. 1969) ("As a matter of law, mutuality of obligation is not essential to the validity and enforceability of an agreement where it is otherwise supported by valid consideration."); Hunt v. Stimson, 23 F.2d 447, 450 (6th Cir. 1928) ("The general principles applied in courts of equity may develop a lack of mutuality into a bar to relief; but in courts of law that defense rests on the legal rule that a contract must be supported by consideration . . . ."); Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3d Cir. 1924) ("The terms 'consideration' and 'mutuality of obligation' are sometimes confused. 'Consideration is essential; mutuality of obligation is not unless the want of mutuality would leave one party without a valid or available consideration for his promise.'").

[46] *Meurer Steel Barrel Co.*, 1 F.2d at 688.

[47] *Id.*

defaulted on certain royalty payments the patent owner claimed that the manufacturer had breached their agreement. In response, the manufacturer argued that their agreement was void for lack of mutuality due to the provision that gave the patent owner the sole right to terminate the contract.[48] The Third Circuit Court held that the agreement was valid because the "obligation of each party [was] supported by a consideration moving from the other," that being the licensed right to manufacture the patented product in exchange for royalty payments.[49] The court of appeals reasoned that while consideration was essential to the contract, mutuality of obligation was not.[50] Mutuality of obligation would only be essential where the "want of mutuality would leave one party without a valid or available consideration for his promise."[51] Because the licensing agreement contained a bargained-for exchange in which the manufacturer knowingly agreed to pay royalty fees in exchange for the right to make the patent owner's invention, the Court of Appeals found consideration between the parties and ruled that the licensing agreement was valid.[52] "Harsh" terms or "unequal" obligations within the contract were not dispositive of a lack of consideration.[53]

B. RISE OF UNILATERAL AND OPTION CONTRACTS

By its very nature, the mutuality doctrine cannot be clearly reconciled with unilateral and option contracts.[54] A unilateral contract, which consists of an exchange of a promise for a non-enforceable performance, is void under the mutuality doctrine because each party to the contract does not have—at the

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[48] *Id.*

[49] *Id.* at 688–89.

[50] *Id.* at 688.

[51] *Id.*

[52] *Id.* at 689.

[53] *Id.* at 688.

[54] *See* 2 CORBIN ON CONTRACTS § 6.1, at 1 (2018) ("If mutuality of obligation were a requirement for contract formation, unilateral contracts and option contracts would be 'void for lack of mutuality of obligation.'").

time of contract formation—a legally enforceable obligation.[55] For example, in a unilateral contract in which A promises to pay B ten dollars if B mows A's lawn, A is bound to an enforceable promise whereas B has the option to perform and get paid, or to not perform and not get paid.[56] Such a unilateral contract would be void under the mutuality doctrine because B is not legally obliged to perform.[57]

Yet courts have not doubted the existence of unilateral and option contracts, and have held that such contracts, regardless of mutuality, are valid if they are supported by consideration.[58] Unlike parties in a bilateral contract, parties in a unilateral contract do not both have a legally enforceable obligation until consideration is conveyed by the promisee through performance or partial performance.[59] Whether the consideration exchanged is of symmetrical or equal value in accordance with the mutuality doctrine is irrelevant in unilateral contracts.[60] "It is enough that the duty unconditionally undertaken by each party [to the unilateral contract] be regarded by the law as a sufficient consideration."[61]

Courts have similarly ruled that the mutuality doctrine does not apply to option contracts which, like unilateral contracts, lack a legally enforceable obligation by each party at the time of contract formation.[62] Under a typical option contract, the option giver promises to act if the option holder exercises the option.[63] The option holder has no legal obligation to exercise the option,

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[55] *Id.* at 2; *see also* Crawford v. Gen. Contract Corp., 174 F. Supp. 283, 297 (W.D. Ark. 1959) (stating that there is no "mutuality" of obligation in a unilateral contract).

[56] Ricks, *supra* note 5, at 493.

[57] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018).

[58] *Id.*; *see also Crawford*, 174 F. Supp. at 297; King v. Indus. Bank of Wash., 474 A.2d 151, 156 (D.C. 1984); Weather-Gard Indus. v. Fairfield Sav. & Loan Ass'n, 248 N.E.2d 794, 799 (Ill. App. Ct. 1969).

[59] *Weather-Gard Indus.*, 248 N.E.2d at 799.

[60] *Crawford*, 174 F. Supp. at 297.

[61] *Id.*

[62] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018); *see also* Kowal v. Day, 98 Cal. Rptr. 118, 121 (Ct. App. 1971); Colligan v. Smith, 366 S.W.2d 816, 819 (Tex. App. 1963).

[63] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018). *See also* Michael J. Cozzillio, *The Option Contract: Irrevocable Not Irrejectable*, 39 CATH. U. L. REV. 491, 503–05 (1990) (explaining the meaning and significance of a typical option contract).

but can do so in order to enforce the option giver's promise.[64] For example, in an option contract in which A promises to sell a parcel of land to B if B exercises his option to be the first purchaser of the property, A is bound to an enforceable promise whereas B has the choice to either exercise the option and buy the land or forgo the option.[65] Under the mutuality doctrine, this option contract would be void because B is "under no legal duty, while at the same time [A] is bound."[66]

Despite the lack of mutuality in option contracts, courts have recognized the validity of "thousands of 'option contracts' that are annually made and performed."[67] For example, in *Kowal v. Day*,[68] the court rejected the option giver's contention that his contract was void on grounds that it lacked mutuality with the option holder. Whether the contract was valid depended not on mutuality but on whether the contract was supported by sufficient consideration.[69] Because the option holder conveyed sufficient consideration by incurring costs and delivering benefits to the option giver in anticipation of exercising his option, the court ruled that the option contract was valid.[70] The validity of option contracts thus depends on "consideration for the contract."[71]

Taken together, numerous courts in unilateral and option contract cases demonstrated throughout the twentieth century that mutuality is not "an essential element in every valid contract."[72] Both unilateral and option contracts lack mutuality of obligation, yet courts have not doubted their validity.[73] Ultimately, the mutuality doctrine lost force in the courtroom as more courts accepted unilateral and option contracts.[74]

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[64] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018).

[65] *Id.* at 2–3.

[66] *Id.* at 2.

[67] *Id.*

[68] Kowal v. Day, 98 Cal. Rptr. 118, 120 (Ct. App. 1971).

[69] *Id.* at 122.

[70] *Id.*

[71] *Id.*; *see also* Colligan v. Smith, 366 S.W.2d 816, 820 (Tex. Ct. App. 1963).

[72] 2 CORBIN ON CONTRACTS § 6.1, at 2 n.3 (2018). (citing Armstrong Paint & Varnish Works v. Cont'l Can Co., 133 N.E. 711, 714 (Ill. 1921)).

[73] *Id.*

[74] *Id.* at 1–3.

C. SECONDARY SOURCES ESTABLISH THE CONSIDERATION DOCTRINE OVER MUTUALITY

In addition to court decisions, the publication of distinguished secondary sources contributed to the decline of the mutuality doctrine.[75] In 1981, the Restatement (Second) of Contracts was published, and it dispensed with the contractual requirement of mutuality of obligation where consideration was met.[76] Section 79 of the Restatement (Second) of Contracts provides that "mutuality of obligation" is not "essential to a contract,"[77] and that "the word 'mutuality' . . . has no definite meaning."[78] Because there are plenty of valid contracts based on consideration rather than mutuality, section 79 explicitly asserts that "[i]f the requirement of consideration is met, there is no additional requirement of . . . mutuality of obligation."[79] Furthermore, section 363 of the Restatement (Second) of Contracts states that "the law does not require that the parties have [mutuality of remedy]."[80] The fact that a specific type of remedy, such as specific performance or an injunction, is not available to one party is "not a sufficient reason for refusing it to the other party."[81] Following the publication of the Restatement (Second) of Contracts, more than one hundred courts have cited either section 79 or 363 for the proposition that where there is consideration, mutuality is no longer required for a contract to be valid.[82]

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[75] Ricks, *supra* note 5, at 491–92 (listing several secondary sources of authority claiming that the mutuality doctrine is obsolete).

[76] RESTATEMENT (SECOND) OF CONTRACTS § 79 (A.L.I. 1981).

[77] *Id.* at cmt. a.

[78] *Id.* at cmt. f.

[79] *Id.*

[80] RESTATEMENT (SECOND) OF CONTRACTS § 363 cmt. c (A.L.I. 1981).

[81] *Id.*

[82] A Lexis Shepard's cite of sections 79 and 363 resulted in approximately 116 cases that cite either section 79 or 363 for said proposition. For example, the First Circuit case United States v. Vizcarrondo-Casanova, 763 F.3d 89, 103 (1st Cir. 2014) cites section 79 for the proposition that "lack of mutuality of obligation does not prevent contract formation where there is consideration."

Professor Arthur Corbin's treatise, CORBIN ON CONTRACTS, has also been instrumental to discrediting the mutuality doctrine.[83] Specifically, over 125 courts have cited Corbin to support the proposition that mutuality is not a necessary element of a contract.[84] Just like the Restatement (Second) of Contracts, Corbin writes, "it is consideration that is necessary [to a contract], not mutuality of obligation."[85] Corbin further claims that "the [mutuality] doctrine should simply be abandoned,"[86] on the ground that the doctrine creates "confusion of thought and potential for error."[87] Subsequent publications by contract law professors have reaffirmed, and further contributed to, the decline of the mutuality doctrine.[88]

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The reasons for the mutuality doctrine's decline include the development of the consideration doctrine, the rise of unilateral and option contracts, and publications from prominent secondary sources. First, the mutuality doctrine's tenet that both parties need a legally enforceable obligation at the time of contract formation began to give way as more courts adopted the position that consideration, rather than mutuality, is essential to a contract.[89] Courts also increasingly viewed the mutuality doctrine's demand for symmetry or equivalence in the obligations exchanged as a forbidden inquiry into the adequacy of

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[83] 2 CORBIN ON CONTRACTS § 6.1, LexisNexis (database updated 2018); Ricks, *supra* note 5, at 491–92.

[84] A Lexis search ("corbin" /s "mutuality" and "consideration") resulted in approximately 125 cases that cite Professor Corbin's work for said proposition. For example, the Seventh Circuit case Consol. Lab., Inc. v. Shandon Sci. Co., 413 F.2d 208, 212 (7th Cir. 1969) cites 2 CORBIN ON CONTRACTS § 6.1 for the proposition that "it is consideration that is necessary, not mutuality of obligation." *Consol. Labs., Inc.*, 413 F.2d at 212.

[85] 1–3 JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 66 (5th ed. 2011).

[86] *Id.*

[87] *Id.*

[88] *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 4.12, at 201 (4th ed. 1998) ("The concept of 'mutuality of obligation' has been thoroughly discredited."); MURRAY, *supra* note 85 at § 66 (claiming that the mutuality doctrine is "devoid of any substance" and "meaningless and confusing.").

[89] 2 CORBIN ON CONTRACTS § 6.1, at 1 (2018).

consideration.[90] Second, the mutuality doctrine began losing force in courtrooms as courts began to recognize the validity of unilateral and option contracts.[91] Rather than striking them down for want of mutuality, courts accepted unilateral and option contracts that were supported by consideration.[92] Finally, proposals from distinguished secondary sources, such as the Restatement (Second) of Contracts, to dispense with the mutuality doctrine influenced numerous courts to discredit the need for mutuality of obligation and mutuality of remedy.[93] By the late twentieth century, the mutuality "doctrine [was] all but dead."[94]

III. DECLINE OF THE MUTUALITY DOCTRINE IN SPORTS

In sports, the mutuality doctrine similarly began to lose force in the early twentieth century as courts increasingly replaced the mutuality doctrine with the consideration doctrine.[95] Many courts began viewing "mutuality of obligation" and "mutuality of remedy" as nonessential to sports contracts.[96] The landmark case *Philadelphia Ball Club, Ltd. v. Lajoie* established that as long as contracts between sports clubs and professional athletes contained

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[90] Pine River St. Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983); Estrada v. Hanson, 10 N.W.2d 223, 225–26 (Minn. 1943); Farrell v. Third Nat'l Bank, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936).

[91] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018). *See also* Crawford v. Gen. Cont. Corp., 174 F. Supp. 283, 297 (W.D. Ark. 1959); King v. Indus. Bank of Washington, 474 A.2d 151, 156 (D.C. Cir. 1984); Weather-Gard Indus. v. Fairfield Sav. & Loan Ass'n, 248 N.E.2d 794, 799 (Ill. App. Ct. 1969).

[92] *See, e.g.*, Kowal v. Day, 98 Cal. Rptr. 118, 122 (Ct. App. 1971) (stating that whether a contract was valid depended not on mutuality, but on whether the contract was supported by a sufficient consideration).

[93] *See, e.g.*, United States v. Vizcarrondo-Casanova, 763 F.3d 89, 103 (1st Cir. 2014) (citing section 79 for the proposition that "lack of mutuality of obligation does not prevent contract formation where there is consideration."); RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. f (A.L.I. 1981).

[94] JAMES T. GRAY, 1 SPORTS LAW PRACTICE § 2.06(3) (Matthew Bender, 3d ed. 2018).

[95] Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 244 (App. Ct. 1969); Cent. N.Y. Basketball v. Barnett, 181 N.E.2d 506, 512 (C.P. Cuyahoga Cty. 1961); Philadelphia Ball Club, Ltd. v. Lajoie, 51 A. 973, 975–76 (Pa. 1902).

[96] *Lajoie*, 51 A. at 974.

valid consideration, those contracts were not void for lack of mutuality.[97]

In *Lajoie*, a professional baseball player, Napoleon Lajoie, attempted to void his contract with the Philadelphia Ball Club ("Philadelphia") for lack of mutuality.[98] Philadelphia had sole power to terminate Lajoie's contract upon ten days' notice and to extend Lajoie's contract for up to six months during the contract's final year.[99] Lajoie claimed that such a contractual arrangement lacked mutuality, but the court found the contract to be valid anyway.[100] Specifically, the court held that the contract was valid because it contained valid consideration by evidence of (1) the terms of the contract which explicitly stated that Lajoie's wages constituted consideration;[101] (2) Lajoie's "deliberat[e] accept[ance]" of the contract containing this explicit language;[102] and (3) the good faith partial performance by both Lajoie and Philadelphia under the terms of the agreement.[103] Although the remedies available to each party favored Philadelphia, the big sports club, over Lajoie, the individual athlete, the court ruled that mutuality of remedy need not require each party to have "precisely the same remedy, either in form, effect, or extent" for the contract to be valid.[104]

After *Lajoie*, other courts also began to uphold the validity of sports contracts, despite claims that they lacked mutuality.[105] In *Central N.Y. Basketball v. Barnett*,[106] the court denied a professional basketball player's claim that his sports contract, which empowered the club to unilaterally renew their

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[97] *See Barnett*, 181 N.E.2d at 512; *see also Barry*, 80 Cal. Rptr. at 244.

[98] *See Lajoie*, 51 A. at 975.

[99] *Id.* at 973–74.

[100] *Id.* at 975.

[101] *Id.* at 974.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 975.

[105] *See, e.g.*, Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 245 (App. Ct. 1969); Cent. N.Y. Basketball v. Barnett, 181 N.E.2d 506, 512 (Ohio Ct. Com. Pl. 1961); C. Paul Rogers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 S.M.U. L. REV. 325, 345 (2002) (stating that the holdings of the *Lajoie* court "has left a more lasting legacy with respect to contract law").

[106] *Barnett*, 181 N.E.2d at 512.

contract for one year during the contract's final year, lacked mutuality. Citing *Lajoie*, the *Barnett* court found that the club provided "sufficient consideration" by paying the player's wage in exchange for the player's "obligations and duties" under their contract, including the renewal provisions.[107] The court further observed, in accordance with *Lajoie*, that the player need not have precisely the same remedies as the club because it was sufficient that the player had the "possibility of enforcing all the rights for which he stipulated in the agreement, which is all that he can reasonably ask."[108] "Owing to the peculiar nature and circumstances of the [sports] business," the club's sole right to unilaterally renew the player's contract did not "make the entire contract inequitable."[109] Mutuality of obligation and mutuality of remedy were unnecessary because the player's contract was supported by a valid consideration from the club.[110]

Several other courts ruling in sports cases demonstrate reserve about measuring the degree of mutuality and the adequacy of the things exchanged between players and clubs.[111] Like the court in *Farrell v. Third Nat'l Bank*,[112] some courts believed, in accordance with the consideration doctrine, that it was not their duty to measure value and safeguard players against imprudent or improvident contracts.[113] For example, in *Nassau Sports v. Peters*,[114] the court placed a heavy burden on the player to prove that his NHL contract was inequitable and voidable for lack of mutuality. Despite the player's filing of an affidavit, the court claimed that the mutuality issue was "not seriously . . . pressed" and remarked in a single sentence that "the contract on its face affirmatively indicate[d] grounds for finding such mutuality."[115] The court's unwillingness to delve deeper beyond what appeared

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[107] *Id.*

[108] *Id.* at 513.

[109] *Id.* at 512.

[110] *Id.*

[111] Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972); Nassau Sports v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972).

[112] Farrell v. Third Nat'l Bank, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936).

[113] *Nassau Sports*, 352 F. Supp. at 876.

[114] *Id.*

[115] *Id.*

on the contract's face exemplified the court's reluctance to measure the adequacy of the things exchanged.[116]

Moreover, the mutuality doctrine experienced further decline in the sports context as more courts recognized the validity of unilateral and option contracts.[117] Although unilateral and option contracts are by definition void under the mutuality doctrine, courts in sports contract cases recognized the validity of such contracts if supported by consideration.[118] For example, in *Lewis v. Rahman*, Boxer Hasim Rahman attempted to void his option contract with opponent boxer Lennox Lewis on the grounds that the contract's rematch option clause lacked mutuality.[119] Rahman specifically argued that the court should not enjoin him from fighting boxers other than Lewis, the sole rematch option holder, because the option was available only to Lewis and not to himself.[120] The court dismissed Rahman's argument, finding that the contract's text expressed that the rematch option clause was supported by consideration,[121] and that Lewis further conveyed consideration by "binding [himself] to fight the rematch on the terms described in the [contract] and to negotiate in good faith for a purse that exceeds the stipulated minimum."[122] The court's decision demonstrated the decline of mutuality as an essential element of a sports contract.[123]

Just as the mutuality doctrine experienced decline in the general realm of contract law, mutuality principles also declined in twentieth century sports contract cases. Like the court in *Meurer Steel Barrel Co.*,[124] the court in *Lajoie*[125] reasoned that even though a sports contract lacked mutuality, it was still valid because it contained sufficient consideration between the parties.

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[116] *See* 2 CORBIN ON CONTRACTS § 6.1, at 6 (2018) (stating that the demand for mutuality is "simply a species of the forbidden inquiry into the adequacy of consideration").

[117] *See, e.g.*, Lewis v. Rahman, 147 F. Supp. 2d 225, 237 (S.D.N.Y. 2001).

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.* at 229.

[122] *Id.* at 237.

[123] *Id.*

[124] Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3d Cir. 1924).

[125] Phila. Ball Club, Ltd. v. Lajoie, 51 A. 973, 975 (Pa. 1902).

The court in *Nassau Sports*,[126] like the court in *Farrell*,[127] also demonstrated reserve about measuring the degree of mutuality and adequacy of the things exchanged in sports contracts. Furthermore, like the courts in *Kowal*[128] and *Colligan*,[129] the court in *Rahman*[130] held that a sports option contract, which lacked mutuality, was valid on grounds that it was supported by consideration. Taken together, the developments in sports contract cases indicate that the mutuality doctrine lost force in the courtroom in both the sports world and the general world of contract law.

IV. THE NEED TO REVIVE THE MUTUALITY DOCTRINE IN THE CONTEXT OF SPORTS

Although the mutuality doctrine fell out of favor among courts during the twentieth century, recent developments in contract law, equity, and sports culture call for a restoration of the mutuality doctrine in the sports context. Specifically, (1) concerns about the power imbalance of sports contracts, (2) the benefits of interleague competition, and (3) recent developments in workers' rights warrant the revival of the mutuality doctrine.

A. POWER IMBALANCE OF SPORTS CONTRACTS

Concerns about the power imbalance of professional sports contracts necessitate a restoration of the mutuality doctrine. In order to promote fairer and more equitable contracts, courts must not be so quick to uphold the validity of agreements that are heavily tilted in sports clubs' favor.[131] Courts should recognize that the obligations and available remedies between players and

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[126] Nassau Sports v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972).

[127] Farrell v. Third Nat'l Bank, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936).

[128] Kowal v. Day, 98 Cal. Rptr. 118, 122 (Ct. App. 1971).

[129] Colligan v. Smith, 366 S.W.2d 816, 820 (Tex. Civ. App. 1963).

[130] Lewis v. Rahman, 147 F. Supp. 2d 225, 237 (S.D.N.Y. 2001).

[131] *See* Eliot Axelrod, *The Efficacy of the Negative Injunction in Breach of Entertainment Contracts*, 46 J. MARSHALL L. REV. 409, 414 (2013).

clubs are often grossly uneven.[132] This is especially true in the NFL. For example, the standard NFL contract not only gives football clubs the power to terminate player contracts on short notice, but they also enjoin players from leaving the contract on their own to sign with other teams or leagues.[133] These provisions generally extend to players in the last year of their contract and those who have been franchise tagged.[134] The power assumed by football clubs to impose such negative injunctions on professional athletes without any recourse is far from fair or equitable.[135] This

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[132] Dom Cosentino, *Why Only the NFL Doesn't Guarantee Contracts*, DEADSPIN (Aug. 1, 2017), https://deadspin.com/why-only-the-nfl-doesnt-guarantee-contracts-1797020799; Frank Therber, *The Anatomy of an NFL Player Contract*, FORBES (Mar. 8, 2016), www.forbes.com/sites/franktherber/2016/03/08/the-anatomy-of-an-nfl-player-contract/#1ff063183faa.

[133] Therber, *supra* note 132 (stating contracts are team friendly, and the teams do not guarantee portions of the contract); *see also NFL Player Contract*, SEC. AND EXCH. COMM'N (2012), https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm ("Without prior written consent of the Club, Player will not play football or engage in activities related to football otherwise than for Club or engage in any activity other than football which may involve a significant risk of personal injury. Player represents that he has special, exceptional and unique knowledge, skill, ability, and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages. Player therefore agrees that Club will have the right, in addition to any other right which Club may possess, to enjoin Player by appropriate proceedings from playing football or engaging in football related activities other than for Club or from engaging in any activity other than football which may involve a significant risk of personal injury.").

[134] *NFL Player Contract*, *supra* note 133.

[135] *See* Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6, 14 (N.Y. Sup. Ct. 1914) (stating that a sports contract lacked mutuality of remedy because only the club could use a negative injunction on the player); *NFL Player Contract*, *supra* note 133 (containing a negative injunction clause available only to the club). Negative injunctions have also been used by entertainment producers on artists and singers. *See* Sarah Swan, *A New Tortious Interference with Contractual Relations: Gender and Erotic Triangles in* Lumley v. Gye, 35 HARV. J. L. & GENDER 167, 168 n.3 (2012) (explaining the Lumley rule, "which holds that a negative injunction may be awarded against artists and performers in circumstances where specific performance cannot be granted").

lack of mutuality of remedy is the same reason the court cited in *Chase* to void the player's contract with the baseball club.[136] This concept should be applied to NFL contracts. Currently, when a player leaves an NFL contract, the lack of mutuality of remedy unfairly allows the football club to impose negative injunctions that prohibit the player from playing anywhere else.[137] The players are left remediless and with no recourse. They cannot compel a club to rehire them. They cannot prohibit a club from hiring replacement players. They even have no guaranty that they will be compensated through salary or otherwise.[138] The mutuality doctrine would not permit such imbalance in these players' contracts.

To be sure, negative injunctions are often the only realistic way to prevent players from committing egregious contract breaches and to deter players from "contract-jumping."[139] One commentator has even called for affirmative injunctions to be used to ensure players specifically perform their contracts.[140] That being said, sports clubs are not unconditionally entitled to negative injunctions.[141] When enforcing negative injunctions, sports clubs are required to show that they are acting in good faith, that they would suffer irreparable harm if not for the negative injunction, and that they would suffer more harm than the player without the negative injunction.[142] If sports clubs can make a successful showing of these requirements, many courts will rule in their favor.[143]

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[136] *Chase*, 149 N.Y.S. at 14.

[137] *See* Therber, *supra* note 132 (describing how, when some NFL players get cut, they do not get any money remaining on their contract).

[138] *Id.*

[139] *See* Axelrod, *supra* note 131, at 427.

[140] *See* Rapp, *supra* note 8, at 263 (arguing that affirmative injunctions against professional athletes are warranted because the common arguments against the use of affirmative injunctions have considerably less force in the sports context).

[141] *See* Bos. Celtics Ltd. P'ship v. Shaw, 908 F.2d 1041, 1048 (1st Cir. 1990) (stating the requirements that clubs must meet when looking for a negative injunction against their players).

[142] *Id.* at 1048–49.

[143] *Id.* at 1049 (holding that a sports club met the requirements to obtain a negative injunction); *see, e.g.*, Erving v. Va. Squires Basketball Club, 468 F.2d 1064, 1066–67 (2d Cir. 1972); Lewis v.

But this is not the case when sports clubs act with "unclean hands" resulting in a balance of harms tilting toward the player.[144] Sports clubs may use negative injunctions to artificially suppress player wages and to restrict market competition by obstructing the development of rival leagues.[145] Negative injunctions have also been used to prevent professional athletes from testing the market and preparing adequately for their next contracts.[146] Moreover, the use of negative injunctions may cause players severe irreparable harm.[147] Given that the average career of an NFL player lasts only three years,[148] negative injunctions stretching for a year or more substantially deprives players of their ability to earn a living. Although mutuality principles should not

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Rahman, 147 F. Supp. 2d 225, 237 (S.D.N.Y. 2001); Nassau Sports v. Peters, 352 F. Supp. 870, 882 (E.D.N.Y. 1972).

[144] *See* Bruce Arthur, *NFL's New Anthem Policy Shows League Has Capitulated to Bad Faith*, THE STAR (May 23, 2018), https://www.thestar.com/sports/football/2018/05/23/nfls-new-anthem-policy-shows-league-has-capitulated-to-bad-faith.html (suggesting that NFL club owners have colluded to cut and not sign certain players); Scott Stossel, *The NFL is Evil—and Unstoppable*, THE ATLANTIC (July 2015), https://www.theatlantic.com/magazine/archive/2015/07/nfl-evil-unstoppable/395306/ (listing several bad faith acts of the NFL authorities); Mike Tanier, *NFL Teams Need to Open the Book and Show Players (and Taxpayers) the Money*, BLEACHER REPORT (July 19, 2018), https://bleacherreport.com/articles/2786655-nfl-teams-need-to-open-the-books-and-show-players-and-taxpayers-the-money (claiming that NFL club owners are not giving players their fair share in collective bargaining); *see also* Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129, 147 (S.D. Ohio 1974) (stating that the balance of harms in its negative injunction case favored the player).

[145] John Charles Bradbury, *Monopsony and Competition: The Impact of Rival Leagues on Player Salaries During the Early Days of Baseball*, 65 EXPLORATIONS IN ECON. HIST. 55, 59 (2017) (discussing the economics of rival league entry and deterrence).

[146] *See Bergey*, 453 F. Supp. at 133–34 (discussing a sports club's attempt to prevent its player from contracting with another club for his future services).

[147] *Id.* at 138 (stating that players would suffer substantial harm if enjoined).

[148] John Keim, *With Average NFL Career 3.3 Years, Players Motivated to Complete MBA Program*, ESPN (July 29, 2016), http://www.espn.com/blog/nflnation/post/_/id/207780/current-and-former-nfl-players-in-the-drivers-seat-after-completing-mba-program.

be used to deny the use of all negative injunctions, they should be used to hold clubs accountable for acting in bad faith. Now that professional football players have more opportunities to earn a living by playing in one of several professional football leagues, such as the NFL or XFL, courts should restore the mutuality doctrine in order to prevent clubs of one league from restricting their players from playing in another.

B. INTERLEAGUE COMPETITION

Reviving the mutuality doctrine to prevent clubs from using negative injunctions against their players in bad faith would promote interleague competition in the U.S., create a better sports product, and serve the public interest.[149] Negative injunctions harm rival leagues when the athletes they wish to recruit are bound up in contracts with clubs for which the athletes no longer play.[150] As a result, rival leagues cannot compete as rigorously for the services of valuable players.[151] Yet the emergence of rival leagues should be encouraged because they offer many benefits to the general economy of the sport.[152] Interleague competition creates more opportunities for players to earn optimal wages and health and security benefits.[153] Competition between leagues also expands public access to sports franchises in their cities.[154] Under the single-league system of the NFL, for example, club owners may take advantage of cities that depend on the NFL franchise for

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[149] *See, e.g.*, *Bergey*, 453 F. Supp. at 138 (stating that the public interest would be served by denying a sports club's request for a negative injunction and promoting interleague competition).

[150] *Id.*

[151] *Id.*

[152] Bradbury, *supra* note 145, at 66 (describing the positive salary effects induced by rival league entry); XiaoGang Che & Brad R. Humphreys, *Competition Between Sports Leagues: Theory and Evidence on Rival League Formation in North America*, 46 REV. INDUS. ORG. 127, 140–41 (2015) (reviewing the benefits of interleague competition on media revenues, player compensation, player supply, and cities).

[153] *See* Stephen F. Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625, 632 (2002) (stating that interleague competition would give clubs greater incentive to improve the quality of their product).

[154] Che & Humphreys, *supra* note 152, at 141 (stating that interleague competition incentivizes expansion of teams into new cities that are without teams).

revenue.[155] Cities without an NFL franchise may only get an NFL franchise by paying millions of public tax dollars to fund construction of a new stadium.[156] Existing NFL clubs have also threatened to pick up and leave if their current home cities do not pay millions in public tax dollars to renovate old stadiums or build new stadiums.[157] NFL clubs are able to exercise this type of power because they control the professional football market.[158] With the emergence of a rival league, however, NFL clubs would be less able to exploit the public's hard-earned tax dollars, and more cities could enjoy their own professional football teams.[159] Reviving the mutuality doctrine to prevent clubs from using negative injunctions in bad faith would open the door to these rival leagues, thereby improving public access to football and bringing professional football to new cities.[160]

Denying negative injunctions in order to promote interleague competition would also be consistent with the business of professional competitive sports.[161] For example, in *Cincinnati Bengals, Inc. v. Bergey*, NFL player William Bergey of the

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[155] Daniel McClurg, Comment, *Leveling the Playing Field: Publicly Financed Professional Sports Facilities*, 53 WAKE FOREST L. REV. 233, 241 (2018) (describing the power professional sports teams wield over state and local governments in the negotiation process for sports franchises).

[156] *Id.*; *see also* Jason Notte, *Your Tax Dollars at Play: How Stadium Tax Scams Pick Fans' Pockets*, FORBES (Aug. 17, 2018, 7:00 AM), https://www.forbes.com/sites/jasonnotte/2018/08/17/your-tax-dollars-at-play-how-stadium-tax-scams-pick-fans-pockets/#142340266fb9 (describing how much public tax dollars are being spent on sports stadiums to allure sports franchises); *see also* James Philips, Caroline Rider & David Schein, *American Cities Held Hostage: Public Stadiums and Pro Sports Franchises*, 20 RICH. PUB. INT. L. REV. 63, 95–101 (2017) (providing charts on recent public expenditures for stadiums).

[157] McClurg, *supra* note 155, at 241.

[158] Ross & Szymanski, *supra* note 153, at 645–56 (describing how the monopoly status of the NFL enables it to pressure cities into subsidizing costs for stadiums).

[159] *Id.* at 634.

[160] *See* Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129, 137–38 (S.D. Ohio 1974) (deciding not to grant a negative injunction to promote the benefits of interleague competition).

[161] *See, e.g.*, *id.* at 138–39.

Cincinnati Bengals signed a contract with NFL rival World Football League ("WFL") while under his contract with the Bengals.[162] At issue was whether the Bengals club was entitled to a negative injunction against Bergey. According to the WFL contract, Bergey would play for the Virginia Ambassadors once his contract with the Bengals expired. Bergey signed the WFL contract with two years remaining on his NFL contract.[163] The Ambassadors offered the player $125,000 per year, while the Bengals paid him $38,750 per year.[164] Bergey's WFL contract did not expressly violate any of his NFL contractual provisions, but the Bengals claimed that a negative injunction was warranted because the WFL "raid[ed] the ranks of the Bengals unfairly by signing players under existing Bengal contracts to contracts for future services."[165] The court ultimately denied the Bengals' request for a negative injunction because (1) enjoining Bergey from playing for the WFL would be a disfavored "restraint[] on competition";[166] (2) the higher salaries the Bengals would have to pay to keep the player did not constitute irreparable harm;[167] and (3) the Bengals' higher costs to compete with the WFL were "attributable to competition and not unfair competition."[168] The court also observed that the emergence of the rival league enhanced the marketability, mobility, and welfare of players in general.[169]

In order to promote interleague competition, create a better sports product, and serve the public interest, the mutuality doctrine should be revived to prevent sports clubs from using negative injunctions in bad faith. Restoring the mutuality doctrine would incentivize clubs to provide better services, take better care of their players, and give more public access to professional sports franchises.

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[162] *Id.* at 131.
[163] *Id.*
[164] *Id.* at 133.
[165] *Id.* at 131.
[166] *Id.* at 147.
[167] *Id.* at 148.
[168] *Id.*
[169] *Id.* at 134.

C. MODERN SHIFT IN WORKERS' RIGHTS ARE CONSISTENT WITH THE VALUES OF THE MUTUALITY DOCTRINE

The mutuality doctrine shares similar values with the recent movement in worker's rights toward fairness and equity. Restoring the mutuality doctrine in sports contracts would reinforce these core values of fairness and equity. The shift toward these values can be seen in the development of the legal doctrines surrounding restrictive covenants not to compete, "garden leave," and arbitration clauses.

1. *Restrictive Covenants Not to Compete*

First, the mutuality doctrine should be restored in sports contracts to curtail the use of restrictive covenants not to compete.[170] Like negative injunctions, covenants not to compete enjoin employees from working for rival companies of the employer for a certain amount of time.[171] The purpose of the restrictive covenant is to preserve worker loyalty, to protect company trade secrets, and to encourage companies to invest their resources into the development of their employees.[172] Covenants not to compete have increasingly been criticized for suppressing labor costs, unfairly benefiting employers, and obstructing the ability of workers to make a living.[173]

Several states and federal courts have limited or ended the use of restrictive covenants not to compete on the grounds that they lack mutuality of obligation.[174] For example, California,

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[170] *See* Arakelian v. Omnicare, Inc., 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010) (declaring that enforcing some noncompete agreements would be unconscionable because it would "destroy the mutuality of obligation on which a covenant not to compete is based"); *see also* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 138 (2008) ("[T]he permissible scope of noncompete agreements has been substantially curtailed in recent opinions.").

[171] Garrison & Wendt, *supra* note 170, at 113–16.

[172] *Id.* at 174.

[173] *Id.* at 175–76.

[174] *Arakelian*, 735 F. Supp. 2d at 41; *see also* OFFICE OF ECON. POLICY, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS:

Oklahoma, and North Dakota have made such restrictive covenants generally unenforceable;[175] New Mexico and Hawaii in 2016 outright banned the use of covenants not to compete in certain industries;[176] Arkansas, Iowa, Kentucky, Maine, Mississippi, New York, Pennsylvania, South Dakota, Tennessee, and the District of Columbia have ended the use of restrictive covenants against employees whose employment was terminated for reasons other than their performance or conduct;[177] Oregon and Utah recently prohibited the use of non-compete covenants lasting longer than eighteen months and twelve months, respectively;[178] and New Jersey, Maryland, Washington, Idaho, Massachusetts, and Michigan have recently introduced legislation to prohibit or limit the use of covenants not to compete in their states.[179] The growing state consensus to decrease the use of restrictive covenants not to compete demonstrates that the mutuality doctrine can and should also be restored in the context of sports.

2. *"Garden Leave" Provisions*

The increasing use of "garden leave" provisions in the U.S. within the past two decades provides further grounds to revive the mutuality doctrine in sports contracts.[180] The garden

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ECONOMIC EFFECTS AND POLICY IMPLICATIONS 16 (2016) [hereinafter *Non-Compete Contracts*], www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf.

[175] *Non-Compete Contracts*, *supra* note 174, at 16.

[176] *Id.* at 16–17.

[177] Non-Compete and Trade Secrets Blog, Fisher Phillips, *Did Your Non-Compete Agreement Just Get Laid Off?*, FISHER PHILLIPS (Apr. 5, 2018), https://www.fisherphillips.com/Non-Compete-and-Trade-Secrets/did-your-non-compete-just-get-laid-off.

[178] UTAH CODE ANN. § 34-51-201 (LexisNexis 2016); *Non-Compete Contracts*, *supra* note 174, at 16.

[179] S.B. 1287, 64th Leg., 2nd Reg. Sess. (Idaho 2018); *Non-Compete Contracts*, *supra* note 174, at 17.

[180] *See* Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 182 (S.D.N.Y. 2006) (holding that a garden leave clause was valid because the employee receive continual payment of his salary); Natsource LLC v. Paribello, 151 F. Supp. 2d 465, 472 (S.D.N.Y. 2001) (holding that a garden leave period was reasonable because the employer continued to pay the employee's full salary during the period); *see also* Thomas B. Lewis & Mark F. Kowal, *Garden Leave Provisions: A Growing Trend in Employment Agreements*, 204 N.J. L.J. 1, 1–3 (Apr. 18, 2011),

leave provision requires employers to keep terminated employees on the payroll for a set period of time.[181] In exchange, the terminated employee is prohibited from working for a rival company during the garden leave period.[182]

The garden leave practice was imported from the United Kingdom, and has found increasing acceptance among U.S. state and federal courts.[183] The increasing use of garden leave provisions is in part a response to criticisms about the one-sidedness of restrictive covenants not to compete.[184] Courts have been more receptive to garden leave provisions than to noncompete clauses because employees experience a lower burden while placed on garden leave.[185] Although employees on garden leave are still enjoined from working for a rival company, they experience a greater mutuality of remedy because they still get fully compensated through salary, whereas in restrictive covenants not to compete, they do not.[186] The growing trend of the

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https://newjerseylawblogboutique.lexblogplatformtwo.com/files/2014/08/TBL-MFK-NJLJ-4_18_11.pdf (describing the increasing use of garden leave provisions in New Jersey and New York); Charles A. Sullivan, *Tending the Garden: Restricting Competition via "Garden Leave"*, 37 BERKELEY J. EMP. & LAB. L. 293, 294–95 (2016) (describing the increasing acceptance of garden leave provisions in the U.S.).

[181] Sullivan, *supra* note 180, at 297–301.

[182] *Id.*

[183] *Id.* at 294; *see, e.g.*, *Estee Lauder Cos.*, 430 F. Supp. 2d at 182.

[184] *See* Peter A. Steinmeyer et al., *Garden Leave Provisions in Employment Agreements*, PRACTICAL L. 1 (May 2017), https://www.ebglaw.com/content/uploads/2017/05/Thomson-Reuters-Rasnick-Steinmeyer-May-2017.pdf (describing the increasing use of garden leave provisions as covenants not to compete experienced increasing judicial scrutiny); Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2291 (2002) (arguing that garden leave provisions should be used in lieu of covenants not to compete because garden leave provisions "provide appropriate safeguards to insure that employers do not overreach" when terminating an employee).

[185] *See Natsource*, 151 F. Supp. 2d at 472 (holding that a garden leave period was reasonable because the employer continued to pay the employee's full salary during the period); *see also* Steinmeyer, *supra* note 184, at 3 ("[C]ourts may be more receptive to garden leave clauses because they have a lower burden on the employee.").

[186] Steinmeyer, *supra* note 184, at 3.

garden leave practice shows that mutuality principles are becoming more relevant in business contracts.

3. *Arbitration Clauses*

Finally, restoring the mutuality doctrine in sports would be consistent with a recent trend among courts that are striking down arbitration clauses in employment contracts for want of mutuality.[187] Courts have held that arbitration clauses are unconscionable under the mutuality doctrine when arbitration is the sole recourse for the weaker bargaining party[188] and when the arbitrator is inherently biased.[189] In light of these developments, applying the mutuality doctrine in sports contracts is particularly warranted, given that the arbitration process for many sports contract disputes is conducted by league commissioners who are hired and paid by club owners.[190]

For example, NFL Commissioner Roger Goodell ("Commissioner Goodell") has vast powers to resolve disputes with "full, complete, and final jurisdiction to arbitrate any dispute between any player, coach, and/or other employee of any member

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[187] *See* Arthur Kaufman & Ross Babbitt, *The Mutuality Doctrine in the Arbitration Agreements: The Elephant in the Road*, 22 FRANCHISE L.J. 101, 104–05 (2002) (analyzing the use of mutuality in unconscionability analysis of arbitration clauses).

[188] *Id.* at 104 (stating that the supreme courts of at least California and Montana have applied mutuality in unconscionability analysis to strike down arbitration provisions).

[189] *See* Alphagraphics Franchising v. Whaler Graphics, 840 F. Supp. 708, 711 (D. Ariz. 1993) (reviewing claims that an arbitration provision is unconscionable on grounds that it is biased and lacking in mutuality); *see also* State *ex rel.* Hewitt v. Kerr, 461 S.W.3d 798, 803 (Mo. 2015) (holding that an arbitration provision is unconscionable on grounds of arbitrator bias).

[190] *See* Theresa Mullineaux, *The NFL's Arbitration Bias: A Powerful Commissioner Makes Impartiality Questionable, and a Process Flawed*, 36 ALTERNATIVES 35, 35 (Mar. 2018) ("[Roger] Goodell, in his capacity as the [NFL] commissioner and arbitrator, has direct, definite, and demonstrable bias. His salary comes directly from the teams and thus creates a bias, as he would be more likely to find in favor of those who pay him."); Bob Wallace, Jr., *Neutral Arbitrators in Sports: What Makes it Fair?*, THOMPSON COBURN LLP (Aug. 10, 2015), https://www.thompsoncoburn.com/insights/publications/item/2015-08-10/neutral-arbitrators-in-sports-what-makes-it-fair.

of the League (or any combination thereof) and any member club or clubs."[191] Commissioner Goodell acts as the lead investigator and reviews all appeals of arbitration decisions.[192] Given that the standard NFL contract requires players to submit all their contract disputes to arbitration,[193] critics have accused the NFL arbitration process under Commissioner Goodell of being biased and impartial.[194] One court even struck down an arbitration provision in an NFL employee's contract on grounds that it was biased and unconscionable.[195] Thus, restoring the mutuality doctrine in sports contracts is needed to ensure that players receive a fair and equal arbitration process.

CONCLUSION

Taken together, concerns about the power imbalance of sports contracts, the benefits of interleague competition, and recent developments in workers' rights warrant the revival of the mutuality doctrine in sports contracts. In order to promote fairer and more equitable contracts, courts must not be so quick to uphold the validity of agreements that are heavily tilted in the club's favor. Courts should recognize that the obligations and

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[191] Theresa Mullineaux, *The Latest NFL Fumble: Using Its Commissioner as the Sole Arbitrator*, 36 ALTERNATIVES 24, 24 (Feb. 2018).

[192] Mullineaux, *supra* note 190, at 36 ("The [NFL] commissioner acts not only as the judge, jury, and executioner, but also as lead investigator, prosecutor, and the court of appeals.").

[193] *See NFL Player Contract*, *supra* note 133, at 3 ("During the term of any collective bargaining agreement, any dispute between Player and Club involving the interpretation or application of any provision of this contract will be submitted to final and binding arbitration in accordance with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs.").

[194] Mullineaux, *supra* note 191, at 35–36 ("Because the NFL and NFL team owners issue the commissioner's salary, establish the rules under which he operates, and hold the power over his contract renewal or termination, it is highly unlikely that the commissioner will exercise his powers impartially.").

[195] *See Hewitt*, 461 S.W.3d at 815 (holding that an arbitration provision in an NFL employee's contract was unconscionable because of arbitrator bias).

available remedies between players and clubs have been grossly uneven.[196] Restoring the mutuality doctrine would restrict clubs from using negative injunctions on players in bad faith.

Restricting the use of negative injunctions based on the mutuality doctrine would also promote interleague competition, create a better sports product, and serve the public interest.[197] Courts should apply mutuality principles in sports contracts to incentivize clubs to provide better services, take better care of their players, and give new cities more access to professional sports franchises.

Furthermore, recent developments in workers' rights demonstrate that the mutuality doctrine should be applied in sports contracts. Employment law in general is moving away from the use of restrictive covenants not to compete.[198] In alignment with this shift in employment law, courts should restore the mutuality doctrine in sports contracts to limit clubs from using negative injunctions on players in bad faith. The mutuality doctrine should also be revived in sports in light of the "garden leave" provisions in the U.S.[199] Without greater mutuality between players and their sports clubs, club authorities will continue to cut their players without compensation or obstruct them in bad faith from playing for other clubs.

Furthermore, the mutuality doctrine should be applied in sports contracts to ensure that players receive fair and equal rights to arbitrate their contract disputes. Restoring the mutuality doctrine in this context would be consistent with an increasing trend among courts that have struck down arbitration clauses in employment contracts for want of mutuality.[200] Recent developments in contract law combined with the movement

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[196] *Cosentino*, *supra* note 132; *Therber*, *supra* note 132.

[197] *See, e.g.*, *Bergey*, 453 F. Supp. at 138 (stating that the public interest would be served by denying a sports club's request for a negative injunction and promoting interleague competition).

[198] *See* Arakelian v. Omnicare, Inc., 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010) (declaring that enforcing some noncompete agreements would be unconscionable because it would "destroy the mutuality of obligation on which a covenant not to compete is based."); *see also* Garrison & Wendt, *supra* note 170, at 138 ("[T]he permissible scope of noncompete agreements has been substantially curtailed in recent opinions.").

[199] Sullivan, *supra* note 180, at 294–95 (describing the increasing acceptance of garden leave provisions in the U.S.).

[200] Kaufman & Babbitt, *supra* note 187, at 104–05 (analyzing the growing use of mutuality in unconscionability analysis).

toward fairer and more equitable dealings between sports clubs and professional athletes, warrant the revival of the mutuality doctrine in sports.