

Of Moore, Players and Owners, and Consequentialist Pedagogy: Can the Center Hold?

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I. Introduction

Like many property instructors, I have taught the *Moore* case¹ for decades. Like some colleagues who assign it at the start of the term, I teach the case largely to illuminate the familiar claim that it makes little sense to ask whether someone “owns” some tangible or intangible “object” that we might call property; property rights define our relationship not to things, but to one another.²

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- 1 *Moore v. Regents of the University of California*, 793 P.2d 479 (1990) (holding that defendant doctor’s failure to disclose his financial interest in developing a cell line from plaintiff’s surgically excised cancerous spleen cells obviated informed consent to the medical procedures and breached his fiduciary duty to the patient, but rejecting the plaintiff’s claim, embraced in dissent, that the doctor “converted” the spleen tissue).
- 2 In this view, our “property” rights are simply either entitlements good against all others or entitlements that derive from explicit or implied contract with contracting partners. Conceptually, whether we think of the right to exclude all “interlopers” vindicated through trespass law or the right to be free from unreasonable interference with use and enjoyment that we protect with nuisance law as sounding in torts or in property is of no moment. The conceptual overlap I note here between the entitlements conventionally classified as tort law-based entitlements and our basic rules of property is sharply observed in John Harrison, *Richard Epstein’s Big Picture*, 63 U. CHI. L. REV. 837, 846, 852-53 (1996). On the “contract” side, much of landlord/tenant law or the law of private land-use planning is at core contract law. All the basic issues we confront in contract law arise when we study private land-use devices (easements, covenants, equitable servitudes): for instance, the degree of formality needed to create the obligation, the interpretation of ambiguous language. What arguably dominates discussions of the private land-use devices, though, is an issue peripheral to ordinary contract law: the extent to which people should be bound by or benefited by contracts that their predecessors made when they purchase with notice real property from people who made land use contracts with one another.

And, within this perspective, a formal legal entitlement is nothing more nor less than a right to prevail in a lawsuit against some specified group of putative defendants who take or threaten to take certain steps the entitlement holder objects to and receive some private

My students are typically predisposed to think the question the case poses is whether Moore “owns” his oversized cancerous spleen. They also typically intuit that if he “owns” it, he should be entitled to give away or sell it (or the tissue therein) to researchers who believe it could prove useful in developing cell lines, which might themselves be useful in developing therapeutic products,³ or to refuse to allow it to be so used or condition its use on compliance with limiting terms that he imposes in the contract transferring the spleen tissue. I urge students to recognize that *all* the judges who wrote the distinct opinions in the case believe Moore “owns” his spleen in the generic conceptual sense that each opinion implies that he is entitled to sue those who breach rights he has in relationship to the spleen.

So, for instance, the *Moore* majority holds that his body cannot be invaded to remove his spleen without his informed consent, and further concludes that the defendant doctor’s failure to disclose his financial interest in developing a cell line using Moore’s tissue rendered the consent uninformed (as well as breaching more loosely defined fiduciary duties that doctors owe patients).⁴ Concurring, Justice Arabian, making brief reference to familiar arguments against commodification of the body or other “sacred” goods, implicitly urges that Moore’s spleen cells should be treated in the same way that gestational surrogacy or sex are typically treated: They can be withheld or given away, but not sold.⁵

remedy (e.g., damages for injury, injunction against the threatened act or continuation of the act) or collective protection (e.g., criminal punishment) against the unwanted course of conduct. Summaries of “bundles of rights” concepts of ownership abound. In my mind, the single most illuminating, in part because it treats the concept as historically contingent, is Thomas Grey, *The Disintegration of Property*, 22 NOMOS 69 (1980).

3 The individual defendant in the case (Dr. Golde) believed the lymphocytes in Moore’s spleen would (as a result of his hairy cell leukemia) be atypically useful in developing cell lines to produce lymphokines to fight infection (and perhaps cancer).

4 Since the operation itself was essentially nonelective—both because the spleen was so enlarged and because at the time splenectomy was the only reasonable treatment for the hairy cell leukemia Moore presented with (changing survival rates from roughly 30% to 80%)—it is not obvious that the failure to disclose the financial conflict of interest was material. It is certainly most obvious that such conflicts of interest are material when they may lead a doctor to recommend unneeded treatment.

If one focuses solely on the splenectomy, then, it is not clear there was a failure of informed consent, or, if there was, precisely how one would measure the damages Moore sustained, since the misrepresentation did not clearly induce any action he would not have taken in any case. Moreover, the nature of the fiduciary duty was radically underspecified in the majority opinion, but it is plausible to argue that a fiduciary should never profit from the “assets” held by the person he is duty-bound to protect so that the breach of fiduciary duty might give rise to some sort of disgorgement remedy that might resemble the conversion damages that Moore sought. The difficulty of measuring damages given the majority’s theory is highlighted in Maxwell J. Mehlman, *Moore v. Regents of the University of California*, in PROPERTY STORIES 43, 54-57 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2004).

5 In my view, the best accounts by psychologists of sacred goods and protected values—goods not readily commensurable with other goods (e.g., by being bought or sold)—are in Alan Fiske & Philip Tetlock, *Taboo Trade-offs: Reactions to Transactions that Transgress Spheres of Justice*,

In dissent, Justice Mosk argues that the doctor converted Moore's spleen, strongly suggesting it is a commodity that Moore could have withheld, given away, or sold, and that, going forward, doctors cannot use spleen tissue without contractual permission, which could be withheld absent payment.⁶ I press students to recognize that one can separate out the right to withhold from the right to monetize, to sell something one controls for as much as a buyer would willingly pay.⁷

Although my primary pedagogic goal is to illuminate the limitations of thinking about property rights in terms of ownership of tangible or intangible "things," we do (and should) evaluate Moore's claim that his property was a commodity the doctors converted. With few exceptions, my students side with Moore.

They do so from two perspectives, and I aim both to express hesitations about each perspective and to contrast them with an alternative perspective: One, a libertarian perspective grounded in the notion that Moore has a natural right to control (and sell) what is "his," and that nothing is more clearly "his" than his own body, would typically be associated with the political right.⁸

18 POLITICAL PSYCH. 255 (1997), and Jonathan Baron & Mark Spranca, *Protected Values*, 70 ORG. BEHAV. & HUM. DEC. MAKING PROC. 1 (1997). Critics of this literature believe people hypocritically claim to resist commensurability to present themselves as moral though they will often except trade-offs or purchase things they ostensibly believe should not be bought if they can do so without harming their reputations. See, e.g., Jason Dana et al., *Exploiting moral wiggle room: experiments demonstrating an illusory preference for fairness*, 33 ECON. THEORY 67 (2007).

I find the accounts by psychologists more illuminating than the philosophical discussions of incommensurability, but for those interested in those, an excellent set of essays can be found in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* (Ruth Chang ed., 1997).

6 The spleen owner would be just like an owner of real property who can exclude neighbors from crossing her land but can also contractually waive the exclusion right by granting a license or easement, whether as a gratuitous gift or in exchange for something of value to the owner.

7 One of the most explicit accounts of "ownership" that separates various control rights from the rights to monetize and derive income from surrendering control rights is found in the classic work endeavoring to specify all the sticks in the bundle of rights that would constitute full-blown liberal property ownership. See Anthony Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107 (A. G. Guest ed., 1961). Using different terminology, Christman also offers powerful arguments that self-ownership does not imply the right to monetize one's inborn talents. See John Christman, *Self-Ownership, Equality, and the Structure of Property Rights*, 19 POL. THEORY 28 (1991).

The intuition that the right to monetize is separate from the right to control can be explored when reflecting on many of the canonical cases that property professors use to introduce the course: It is far more obvious, for instance, in *International News Service v. Associated Press*, 248 U.S. 215 (1918), that journalists "own" their labor in the sense that they have the privilege to withhold that labor, and cannot be forced to gather news, than that the news they do gather by dint of their labor is protected against republication by commercial competitors without permission (and payment), though that right to charge all users would entail a greater obligation to protect the laborer's capacity to monetize her labor.

8 Neither my straight-up libertarian students nor the progressive students adopting a small sliver of libertarian thinking ever spontaneously question the degree to which the defendant

The other, an anti-subordination perspective students have advanced more explicitly in the past decade, is grounded in the notion that in a battle between the privileged (here, the corporate, profit-seeking Big Pharma defendant and the defendant doctor working for that biotech firm) and the more marginalized (here, a beleaguered sick individual), we should reject claims made by the globally privileged.⁹ This perspective would typically be associated with the political left.¹⁰ Each argument is fundamentally nonconsequentialist. My students typically make no effort to argue that granting Moore the legal privilege to monetize his scarce spleen cells will redound to the benefit of the range of people affected by adopting that rule.¹¹

In part II of this essay, I set out a possible consequentialist analysis of the decision to grant those in Moore's position the privilege to monetize their tissue, just as I discuss in part III how a consequentialist might decide whether it is desirable to allow professional athletes to maximize their freedom of movement to enhance both their control over how to practice their profession and their incomes. But for now, I want to make several more general points about pedagogy.

I recognize that both one-factor, lexical libertarian and "anti-subordination" evaluative schemes offer, at least at first blush, a level of certainty that consequentialist policy analytics does not even purport to supply. I acknowledge as well that many students are attracted to analytical schemes that generate

doctor in this case would have to be regulated considerably more intrusively than true libertarians would find acceptable if patients' practical ability to cash in on their valuable tissue would have much operative significance. In a fuller-blown libertarian regime, the doctors would have no duties to disclose anything about the potential value of the tissue, and no duty to treat a patient who refused to give away his tissue (shifting the balance of bargaining power). While theoretically patients might consult third parties to estimate the value of their tissue (and negotiate on their behalf?—a bit more on that later), it is hard to imagine such a market developing in a world where very few patients have uniquely valuable (or even scarce) tissue.

- 9 I don't believe any of my students self-identifying as politically progressive believe one should resolve *each case* by siding with the less privileged party in the dispute. They do not endorse the idea that in each lawsuit, the less globally privileged party should prevail. But many believe that if the more subordinated parties would proximately benefit from a certain resolution of "like cases," that *is* enough to resolve the case.
- 10 Interestingly, my progressive students, who reject most of the anti-redistributive implications of libertarian claims to natural rights to own one's labor, typically blend libertarian and "side with the subordinated" arguments here, contending that Moore has been exploited along the two dimensions that give rise to the conclusion that exploitation has occurred. He has lost something that is rightfully his, taken by an entity with social power.
- 11 Though not defending the proposition, I assume the form policy analytical consequentialism will take is "welfarist"—that the policy analyst will determine who is "helped" and who is "hurt" by adopting a particular rule. Views about what it means to be "helped" or "hurt" range from ones focusing on hedonic states to those that focus on preference satisfaction to those that focus on the provision of objective capabilities. Each poses real problems. For some of my views on how difficult it is to define welfare, see Mark Kelman, *Hedonic Psychology and the Ambiguities of Welfare*, 33 PHIL. & PUB. AFF. 391 (2005).

clearer answers. (Most instructors hear complaints from first-year students that they are not being taught enough clear rules.) It is indeed far easier, for instance, to conclude that one must “own” one’s own body, full stop, or that the research doctors and Big Pharma occupy privileged social positions, than it is to figure out what effects we will observe if we protect expansive tissue sales rights for patients. Symbolic schemes grounded in assessing the strength of the claims of the disputants alone, without regard to the impact of protecting these claims on others, and “performing” a sociopolitical commitment certainly seem to generate more determinate answers to tough questions.

I return, particularly in part IV, to note that the promise of certainty is generally illusory. But even if we could reach conclusions more readily if we adopted what I am labeling the more symbolic positions, the comfort we gain from being more certain that we have easily settled on our final answer, and that it is the right answer given the commitments we want to uphold or signal, must be counterbalanced by the fear that we have had to ignore too many considerations that ought to count.

Perhaps more significantly, from a pedagogic vantage, students who see controversies above all as raising an opportunity to cement or even merely “perform” their political identities might find it difficult to address innumerable judges and policymakers unless they learn how to perform policy analytics. But, of course, that claim is a historically contingent one: To the extent that the bench and bureaucracy become increasingly populated by non- or anti-consequentialists, the libertarian and anti-subordination students may well be doing a perfectly good job practicing the rhetoric of the mid-21st century. Even if they are, though, they will lack a capacity I believe will not become a dated relic: the capacity to anticipate what those who do not share their pre-commitments believe, to understand why others, acting in perfectly good faith, might resolve an issue differently than they do. And, worse, they will have lost the lawyer’s critical capacity to muster arguments that might sway others who do not share their prior views, and the equally vital ability to find more common ground approaches to problems or to raise concerns that might genuinely soften more polarized positions.

They will also forgo the invaluable opportunity to learn to make and evaluate empirical arguments and understand better why empirical arguments may be less determinate than we would wish them to be. They will also lose the chance to explore how complicated our normative commitments really are. It is very hard to fully embrace any particular account of what it means to describe an outcome for any individual to being “good” or “welfare enhancing” and at least as hard to know how we might balance gains (however defined) that accrue to some against losses that accrue to others, and in the course of trying to answer these tough questions, we do a great deal to clarify and self-critically develop our values.

I understand that my students’ commitment to single-factor (or highly principled?) symbolic decision-making rubrics may reflect not just the embrace of an analytic vantage point by scattered individuals but may reflect

our deepening political polarization as a society. It might well be that more and more often, we treat our political beliefs as constitutive of our identities, rather than as simple policy views that we as individuals constituted by a wide array of interests and identities maintain, and that we therefore experience political debate not so much as an occasion to solve discrete problems as an occasion to construct ourselves and to manifest our distaste for those outside our group.¹² To the degree that asking students to disclaim identity-conferring argument runs counter to a deep social transformation, my pleas in this essay may well be hopeless. Nonetheless, it might be both desirable and possible to push students toward engaging in what I am calling centrist consequentialist analysis¹³ and away from what I am calling symbolic (and/or performative) resolutions of hard problems.

I proceed as follows: In part II, I discuss the gap between the consequentialist and symbolic approaches to *Moore*, recognizing that I have *never* taught a student who spontaneously approached the case as I think a consequentialist likely would. My goal is to persuade readers that there is much to be said for the consequentialist methodology. I then discuss in part III the battle between team owners and players over freer player movement, in part to contrast once again what a consequentialist analysis of the controversy would look like with the symbolic arguments that are closely analogous to those made by students discussing *Moore*. Focusing on this controversy is useful in part because it sharpens some of the ways in which consequentialist analysis is genuinely hard to do: Both defining appropriate consequentialist *ends* in this case and dealing with the problem of conflicting ends among affected parties are more difficult tasks than in the situation raised in *Moore*, where most of the truly nettlesome difficulties a consequentialist would face are at core empirical. But it is also worthwhile because I suspect that students' symbolic commitments on this issue might be somewhat weaker and more ambiguous than they are when confronting *Moore*: My tentative, more general pedagogic claim is that one might nudge students to take centrist consequentialist thought more seriously

12 This is perhaps the central starting place in Ezra Klein's account of growing political polarization. See EZRA KLEIN, *WHY WE'RE POLARIZED* 36–38, 45–48, 51–52, 60–62, 65–79 (2020) drawing heavily in this regard on LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2017). Klein argues further that at the political level, the sorting of political parties by identity that began with the passage of the 1964 Civil Rights Act accelerated polarization (and a move away from policy compromise) and exacerbated the sense that one's basic political commitments are indistinguishable from who one is.

13 A “centrist,” in the limited sense I am using the term, could be more or less politically progressive or conservative along conventional dimensions, e.g., deeply concerned (or not) with inequality (of income, of social group status), more (or less) suspicious of government regulation of consumer or labor markets, or more (or less) prone to explain the existing distribution of privilege in terms of the subjugation of subordinated social groups by other superordinate ones rather than individual distinctions in attributes and endowments. “Centrists” in this limited sense are those who accept the substantial possibility that their empirical priors about the impact of various policies will prove false or at least reasonably contested and that their normative commitments are ambiguous and ambivalent enough to be shaken as they attempt to work through how they apply to particular controversies.

by demonstrating how it works in less symbolically charged controversies, and then noting that the consequentialist analysis they might be sympathetic to using in such cases might proceed in a structurally similar way if applied in the more symbolically fraught situations.

Finally, I draw some conclusions in part IV.

II. Moore and Tissue Sales

Policy-analytic instructors like me are hardly surprised to be confronted with the purer libertarian claim my students sometimes make when discussing *Moore* that patients have some pre-political natural right to control the disposition of the tissue in their body however they want or the more common mixed libertarian/anti-subordination claim that students more frequently articulate that siding with the patients is siding with the less powerful individuals against the rapacious efforts of the elite (Big Pharma, research doctors) to exploit the resources that (in some not fully specified fashion) “belong” to the patient. It has taken me a long time, though, to stop being surprised that there is almost never any pushback from consequentialist students, questioning whether claims to control one’s body are coextensive with (or can be justified in the same way as) claims to monetize one’s body or labor and whether claims that patients should be allowed to monetize their tissue serve the interests we generally seek to serve when permitting people to sell scarce physical or labor resources.

Consequentialists simply reject the idea that the case for permitting people to withhold their labor is coextensive with the case for permitting them to retain whatever they can garner in exchange for providing labor/disclaiming their right to withhold labor. In the canonical libertarian work, *Anarchy, State and Utopia*, Robert Nozick argues we would generate normatively defensible inequality even if each of us started with equal resources. He argues that the basketball star of Nozick’s era, Wilt Chamberlain, must clearly be entitled to retain his high earnings if we imagine that those who wanted to see him play basketball each voluntarily paid him some of the money to which they were initially entitled to watch him.¹⁴ These sorts of arguments about “justice in transfer” do Nozick no good though because one can only sell what one has an entitlement to. Imagine that instead of playing basketball well, Chamberlain used his height in some hypothetical economy to pick apples from high on the tree and our property rule was that he could retain only half the apples he picked, having to share the rest with the short and hungry. The fact that others would pay him for the half of the apple crop he picked that he did not own given our property rules would not justify his keeping his earnings from selling all the apples. To justify his keeping the “earnings” from the sale of the entire crop, we must justify his initial right to retain or sell all the picked apples.

14 See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 161–64 (1974).

Whatever case one might make for allowing him to withhold his labor entirely (an anti-enslavement principle) is wholly different from the case that would have to be made to allow him to keep all he could earn in a market exchange. As I noted earlier, the case for forbidding people from forcing journalists to gather news is quite distinct from the case that they can monetize all aspects of their newsgathering work, that they “own” the news that they gather in the sense that the legal system should stop those who do not pay them for its use from making particular uses.¹⁵ Absent a claim (one Nozick himself recognized was not easy to justify¹⁶) that there is some sort of natural right to monetize his scarce talents at the price he could extract from willing buyers, we must examine the range of consequences we would observe if Wilt faced a regime in which the starting entitlement baseline was one in which he faced a tax on high-labor income. Answering that question from a consequentialist vantage entails evaluating whether the observed world is less desirable, overall, than the world that would be generated in the libertarian’s tax-free world.

Given that policy-analytic consequentialists typically tolerate earnings inequality only to the extent that it benefits those who purchase goods and services from suppliers requiring higher incomes as an incentive to produce those goods and services,¹⁷ we would try to determine the extent to which eliminating the tax would facilitate mutually beneficial transactions that would

- 15 See *supra* note 6 and accompanying text. Though Nozick famously equates income taxation with forced labor (see NOZICK, *supra* note 14, at 169), few have found the argument persuasive: Chamberlain himself would have limited ability to choose life projects if he could be forced to play basketball. His decision whether to play basketball or engage in other activities given the psychological and economic payoffs to the alternative activities remains his in a world with an income tax—though the pay-offs would differ. For a critique of the forced-labor analogy, see, e.g., Robert Taylor, *Self-Ownership and the Limits of Libertarianism*, 31 SOC. TH. & PRAC. 465, 477-79 (2005).
- 16 Barbara Fried carefully reviews the ways in which Nozick ducks the question of justifying the right to receive whatever market actors will offer for one’s labor in favor of the argument that inequality can be justified in that it can arise as a result of voluntary transfers made by people entitled both to initially control and then to dispose of resources. See Barbara Fried, *Wilt Chamberlain Revisited: Nozick’s “Justice in Transfer” and the Problem of Market-Based Distribution*, 24 PHIL. & PUB. AFF. 226, 230-33 (1995). Justice-in-transfer arguments are empty absent well-reasoned accounts of initial ownership, and some have argued that absent a theory of entitlements there is also no reason to believe the buyers have the right to use their resources in a way that generates substantial inequality. See, e.g., Thomas Nagel, *Libertarianism without Foundation*, 85 YALE L.J. 136 (1975); JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY (2007) (noting that individually just transactions may not be justice-preserving in the way that logical operations are truth-preserving; a substantial series of small inequalities created by particular just transactions may accumulate to create large inequalities that are not just).
- 17 A consequentialist might believe that the laborer has some legitimate claim on these goods and that overriding this claim somehow impairs social relations or our capacities to flourish as individuals; one can, of course, make consequentialist arguments to ground claims typically presented in natural-rights form. One could also believe inequality-generating institutions served some other good ends as well (e.g., that generating higher levels of social inequality led to significant increases in spending on certain forms of “culture” whose preservation one believed served multiple ends). The dominant consequentialist arguments about inequality, though, are the ones referred to in the text.

not occur absent inequality-generating legal institutions. Consequentialists would, thus, typically try to ascertain to what degree establishing a wage tax levied on high incomes would diminish the amount of basketball playing he supplied rather than merely taxing away monopoly rents in excess of his reservation price; to what degree the tax would diminish his incentives to develop his talents; and to what degree the resources we might distribute from the player to those in need generate more “welfare” than the welfare losses both Chamberlain and the fans who’d be deprived of his most extensive or best efforts would experience.¹⁸

Answering these empirical questions will not be easy; it is unlikely all policy-analytic observers will agree.¹⁹ *This same empirical indeterminacy will confront us when we analyze Moore’s claim.* As I mentioned, one of the attractions that both libertarian and “side with the subordinated” approaches have is that they seem to readily generate more determinate resolutions to disputes, or, at least, that the answers they generate do not rely on inevitably disputed empirical propositions.

Of course, in a parallel fashion, we might justify protecting Moore’s capacity to direct the use of his tissue without protecting his capacity to monetize the tissue, to sell use rights to others. There may be good arguments that we should allow patients to manifest ethical objections to cell line production altogether by withholding their tissue from research use completely, or to withhold it from use by for-profit entities or entities planning to do a particular sort of medical research they disapprove of.²⁰ And there may well be administrative

18 It might seem possible to defend the “justice in transfer” argument by claiming that those in Nozick’s thought experiment, initially given their fair distributive share, are implicitly deprived of that share if they cannot spend it to get whatever they’d like. But, of course, they *can* spend it however they want (absent a wholly separate set of possible legal constraints) even if what they spend it on might be different than it would be in a world in which Chamberlain faced no tax on labor income—just as it is different than it would be if Chamberlain’s work/leisure preferences were different. Presumably, their welfare in the state in which Chamberlain is taxed might well be lower than it would be in the no-tax world, but they are no more entitled to the social arrangements that maximize their welfare than Chamberlain is.

19 Estimates obviously diverge widely on the impact of increasing taxes, and more particularly of increasing marginal tax rates for high-income earners, on economic output. Compare Christina D. Romer & David H. Romer, *The Incentive Effects of Marginal Tax Rates: Evidence from the Interwar Era*, 6 AMER. ECON. J. 242 (2014) (changes in marginal rates have economically small effects on the amount of income taxpayers generate) with Edward Prescott, *Richard T. Ely Lecture: Prosperity and Depression*, 92 AM. ECON. REV. 1 (2002) (high marginal taxation severely depresses economic output).

20 Just as I believe the consequentialist case for protecting people from involuntary labor is complicated—I am not convinced for instance that a military draft is invariably unacceptable or that duties to rescue in certain circumstances are illegitimate because they require labor—so, I believe the consequentialist arguments for allowing people to withhold tissue from medical research entirely, and the (distinct) case for allowing them to direct in more detail how it is used (abstractly, or conditional on their right to withhold entirely), are hardly straightforward. My point for now, though, is that the arguments are different from arguments protecting the right to exchange tissue for its market value.

For passionate and eloquent defenses of control rights, see Lori Andrews, *Who Owns*

reasons to believe that if one protects the entitlement to withhold, it is futile to try to deny the right to sell because surreptitious sale will flourish if people are not obliged to transfer tissue to researchers.

But we can readily see that our intuitions about “control rights” and rights to monetize are distinct if we consider how we might react to two different situations in which the source of tissue directs that tissue he had once voluntarily given to a researcher no longer be used. In the first case, the patient learns the tissue is now being used for research that he disapproves of, while in the second he learns the market for products using cell lines still being developed from his tissue are more commercially valuable than projected when he first transferred rights to use the tissue.

We *might* think we can solve the first problem through what is usually referred to as “tiered consent”—contracts that specify all the conditions in which use is acceptable and those that would be unacceptable. Assume, though, that we are wary of tiered consent, perhaps believing patients confronted with a complex set of alternative conditional dispositional plans will, to avoid cognitive overload, simply decide not to donate at all.²¹ Or we might believe that “complete” state state-contingent contracts are either costly to draft (assuming one can foresee the future) or impossible to draft (assuming events occur that one could simply not anticipate).²² We might still set the default on incomplete contracts as allowing tissue transferors to withdraw consent to use the tissue when an unwanted use is made if we believe that people are badly injured if their body parts are used on unwanted projects²³ or that donation will be suppressed unless people know they can withdraw consent if they learn of an unwanted use.

Your Body? A Study in Literature and Law, 84 CHI.-KENT L. REV. 3 (2009); Lori Andrews, Who Owns Your Body? A Patient’s Perspective on *Washington University v. Catalona*, 34 J. LAW, MED. & ETHICS 398 (2006).

- 21 This critique of tiered consent is articulated in Natalie Ram, *Tiered Consent and the Tyranny of Choice*, 48 JURIMETRICS J. 253 (2008). Note, too, that wariness over dead-hand control might make us cautious about permitting perpetual contingent contracts for the use of transferred property. Statutory reforms limiting the lives of rights of entry and possibilities of reverter reflect hesitancy about perpetual-use control.
- 22 For a general discussion of why contracts are incomplete in the sense that they do not direct obligations under all possible contingent states, see Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. L. REV. 187, 189-91 (2005) (obligationally complete contracts could readily be drafted but they would, given informational incompleteness, specify obligations that would be inefficient and irrational given eventual circumstances).
- 23 Those who worry about the injury that purportedly arises when one’s “own” resources are used for unwanted purposes worry about the problem not just in the tissue donation case, but in situations in which an owner’s real property is used in an unwanted way (e.g., when a shopping center owner is forced to permit pickets to spread a message the owner finds abhorrent). There is an unbending legal realist/positivist response: If state law forbids a shopping center owner from excluding peaceful pickets, nothing aptly described as “her property” is being used to further a despised cause; if tissue owners cannot direct how excised tissue is used, nothing the patient “owns” is being used on unwanted research projects.

We may well, though, believe that even if we can sell tissue in the first instance, we should be forbidden (certainly absent explicit contractual terms to the contrary) from withdrawing consent once the transferee is using the tissue in ways that are more economically valuable than anticipated as a prelude to renegotiating the sales price. The person who withdraws consent once he knows that he can, if allowed to renegotiate, charge the transferee up to the point where incremental production profits disappear creates familiar problems of *ex post* opportunism: He is no different than a host country that induces, say, investment in immovable power-generating infrastructure on the promise that the investor will be able to charge enough for power to cover both incremental production costs and the fixed cost of initial investment and then renegotiates to lower the amount that can be charged to the point that it merely more than covers incremental costs. The Big Pharma company invests in product development expecting to cover both development costs and incremental production costs, but if it is deprived, *ex post*, of a resource it needs to continue production, it can be induced to accept payment that permits it to earn a profit going forward but covers none of its past investments; the opportunistic seller of the scarce resource will capture the quasi-rents. And if such opportunism becomes widespread, without legal redress or informal norms that preclude it, of course, transferees simply will stop making project-specific sunk-cost investments.

Again, from the vantage of “centrist policy analysts,” we “reward” Moore—like anyone else who might withhold something of use to others—not because he has a pre-political claim to the benefit he seeks or because he “deserves” a reward. (Even if one believed that distributive claims should be at least partly merit- or desert-based, it is certainly not easy to defend the claim that Moore deserves to have tissue that is atypically valuable in the production of cell lines.)²⁴ We do so because doing so redounds to the benefit of those who seek the products the tissue helps to create. And, of course, once one recognizes that it is sensible to consider not just the parties directly disputing the proper rule but the interests of nonparties in resolving the dispute, the capacity of those students who merely seek to “side with the subordinated” to pick the right answer diminishes as well. Even if Moore is less privileged than the doctors or Big Pharma shareholders,²⁵ the *most* subordinated people with an interest in the case may be the patients seeking the drugs that might be developed from the cell line.

Imagine that we are in a world in which certain (concededly unrealistic) conditions obtain. (1) We are certain that Moore and those similarly situated bear no incremental costs if their tissue is used: The tissue will be excised in any

24 There are innumerable arguments about the propriety of basing distributive claims on unmerited “virtues” or on any other aspect of “luck.” A reasonable summary of the relevant literatures can be found in Carl Knight, *Distributive Luck*, 31 S. AFR. J. PHIL. 541 (2013).

25 This is itself a complicated proposition once we recognize that Moore is something of a “privileged” monopolist here by virtue of possessing cells that are uniquely valuable to others.

case during nonelective surgery, and they bear no psychic costs knowing it will be used by researchers. (2) IP rights for the cell line developer are so flexible and individualized that the innovator receives no more (whether through, for example, patent-based monopoly profits or prize) than is needed to encourage innovation investments whose expected benefit exceeds cost.

If we set a single price for Moore's tissue, that ideal price, of course, is zero. The reason he might be able to charge Golde (his doctor) a positive price is that he is (to some extent) a monopolist.²⁶ But if Moore is allowed to sell his cells, raising the *possibility* that the price will be set above zero, each of the following bad outcomes is reasonably plausible, if by no means certain:

- First, assume that Golde is the only possible buyer for the tissue, perhaps because the tissue must be used almost immediately after surgery to develop a cell line. Moore, having no real idea what Golde's reservation price is, insists on a price above Golde's actual reservation price. Moore is an imperfect price-discriminating monopolist. No deal is consummated. This is inefficient in the two distinct ways we typically associate with the perils of monopoly pricing, the second of which may seem more socially significant. First, a potentially Pareto superior deal, one that would make both Golde and Moore better off, is not made. Any deal in which Moore receives more than zero for his cells would in fact make him better off. Second, Golde may substitute a process that utilizes more real resources to meet his needs for the (superior, less costly) process utilizing Moore's tissue, recognizing that while employing Moore's tissue would employ less-costly-to-produce resources (the production cost, once again, is zero), his tissue is nonetheless *priced* higher.²⁷
- Assume instead that Moore hires third-party negotiators who help him strike a deal with Golde. Perhaps Moore is willing to sell for a price that, while positive, is below Golde's reservation price. We would need to set

26 It is likely the case that Moore's cells are not *unique*; other patients with hairy cell leukemia likely have tissue useful in cell line development. But the disease is pretty rare. The incidence is about 600-800 a year in the United States, according to the Rare Disease Database, so any oncologist capable of using the tissue to develop cell lines is unlikely to find multiple patients who could provide him equally valuable tissue and then run a reverse (aka procurement) auction in which the price would tend toward zero. See *Rare Disease Database: Hairy Cell Leukemia*, NATIONAL ORGANIZATION FOR RARE DISEASES, <https://rarediseases.org/rare-diseases/hairy-cell-leukemia/#:~:text=Hairy%20cell%20leukemia%20is%20a,years%20of%20age%20or%20older> (last visited Dec. 30, 2021).

27 The standard IP fable here from the tangible asset world that we use is the tale of a bridge with a high fixed cost of production (parallel to, say, the cost of producing a recorded song) but no incremental cost to cross/consume (parallel to the zero cost of distributing an extra digital copy of the song.) If we charge a toll that is set above incremental cost, some consumers might take a socially wasteful looping route to avoid the bridge, wasting time, gas, etc. In the IP world, we need some mechanism to induce an asset's creator to make fixed cost investments; that's not a problem for Moore. Golde might substitute less efficacious (but more cheaply available) tissue or try to develop therapeutic products through resource-costly (but cheaper priced) synthetics.

the prize (or patent protection level) for the *invention* (the cell line, not the tissue used in developing it²⁸) at a point above that we would set it at if Golde received the tissue free of charge. Consumers or taxpayers could bear the cost of permitting Moore, and not Golde or Big Pharma, to sell, and consumers might be induced to substitute higher-cost but lower-priced products for those made with Moore's tissue.

- Assume instead that multiple researchers could use the tissue to develop cell lines, and still others could use it for research on the disease or other biological processes. Since *either* Golde or Moore will have control over the tissue in the first instance, the question is whether Golde or Moore is more likely to be an effective price discriminator, providing tissue to each would-be user at that user's reservation price. Golde is likely both to be much better positioned to locate other possible users than Moore would be, and more likely to understand which users would pay more to use the tissue. Again, absent perfect price discrimination, the "resource" (Moore's tissue) will be underutilized; it seems likely that Golde as "owner" could price-discriminate better, preventing the relevant social harm (underutilization of a resource useful in promoting health-increasing research).

The actual controversy would surely be even harder to analyze: Some potential tissue transferors might require compensation to induce them to endure the physical or psychological costs associated with transferring tissue. Or some transferors might fail to consummate transfers if uncompensated not because transfer entailed a cost, but because they thought they were being treated unfairly if they received nothing for an object they once possessed that others valued.²⁹ Were either of these true, setting the price at zero (by removing the power to sell) would lead to underprovision. Furthermore, it might be hard to protect a donor's normatively desirable capacity to direct the types of uses made of her cells without facilitating surreptitious sales. If that is the case, a no-sale regime is merely theoretical.

I have no strong intuitions or empirically warranted beliefs that would suggest that giving tissue transferors sales rights would lead to inefficiently low levels of tissue use, although generally defensible hesitations about monopoly sellers suggest we should be wary of creating a monopoly here. Nor, on the other hand, am I confident that the theoretically credible inefficiencies would be eliminated in practice or that some would be *created* by a no-sale regime. But I suggest that to the degree to which we have no faith in any of the empirical

28 The patentability of the cell line of course depends on the fact that the tissue (a natural product) is *not* the cell line, that the cell line is developed as a result of separable inventive labor.

29 Responders in ultimatum games often reject offers that plainly make them financially better off than they would be if they turn down the offer because they believe the proposer's offer—diverging far from what is perceived in many situations as the socially appropriate 50/50 split—is unfair. For a summary of some of the literature on how different responders react to distinct sorts of "unfair" splits, see Hessel Oosterbeek et al., *Cultural Differences in Ultimatum Game Experiments: Evidence from a Meta-Analysis*, 7 EXPERIMENTAL ECON. 171 (2004).

hunches, there may be nothing much useful to say about the propriety of granting patients the right to sell tissue. And again, literally none of the 1500 or so Property students I've taught the case to have spontaneously raised these questions or analyzed the case this way.

III. The Fans' Interest in the Battle Over Freer Player Movement

I have never taught a sports law course, but I am an unreasonably obsessed sports fan, and the discussions I have heard among fans and commentators about the battles between owners and players seeking a higher portion of their monopoly rents as athletes with intrinsically scarce talents³⁰ often significantly echo the discussions my property students engage in when responding to *Moore*.

However, while the symbolic responses to *Moore* are uniformly favorable to the patient, that is not so true here. No students in my property class treat the putative monopoly seller in *Moore* with the same sort of resentment, contempt, and anger with which a subset of fans treats the monopoly seller players.³¹ Perhaps the most common derisive symbolic argument is that players do something fundamentally trivial—compared, say, with teaching or nursing—and their salaries oughtn't dwarf those of folks doing “important” stuff.³² At any rate, survey data over the past quarter-century shows fans are fairly evenly split between pro-player and pro-owner attitudes during labor disputes.

30 Players seek not only higher financial compensation when they try to establish institutions guaranteeing greater freedom of movement and a concomitant decline in each owner's monopsony power, but also greater control over where they work and whom they work for and with. There is some parallel to the arguments over patients' rights over tissue: Patients seek not just more money, but more control over how “their” tissue is employed.

31 One hears a variety of symbolic anti-player diatribes: Players are getting to do something they love and should be grateful to get well-paid, let alone absurdly well-paid; paying young players a fortune just leads them to recklessly waste money or ruin their lives; it's insulting to expect fans struggling financially to empathize and root for people whose material lives don't resemble their own in any fashion.

32 The standard casual counterargument among the “don't-reward-the-trivial” argument is that we show what we *really* value not by our pious pronouncements but by how we spend our money, and if we choose to spend more to see sports stars than to pay teachers that shows how much we “really” value sports. The standard counterargument among economists, though, would be that we indeed value education more than sports, both in the aggregate (compare educational expenditures in the country—7.3% of GDP—with the \$56 billion-a-year expenditures on attending sporting events, less than 0.3% of GDP) and at the individual level (about a quarter of educational expenditures in the United States are privately borne, and many families spend tens of thousands of dollars a year on college education for their kids, while almost no one spends that much on sports). Star athletes make so much because of the scope of production; a high school teacher might teach a few hundred students at most, while the small number of star athletes can earn a bit from millions of people who value their star-level performance. If all teaching were done through mass online lectures, it might become the case that the superstar teachers (were some perceived to be superstars) would also be very rich.

And, of course, while the absence of economic incentives would likely have little impact on the decisions of potential tissue transferors undergoing nonelective surgery, both aggregate labor supply (number of years played) and training-sensitive labor quality will likely be positively affected (to an uncertain extent) by higher salaries.³³ This is true even though it is also fairly clear that players typically receive salaries in excess of their reservation prices to provide their services.³⁴

Still, it is common to hear arguments both for and against the players that are at core claims that simply permit people to perform their symbolic commitments. This is true for the anti-player arguments (e.g., Why do we pay “mere” entertainers so much more than we pay heroic service providers?). And it is also true for the pro-player arguments, which almost precisely mirror the arguments made for the would-be tissue sellers when discussing *Moore*: The players have a natural quasi-libertarian right to sell their labor for whatever buyers will pay,³⁵ and they are, at least compared with the hyperprivileged older white guys who own virtually all major sports teams,³⁶ the subordinated and exploited.

- 33 It is particularly difficult to measure the impact of economic incentives on players who play in sports with discrete seasons. But where players can readily vary labor supply and where quality is observable, some argue that there is good evidence that economic incentives do affect performance: Professional golfers are arguably more likely to enter tournaments (supply labor) and play better (improve labor quality) where prizes for finishing among the best performers increase. See Ronald G. Ehrenberg & Michael L. Bognanno, *Do Tournaments Have Incentive Effects?* 98 J. POL. ECON. 1307 (1990). Note, though, that these findings are rejected in Jonathan M. Orzsag, *A new look at incentives effects and golf tournaments*, 46 ECON. LETT. 77 (1994).
- 34 Few athletes (with the possible exception of some late-career, declining onetime stars who might get highly paid as broadcasters) could make the claim that some of us rent-earning law pros could reasonably make that lower salaries would cause them not to substitute leisure for athletic (law prof) work but to shift to a higher-paid nonathletic (law firm) job, a distinct form of labor misallocation.
- 35 Those who emphasize the libertarian “rights” of the players to sell to the highest bidder ignore the degree to which libertarians would disdain the use of antitrust law to forbid owners from contracting with one another to create a league with rules about how teams competed with one another, most particularly so long as the “league” was neither a natural monopoly, nor took illegitimate steps to squelch the formation of competitor leagues. For some typical discussions that cropped up as players were attacking mobility and salary restrictions across sports, focusing on the question of whether teams should be viewed as colluding competitors for purposes of antitrust law or as forming a league which is a single entity, subject to antitrust scrutiny, compare Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983) (endorsing the single entity antitrust analysis) with M. Blecher & H.F. Daniels, *Professional Sports and the Single Entity Defense under Section One of the Sherman Act*, 4 WHITTIER L. REV. 217 (1982) (rejecting the view).
- 36 Three of the thirty teams in the NBA are dominantly owned by people of non-European descent (Michael Jordan, Hornets; Joseph Tsai, Nets; and Vivek Ranadive, Kings). Five are owned by women. Four of the women (Jeanie Buss, Lakers; Gayle Benson, Pelicans; Jody Allen, Trail Blazers; Gail Miller, Jazz) inherited ownership from a male relative.

Once again, the focus on manifesting strong symbolic commitment to a simple single principle seems the wrong way to go, though normative conflicts and empirical uncertainty stymie our search for clear answers once one asks more relevant questions. I hope that what I call the policy-analytic questions are more commonly asked in this domain, and that urging students to acknowledge their significance here is a useful step toward making them see their importance in domains where they are more typically ignored.

Assume that we have been asked to examine player-friendly institutional structures that facilitate players in receiving their rents—the abolition of player drafts (which prohibit players entering a league from selling their services to any team), freer player movement from team to team,³⁷ abolition of (NFL-style hard or NBA-style soft) salary caps or (MLB-style) luxury taxes levied on salaries above a threshold, all of which dampen bidding for players. The critical point for the policy analyst is that we need to examine them with our strongest focus on which institutions redound to the benefit of fans, who are buying the services.³⁸

We will confront uncertainty, not only about the factual impacts of the more player-friendly institutions but about what “the fans’” goals really are, because different fans seek different outcomes, for distinct reasons and with different degrees of intensity. Not only will we not know precisely how each fan evaluates each potential outcome; we do not have an uncontroversial way of summing distinct preferences. Constructing a social welfare function is *always* tricky, but the problem is far harder in this case than in *Moore*, since the goals of therapeutics-seeking consumers are less likely to diverge.

Fans will conclude that owners better represent their own interests if they believe that higher salaries will lead to higher ticket prices. But, at least on first inspection, the intuition that ticket prices are sensitive to labor costs seems to rely on a model of the simple dynamics of competitive markets that is simply inapplicable: In a competitive market, long-run prices cannot remain above costs (including “normal” profits) lest entrants come in to offer the product at a lower, but still profitable, price. In such markets, increases in input costs will indeed drive prices up. But, of course, there are, at best, very weak substitutes for the product that teams offer their fans. Thus, the price-setting owners are more or less immune to competition from price-affecting entrants. We would expect, instead, that owners would charge ticket prices that maximized

37 Note that players could in theory be *permitted* to move but bear a financial penalty (a quasi-tax on mobility) for doing so.

38 Fans should be asking themselves not which party they think is more heroic, subordinated, or morally entitled but which one seeks institutional arrangements that better serve the fans’ interests. Similarly, the most significant question we should ask in analyzing *Moore* is which legal rule is likely to allocate tissue efficiently to produce valued medical advances for patients. The consequentialist analysis gets even more complicated if we assess the impact of alternative arrangements on taxpayers in the cities in which teams play, service workers employed by the team and at subsidiary support establishments, etc.

revenue without any regard to the costs they bore, at least if revenue did not change when costs changed.³⁹

But ascertaining the team's profit-maximizing ticket pricing strategy is far from easy. The teams themselves price tickets far below the price that scalpers and other market-clearing sellers charge, seemingly leaving a good deal of revenue on the table to be earned by these secondary market sellers. This has generated a great deal of quite varied commentary by economists, little of which seems wholly convincing. Still, many of the explanations of the persistence of submarket-clearing prices do nothing to shake the intuition that shifting labor costs will have no impact on ticket prices.⁴⁰

A few, though, might. One might believe, first, that teams depend on fairly broad-based support among fans who could not pay market-clearing prices. They might do so both because mass support in municipal votes is important if the teams are to receive the substantial public subsidies they often receive⁴¹ and because the teams worry that "average fans" who have little or no chance of getting to see games live will lose interest in the team in ways that ultimately hurt the team. One might further believe that the ticket price that will keep "average fans" engaged and willing to go to the stadium is set in some part by expectations about what a "fair price" is,⁴² expectations

39 That assumption is likely unrealistic: Costs and revenue are not independent, and owners would be expected to maximize the surplus of revenue over costs. If spending hikes increased revenue, because, for instance, fans would pay more for tickets when a team wins more and spending more leads to a greater probability of winning, it might be rational to spend more, but it also might be beneficial in some circumstances to make revenue-reducing decisions that cut costs.

40 Among the explanations for the persistence of submarket-clearing ticket-face prices and scalping that in no way imply a connection between lower labor costs and lower ticket prices are the following: 1. Teams are more interested in pursuing sellouts to generate excitement and TV contracts than in maximizing revenue from first-order ticket sales. 2. Similarly, secondary sellers might be more risk-tolerant than the team owners, willing to buy up tickets early from risk-averse team owners and take a chance that near-to-game demand rises rather than falls. 3. Secondary sellers might have more information about the reservation prices of a subset of high reservation price buyers than the teams have. 4. Game prices may be set to attract long-term loyal season ticket holders, stabilizing team revenue. 5. The perception by consumers/fans that there is excess demand for a product at Time One stimulates demand for the product at Time Two. For good nontechnical summaries of the range of theories, see Alan B. Krueger, *Economic Scene; Seven lessons about Super Bowl ticket prices*, N.Y. TIMES (Feb. 1, 2001), <https://www.nytimes.com/2001/02/01/business/economic-scene-seven-lessons-about-super-bowl-ticket-prices.html>; Paul Krugman, *Thinking Outside the Box Office: Ticket scalping and the future of capitalism*, SLATE (May 13, 1999), <https://slate.com/business/1999/05/thinking-outside-the-box-office.html>. A more technical summary can be found in Craig A. Depken, *Another look at anti-scalping laws: Theory and evidence*, 130 PUB. CHOICE 55 (2006).

41 See Philip K. Porter & Christopher R. Thomas, *Public Subsidies and the Location and Policy of Sports*, 76 SO. ECON. J. 693 (2010) (arguing that non-market-clearing ticket prices are significantly motivated by the desire to appeal to less wealthy voters whose support for subsidies is needed by owners).

42 There is a rich literature—in economics and marketing—showing that consumer behavior is sensitive to the perceived fairness of prices. For classic expositions, see Daniel Kahneman

that may well be sensitive to the costs the “average fan” believes the team is bearing. So if “average fans” recognize that teams are spending more, likely to remain competitive, they would better tolerate increasing ticket prices. But if the owners’ monopsony power diminished the need to spend to remain competitive, fans would resist and resent higher prices, and the owners would be reluctant, knowing of that resentment, to raise them.⁴³

Determining what institutions help “fans” can be difficult—not only because of empirical uncertainty about each rule’s impact, but because fans’ interests are heterogeneous, and there are no institutional reforms that are Pareto superior. The question of whether player-favorable rules help “competitive balance” is complex in just this way.

Partly, of course, we face the typical empirical research questions: What impact, if any, does changing X rule (the input) have on the output Y? Figuring this out is difficult enough even if the output Y is well-defined, but the relevant output here (“competitive balance”) is extraordinarily poorly defined.⁴⁴ There are a number of quite distinct conventional measures: A league could be defined as more “balanced” if season records were more compressed (lower standard deviation of wins);⁴⁵ if the average margin of victory per game

et al., *Fairness as a Constraint on Profit-Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986) (finding that buyers believe raising prices is fair when costs rise but not simply when demand rises); Margaret C. Campbell, *Perceptions of Price Unfairness: Antecedents and Consequences*, 36 J. MARK. RES. 281 (1999) (if consumers infer “bad” motive for a price increase—a design to increase relative profit—they will lower shopping intentions). Among pieces that find that consumers find prices more fair when justified by supplier cost concerns, see Joel E. Urbany et al., *All’s not fair in pricing: An initial look at the dual entitlement principle*, 1 MARKETING LETTERS 17 (1989) (ATM fee with cost justification fairer than one without).

- 43 The empirical evidence on whether salary cost increases cause price increases is thin and, in my view, mostly off point: It typically focuses on whether a team’s payroll increases are associated with short-term increased prices for that team. See, e.g., Nate Silver, *Lies, Damned Lies: Ticket Prices vs. Player Salaries*, BASEBALL PROSPECTUS (Apr. 30, 2003), <https://www.baseballprospectus.com/news/article/1844/lies-damned-lies-ticket-prices-vs-player-salaries>. One could readily overestimate the straightforward impact of rising costs: Assume that payroll bumps typically precede ticket price increases. Teams that increase payroll may charge more in preseason price-setting because they expect to win more, thus boosting demand for tickets. It could also underestimate the impact: many fans’ perceptions of team costs (and their concomitant views of “fair prices”) may be more sensitive to the overall perception that salaries in the sport have risen generally than they are sensitive to team-by-team variations in payroll. Furthermore, empirical studies relying on longitudinal data on industrywide ticket price changes during periods of rising labor costs are very difficult to interpret, since labor costs rose at the same time as disposable income, particularly disposable income of high-income buyers likely to drive demand for tickets.
- 44 For discussions of alternative conceptions of competitive balance, see, e.g., Roger Noll, *Professional Basketball: Economic and Business perspective*, in THE BUSINESS OF PROFESSIONAL SPORTS 18, 39-40 (Paul D. Staudohar & James A. Mangan eds., 1991); Allen R. Sanderson & John J. Siegfried, *Thinking About Competitive Balance*, 4 J. SPORTS ECON. 255 (2003); JAMES QUIRK & RODNEY D. FORT, *PAY DIRT: THE BUSINESS OF PROFESSIONAL SPORTS TEAMS* 240-50 (1992).
- 45 This might be valued by fans if they stayed more engaged when for more of the year the team they root for had a reasonable chance of getting to postseason playoffs. For a typical

decreased;⁴⁶ if there were a decreased probability at the beginning of the season that an identifiable team (or small number of teams) would make the playoffs/advance in the playoffs/win a championship;⁴⁷ if it were likelier that a team that was successful (unsuccessful) in year 1 would be unsuccessful (successful) in subsequent years.⁴⁸

It is also plausible that the most intensely interested fans have a still-more-complicated understanding of what free-player movement does to competition. In this view, the problem is that fans of teams in unattractive markets face a disheartening experience that both fans of these teams and high-intensity sports fans more generally code as unfair in a high free-movement regime: Their teams have a very narrow window of opportunity⁴⁹ to be successful, and that success requires near-perfect luck and decision-making while the “glamour” free-agent destination teams have many more windows of opportunity and the capacity to survive both bad decisions and some periods of bad luck. Championship contention-level NBA success is extremely dependent on superstar-caliber players; only one player earning a superstar salary (top thirty in the league) or earning All-NBA honors in the previous season has signed with or demanded to be traded to one of the ten lowest franchise value teams *in this century*, while the list of players who have left those ten franchises through free agency or trade demands is substantial.⁵⁰ On

discussion focused on dispersion of win/loss percentages, see PAY DIRT, *supra* note 44, at 244-55; Noll, *supra* note 44, at 18, 40.

- 46 This might be valued by fans if it were more entertaining to see more competitive games where the outcome is in more doubt from beginning to end.
- 47 This might be valued by fans of both the good teams—who would want to think their team’s triumph was not a foregone conclusion—and bad teams—who would like to be hopeful during more seasons.
- 48 Fans of the sport generally might value turnover or might value seeing the Great Traditional Rivals play one another in championship matchups each year. TV ratings suggest that casual fans (*more* people) prefer repetitive matchups among a small handful of historically successful teams to contests between occasional upstart successes. It is also possible that (many) fans are no less interested in or entertained by leagues that are not competitive in any of these ways, perhaps in part because they discover new forms of competition to focus on (e.g., fantasy teams) or recalibrate their expectations. For an elaborate and thought-provoking argument that traditional forms of competitive balance may be of no moment to consumers given the development of substitutes for traditional forms of “balance,” see Salil K. Mehra & T. Joel Zuercher, *Striking Out ‘Competitive Balance’ in Sports, Antitrust, and Intellectual Property*, 21 BERK. TECH. L. J. 1499 (2006).
- 49 The window in the NBA is of course far longer than it would be in a pure free-agency regime since players do not become unrestricted free agents until their first non-rookie contract runs out; that generally occurs after they have been on the team that drafted them for eight years, so long as the drafting team chooses to match offers and re-sign a player after his initial (four-year) contract runs out. A team that drafts a superstar always has a few years in which it might build a powerful team around him.
- 50 Star players leaving low valued franchises were Pau Gasol and Mike Conley, Memphis; Chris Paul and Anthony Davis, New Orleans; Kemba Walker, Charlotte; LeBron James and Kyrie Irving, Cleveland; Al Horford and Paul Milsap, Atlanta; Carmelo Anthony, Denver.

the other hand, the truly dismally managed Lakers franchise was rescued by the decision of a superstar (LeBron James) to join the team, attract other star players (like Anthony Davis), and instantly contend.

The opportunities for badly run teams to turn around, and well-run ones that don't collect enough assets to compete for championships during their "window" to decline, are simply radically unevenly distributed. What intense fans likely mean by competitive imbalance is precisely inequality in capacity to succeed at any given level of good management and luck. If this is the "output" we are interested in, though, it is extremely difficult to find an ideal measurable proxy for it, so that attempts to test empirically whether the owners are protecting something valuable in reducing player rights will be inapt.

The *theoretical* argument that competitive balance, *however defined*, will not change if we adopt more player-favorable rules like those permitting free agency is grounded in standard Coase theorem assumptions (first articulated by Simon Rottenberg in the context of professional sports⁵¹ well before Coase had articulated the invariance proposition in his famous article on social costs): Each player would always have gone to the team that valued him most highly anyway, regardless of who owns his monopoly rents, since team owners would have sold or traded players before the advent of free agency to teams that valued them more highly. The theoretical argument does not hold if some owners are win maximizers rather than profit maximizers⁵² and/or if owners behave like consumers subject to endowment effects.⁵³ Those who think the Coase theorem applicable note that aggregate player mobility changed little, for instance, after baseball players gained the right to sign with new teams,⁵⁴ but I find that is a particularly irrelevant test.⁵⁵ The appropriate question is

The list is likely no longer simply because there are very few "superstars" in the league and even fewer of them *ever* played in unattractive markets. The teams in the league's ten least attractive markets have lost every superstar player who has played on the team during this century who is not currently on the team for fewer than eight years. So fans of these teams would rightly despair that unless they manage to make near-perfect moves in the next few years, they will lose all of the current superstars or potential superstars that they now have.

- 51 Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242, 255-56 (1956).
- 52 For a discussion of the distinction in behavior between win-maximizing and profit-maximizing clubs, see Helmut Dietl et al., *Social Welfare in Sports Leagues with Profit-Maximizing and/or Win-Maximizing Clubs*, 76 SO. ECON. J. 375 (2009). For their brief summary of the literature that the invariance proposition does not hold if owners are win maximizers, see *id.* at 376.
- 53 See Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1978).
- 54 See T. Hylan et al., *The Coase Theorem, Free Agency and Major League Baseball: A Panel Study of Pitcher Mobility from 1961 to 1992*, 62 SO. ECON. J. 1029 (1996); Matthew Spitzer & Elizabeth Hoffman, *A Reply to Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 53 S. CAL. L. REV. 1187 (1980).
- 55 I first expressed my hesitation about the reliance on aggregate player movement to test the validity of the invariance proposition many decades back in Mark Kelman, *Spitzer and Hoffman on Coase: A Brief Rejoinder*, 53 S. CAL. L. REV. 1215 (1980).

whether more (of the less attractively located and/or poorer) teams lost more high-quality players *without receiving high-quality players in return*, either through trade in the pre-free-agency era or by letting players go but signing others in the post-free-agency era, not whether players were always traded or whether unattractive teams still fill out their rosters by signing unwanted players from attractive teams. The claim by those who think the pre-free-market era saw a level of simple sales of contracts comparable to the net player-quality losses that unattractive/poor franchises face in the freer market era is simply unsustainable.⁵⁶

The *empirical* argument that competitive balance hasn't changed with owners' loss of monopsony power is grounded pretty much in simple pre-/post-regime-change comparisons. The arguments are, once more, quite suspect, and figuring out why they are unconvincing would help students better understand empirical methodology.⁵⁷ Even if it were true that "competitive balance" (as measured by standard deviations, SDs, of wins, or score margins, for instance) did not change, some explanations of stability would be more benign from a fan's vantage than others: Most benignly, attractive and richer teams might indeed sign highly sought-after players who do not systematically improve their teams because players' performance is unpredictable and inconsistent.

Less benignly, aggregate measures of competitiveness may cover up profound shifts in the long-term ability of unattractive and/or poorer

56 An inexplicable outcome for those who believe the invariance proposition operated here is that the pre-free-agency Pittsburgh Pirates did not sell the contracts of *any* stars from the early 1900s to the mid-1970s (Wagner, Traynor, Vaughn, Groat, Mazerowski, Face, Law, Clemente, or Stargell), but the post-free-agency franchise (after the mid-1970s) signed no stars and lost Bonds, Drabek, Bonilla, Van Slyke, Cole, and McCutcheon—virtually every star-level player the team has employed. Ralph Kiner was the only pre-free-agency Pirate to depart in a salary-related dispute that could be said to resemble in some sense a "free agent" departure in which the team received little or no value when losing a star-level player.

57 See, e.g., Noll *supra* note 44, at 41-42; Rodney Fort & James Quirk, *Cross-subsidization, Incentives and Outcomes in Professional Teams Sports Leagues*, 33 J. ECON. LIT. 1265, 1275-77, 1279 (1995). In no cases, though, are the researchers comparing simple free-movement regimes (no draft, no soft or hard caps, immediate free agency) with "restrictive" regimes, and it is unclear whether we could draw any conclusions about the hypothetical impact of simple free-movement regimes on "competitive balance," however defined, even if we find that the removal of one class of restrictions is of little moment.

Moreover, critiques of time-series-regression analyses make me deeply skeptical of all the findings. Variants of omitted-variable bias are obviously the big problem. There was no change in owners' monopsony power between the 1960s and mid-1970s, but the American League became much more competitive in the sense that the Yankees' probability of success declined radically after the mid-1960s (perhaps because the team was relatively slow to employ Black ballplayers). There might well be factors that increase competitiveness in the post-1976 period that offset the anti-competitive impact of adopting a regime with declining monopsony power. For a more formal statement of the problems with describing an earlier event as a "cause" of a later event when it is associated with a break in time series data, given that one might simply later learn more about the attributes of earlier events, see Paul W. Holland, *Statistics and Causal Inference*, 81 J. AMER. STAT. ASSOC. 945, 957-58 (1986) (for X to be considered a true cause of Y, X must be capable of being deemed a treatment in an experiment, and earlier settings are not treatments in the relevant sense).

franchises to compete if they lead to patterned shifts in the identity but not the relative strength of good and bad teams. When LeBron James went from the Cavaliers to the Lakers, the teams simply switched places within the league's hierarchy,⁵⁸ but there was no league-wide shift in competitiveness. What seems to me the critical, but underappreciated, question is whether distinctions in the probability that particular teams occupy higher (or lower) positions on the rung over the long haul represents a welfare-dampening decline in "competitiveness" (or "fair competition") for some subset of fans (both of the directly impaired teams and of "purists" who believe that only some mix of luck and management skills should determine outcomes), and how to weigh the losses they experience against gains to fans of the "attractive" teams whose probability of winning at each level of management skill increases.⁵⁹

The issues raised by *Moore* were difficult because it is hard, empirically, to determine whether granting the patient the right to sell would inhibit the outcome that should, from a consequentialist policy vantage, clearly be of most interest: the development of therapeutic treatments. Likewise, from a consequentialist vantage, it is difficult to know whether to side with players or owners in typical disputes, even if one accepts that in some broad sense, the most important question is what set of institutional rules will "help the fans." It is both empirically unclear what occurs when we adopt a particular regime, and normatively and empirically unclear which fans' interests to attend to, how to balance conflicting interests, and what is the best measure of anyone's reactions to an outcome. In each case, though, from my vantage, reflecting on the "right" to profit from one's body or one's skills or reflecting on which party belongs to a privileged or a less privileged social group clearly does no real work.

58 The Lakers had a winning percentage of .776 when the 2020 season was suspended; the Cavs, .292. In 2017–2018, the Cavs played .610 ball in the regular season (and reached the NBA Finals), while the Lakers had a winning percentage of .427 after finishing with an even more dismal .317 winning percentage the year before. In the 2010–2011 season, Chris Paul's last playing for New Orleans, the team's win percentage was .561 (and the team took the defending champion Lakers to six games in a playoff series), and the Clippers played .390 ball. In 2011–2012, with Paul a Clipper, the Clippers had a .606 winning percentage and New Orleans, .318. The aggregate competitiveness of the league had not changed much, in part because the teams occupying the rough position in the league that each occupied before the star left the unattractive market simply switched places.

59 The measurement problem would be difficult enough, practically, even if we adopted conventional willingness-to-pay style measures, but the problem gets more conceptually and practically intractable if we entertain the possibility of adopting less subjective theories of welfare. While it is hard to conceive of fans' pleasures as more or less noble, one can certainly imagine taking the position that one form of satisfaction is more worthy of respect and nurturing than the other. (Is it in some sense a "better" pleasure, nurturing a set of human capacities we would want people to nurture. to stick with a team, mostly through thin when the thick times finally come, than to enjoy rooting with a high sense of expectation or entitlement for a perennial winner?) Are the pleasures that fans sophisticated enough to value equal opportunity to compete given equally "smart" management gain "objectively" deeper than the gains less sophisticated fans get?

Less clear, but enormously intriguing, is the possibility that a student exposed to the policy-analytic approach to player movement—an approach both more familiar and less likely to fly in the face of truly deep symbolic commitments—will recognize that this approach could have been used in situations in which the student was initially predisposed to abjure this method. It seems quite plausible to me—if no more than plausible—that a student who confronted the player movement case just *before* confronting *Moore* (raising many parallel issues about the virtues and drawbacks of rewarding a monopolist) would be more likely to appreciate the wisdom of seeking to ascertain the consequences of protecting the patients’ interest in monetizing their tissue.

I acknowledge that urging that students in essence “practice” policy-analytic techniques in low-meaning situations as a starting place in their educations could be read as a plea for insisting that students spend more time on issues that spark little passion. And I understand that position runs counter to important demands that law schools address the most pressing issues of our time (e.g., systemic racism, climate change) *more*, right from the start, than they conventionally have. I appreciate the need to connect both school and legal practice to genuinely grave concerns, but I see significant problems in engaging many of the issues that matter most right from the start.

It might well be best to expose students to the issues in the context of what Duncan Kennedy once called “cold cases,”⁶⁰—those raising doctrinal issues that elicit few strong symbolic reactions (or affective reactions of any sort). Whether students would be better off exploring how to define assent and consent in a “drier” contracts class discussion well before having to confront them in a criminal law class discussion of rape law is not clear; but having taught criminal law for four decades, I intuit that confronting these issues for the first time when discussing sexual violence issues risks not only traumatizing students victimized by such violence, but leads students to “perform” positions that they perceive demonstrate allegiance to those subordinated by violence, in a fashion that clarifies values and bridges gaps far less carefully.

IV. Conclusion

The easier attack on both the libertarian and anti-subordination perspectives that students typically embrace is that students often believe that articulating basic starting places leads to more determinate conclusions than is actually the case.

The illusory determinacy of libertarian thought has been the subject of considerable academic writing.⁶¹ Embracing the idea that libertarian thought

60 Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 594–95 (1982).

61 Much of the indeterminacy critique came in reaction to Nozick’s *Anarchy, State, and Utopia*. See, e.g., Thomas Nagel, *Libertarianism without Foundations*, 85 YALE L.J. 136 (1975); Cheyney Ryan, *Yours, Mine, and Ours: Property Rights and Individual Liberty*, in READING NOZICK: ESSAYS ON ANARCHY, STATE AND UTOPIA 323 (Jeffrey Paul ed., 1981); G.A. Cohen, *Freedom, Justice, and Capitalism*, 126 NEW LEFT REV. 7 (1981); Mark A. Michael, *Redistributive Taxation, Self-Ownership and the Fruit of Labour* 14 J. APP. PHIL.

is inexorably indeterminate, though, requires a pre-commitment to both a certain level of legal positivism and a Hohfeldian understanding of legal relations that significantly undergird centrist consequentialism. Absent such pre-commitments, one is unlikely to share the intuitive suspicion of the possibility of coherent libertarian commitments. From the vantage of those who have accepted these basic premises, it is obvious that every legal rule we adopt simply mediates between clashing claims and desires. If we are talking about conventional property rights, we may mediate between desires to exclude and desires for access; desires for free use and desires to be immune from the negative impacts of free use;⁶² desires for full eternal dispositional control and desires to be free of dead-hand restrictions. If we side with the would-be user, rather than the party seeking higher levels of immunity, we do so because of the impact that decision will have, not because there is some fixed natural level of use privileges *or* some fixed natural level of immunity. If we are talking about the hypothetical fruit picker I mentioned in discussing Nozick's discussion of Wilt Chamberlain's claims to monetize his basketball talent, we mediate the clash between the fruit picker's claims to use state force to protect his desire to control the fruit that he picked and the claims of the hungry to appropriate some of the fruit without interference from the picker because one resolution will be more acceptable than the other.⁶³

137 (1997). The critiques drew very heavily on early twentieth century Legal Realist criticism of Lochner-era libertarian jurisprudence. See Morris R. Cohen, *The Basis of Contract Law*, 46 HARV. L. REV. 553 (1933) (emphasizing that the relevant query in all legal disputes is not *whether* collective compulsion should be brought to bear but on whose behalf it will be brought to bear and answering that question cannot be done by appeal to ideas of limiting government). For similar Realist anti-libertarian arguments, see Morris R. Cohen, *Property and Sovereignty* 13 CORNELL L. REV. 8 (1927); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

Much of the hesitancy about claims to the determinacy of libertarian principles in the law school world developed further in reaction to Epstein's *Takings*. See e.g., Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829 (1986); Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279 (1986); Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986).

- 62 My students typically find it far easier to embrace the proposition that libertarianism is indeterminate in resolving controversies over "use rights" than to embrace the proposition that libertarian conceptions of the ownership of the fruits of labor—not just the right to withhold labor but to monetize the agreement not to withhold it—is indeterminate. I suspect that even though the overwhelming majority of my students believe that income taxation aimed at reducing inequality is legitimate, most still believe that libertarian thought *does* dictate in a determinate fashion that income taxation is at core a breach of laborers' property rights. I suspect this intuition is grounded in a set of prior commonplace (if hard to justify) intuitions about the distinction between acts and omissions and between harming and failing to benefit.
- 63 I leave aside for here the other significant indeterminacy in libertarian thought, an indeterminacy that is especially sharply exposed at the beginning of law school for some students when they think about the issues of sexual consent. Libertarianism is premised on the idea that there is a clean line between impermissible coercion (and threats) and mutuality (and offers) that is not actually readily drawn. There is, for instance, no formulaic answer to the question of whether an employer who would fire a worker who did not attend a political rally for a candidate the worker opposed has coerced him into attending the rally or done something impermissible whether or not we think he has coerced him.

The indeterminacy (emptiness?) of efforts at libertarian resolutions came into sharp focus during the early days of the COVID crisis when protestors objected to mask-wearing mandates. Though some relied on loose cousins of natural law arguments that were more explicitly religious than libertarian (e.g., that the masks interfered with God's designs for breathing), most were using (misusing? but how can one tell if it is a misuse if the underlying scheme is actually indeterminate?) libertarian ideas that resemble libertarian "free use" ideas in real property law (of the sort that would consider strict environmental laws compensable takings). It is easy enough to label these efforts pathological misuses of libertarian rhetoric: It is hardly "determinate" and unambiguous *within* libertarian schemes that the mask-resisters' "rights" to be mask-free should be protected rather than their neighbors' "immunity rights" to be exposed to lower levels of risk. But from the vantage of centrist consequentialists, the pathology is just more obvious, rather than different in kind, from the pathology revealed in the more mainstream libertarian discussions of *Moore* or players' rights.

Indeterminacy is hardly the most critical problem facing those who resolve cases simply by siding with the more subordinated parties affected by the decision, but it is *a* problem. Even if one believes one need look no further than the identity of the particular disputants, labeling one party as "privileged" and one as "subordinated" may not merely be an analytically incomplete decision-making guide, it may not be possible to do in a determinate fashion. Are the high-SES parents who press school districts to pay for expensive individualized educational plans for their kids whose educational needs might be less pressing than the needs of others in the district⁶⁴ "privileged" (by virtue of their high SES and ready ability to advocate efficaciously within the educational bureaucracy)⁶⁵ or "subordinated" (by virtue of their disability)? Are disabled students generally "subordinated" (in that we can treat them as a part of a social group facing substantial discrimination) or "privileged" (in that they may be able to make federal-law based claims on local school resources denied other resource-deprived students whose learning outcomes might improve if more resources were devoted to their education)?⁶⁶ Are race-based educational affirmative action programs acceptable even when they might focus benefits on high-SES students of color, or are such programs suspect if they displace first-generation, low-income applicants, even those of European descent (who might be thought of as "more subordinated")?⁶⁷ Is

64 See MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 77 (1997).

65 *Id.* at 87, 89.

66 *Id.* at 224-26.

67 For discussions of this issue, see, for instance, Maria Cancian, *Race-Based versus Class-Based Affirmative Action in College Admissions*, 17 J. POLICY ANALYSIS & MGMT. 94 (1998). An excellent defense of the proposition that race, without regard to class status, is an important factor that schools should account for can be found in Khiara M. Bridges, *Class-Based Affirmative Action, Or the Lies That We Tell about the Insignificance of Race*, 96 B.U. L. REV. 55 (2016). The most

Moore himself really subordinated, or someone privileged to possess a scarce resource, intending, like a gifted athlete or a private equity firm manager, to extract monopoly rents?

Identifying what one should do if “siding with the subordinated” is harder still if one needs not only to identify the more privileged party in each case but to figure out how a decision will affect those one identifies as the privileged and the subordinated when applied more generally. Once one looks to the impact of a decision on not just the disputant but the “community,” we face the descriptive problem that it is very hard to determine the impact of policy decisions, and the normative problem that we need some scheme to sum the clashing interests of members of the community. These are, of course, precisely the problems that made centrist policy analysis indeterminate. A particular pattern of police stops might, in the first instance, adversely affect people of color who are disproportionately stopped; but to reject the claim that the disputed pattern of stops is justified (e.g., by its purported crime-dampening impact within the community of color where stops are most typically made),⁶⁸ one must reject the empirical contention that the stops diminish (widely condemned and feared) forms of behavior in the community and/or believe that the interests of those stopped outweigh the interests of those benefited by the reduction in unwanted crime. People in the affected community are *all* subordinated, generally speaking; simply “siding with the subordinated” will not resolve the dispute if those within the community are differentially affected.

Indeterminacy, though, does not strike me as the biggest problem with acting on symbolic commitments. To harken back to the example I discussed earlier, I really can *predict* that my libertarian students will be persuaded by

publicly prominent proponent of attending to class, not race, has been Richard Kahlenberg. See, e.g., RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1987). Richard Sanders not only argues that class is a more appropriate basis for a number of distinct forms of affirmative action than race, but expresses skepticism about how one defines membership in subordinated racial groups. He notes, for instance, Lani Guinier’s finding that fewer than one-third of Black students enrolled at Harvard Law School have four African American grandparents, and that it is not obvious that multiracial children and children of recent Caribbean immigrants have been “subordinated” in the same way as those with four African American grandparents. See Richard Sander, *Class in American Legal Education*, 88 DENVER U. L. REV. 631, 664–66 (2011).

68 There are certainly reputable studies claiming to demonstrate that increasing police presence—though not arrests or stops per se—has a crime dampening impact, though they are hardly incontrovertible. See, e.g., Jonathan Klick & Alexander Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 J. LAW & ECON. 267 (2005). There are also studies that suggest that “stop, question, frisk” strategies produced statistically significant but modest crime reduction effects, though they were not clearly superior to other strategies less harmful to police legitimacy. See, e.g., David Weisburd et al., *Do Stop, Question, and Frisk Practices Deter Crime?*, 15 CRIM & PUB. POL’Y 31 (2016). My point here is not to assess these empirically controversial claims but merely to argue that one needs to assess them—in the fashion that a centrist consequentialist would—even if one’s self-conscious goal were simply to implement a “support the subordinated” strategy.

Nozick's argument that principles of justice-in-transfer validate Wilt's high income, whether rationally warranted or not. Likewise, I can predict that libertarian students in my property class will believe that the antidiscrimination provisions of Title II of the 1964 Civil Rights Act are *per se* takings of exclusion rights and that the Endangered Species Act takes use rights.⁶⁹

The predispositions of my libertarian students, then, are fairly predictable, whether or not any is logically entailed by any coherent foundational commitments. The deep problem is substantive: Legal decisions *should* be grounded in our views of factual consequences and complex norms, not any single set of symbolic commitments. We should learn what we can about the impact of masks on COVID transmission rates, think more about the costs of alternative means of protecting those most vulnerable to the disease, and debate how we weigh distinct costs borne by distinct people. Separate from the question of whether the consequentialist approach is inherently more sensible, it is an approach that permits opponents and proponents of mandatory masking to address one another; it might be the only approach that holds out the possibility of persuasion. It deemphasizes inevitably polarizing identity issues in a world where polarization is often leading to policy paralysis.

In considering those committed to embracing the perceived interests of the subordinated, think about the controversy that was (in my view) appropriately resolved when the recently renamed Washington Commanders finally, seemingly under pressure from those well-celebrated champions of the anti-subordination agenda, Fed Ex and Nike, shed what had long struck me as a racist team moniker. Set aside the much-debated issue of whether the political culture in (some) universities "silences" those who might raise points that will label them as less-than-woke and subject them to informal social reprisal, and simply hypothesize that some student in a sports law or antidiscrimination-focused class argued that there was little or no reason to change the team's name because public opinion polls revealed overwhelmingly that self-identified Native Americans stated they were not offended by the name and that more respondents expressed pride in the team's use of that name.⁷⁰

69 I can also *predict* that libertarian students will believe that the "public use" requirement of the Fifth Amendment should be read to bar "economic development" takings, whether or not, from a policy analytic vantage point, the problems of parochialism in the use of publicly condemned real property are any more serious or justiciable than the problems of undue parochialism in the use of tax funds. I have argued that Justice Thomas' restrictive reading of the "public use" requirement makes little or no functional sense in Mark Kelman, *The Conceptual Conundrum at the Core of the Kelo Dissent*, 16 DUKE J. CON. L. & PUB. POL'Y 121 (2021): The problem that the "public use" requirement might solve—the use of publicly garnered resources (whether in cash—through conventional taxes—or in kind—through conventional land condemnation) to benefit only a subset of the population is no more readily solved in the context of condemn-and-use than tax-and-spend. The argument is not entirely conceptually dissimilar to the argument that plaintiffs in public use cases ought to lack standing because they are not particularly affected by the ways in which their condemned property is utilized. See David L. Breau, *A New Take on Public Use: Were Kelo and Lingle Nonjusticiable?*, 55 DUKE L.J. 835 (2006).

70 Typical polling evidence offered to support the proposition that Native Americans were

I worry that the comment raised by the hypothetical student, even if not met by informal social shaming, gets dismissed as wholly beside the point if classmates think the question can be resolved simply symbolically, by evaluating language specifically used by the privileged to refer in anything but a flat or honorific way to groups of subordinated people as an unacceptable act of subordination. The problem here is surely not “predictive” indeterminacy; I have no doubt that students committed to the anti-subordination position would resolve this and other indeterminate cases in this way.⁷¹

What I think centrist consequentialist students would need to do—I would think in reaching precisely the same bottom-line conclusion in this case—is considerably harder. But in going through the analytical process, they would learn a good deal about social science concepts relevant to innumerable controversies and challenge their normative preconceptions by raising hard but important conceptual questions.

So, for instance, such students should and would learn not to accept “polling data” uncritically. In fact, the real-world polls the hypothetical student would have cited are, in my mind, not nearly as straightforward as the student might think. And centrist consequentialist students could learn a good deal about the difficulty of both constructing and interpreting public opinion data generally by analyzing some of the familiar methodological problems in these polls (e.g., even the category of self-identified Native Americans is troubling if, as appears to be the case, those who not only identify as Native but engage in some traditional Native practices are much more likely to be offended by the name than those who don’t).⁷²

One would also have to interrogate one’s own views on one of the hardest normative questions we face if forced to perform a conventional consequentialist evaluation here: What should one make of “adaptive preferences” (the tendency of people to learn to accept or even like the things they actually have no hope of changing) if one believes that a significant reason many Native

unbothered by the Washington team’s nickname can be found in a 2016 Washington Post poll of Native Americans on the Redskins’ team name. John Woodrow Cox et al., *New poll finds 9 in 10 Native Americans aren’t offended by Redskins name*, WASH. POST (May 19, 2016), https://www.washingtonpost.com/local/new-poll-finds-9-in-10-native-americans-arent-offended-by-redskins-name/2016/05/18/3ea11cfa-161a-11e6-924d-838753295f9a_story.html.

71 Some of my progressive students *would*, for instance, question whether high-SES parents of students with disabilities seeking private school placements for their children merit concern as subordinated, but very few if any of them would question more generally whether students with disabilities are in some sense “privileged” relative to other students who could profit from educational resources now devoted to students with disabilities.

72 Many of the methodological problems in the polls that purported to show little opposition by Native Americans to the use of the name “Redskins” are highlighted in a piece that especially emphasizes distinctions in ethnic identity among those surveyed. See Stephanie A. Fryberg et al., *Unpacking the Mascot Debate: Native American Identification Predicts Opposition to Native Mascots*, 12 SOC. PSYCH & PERSONALITY SCI. 3 (2020).

American respondents said that they were not offended by the name is that they had come to believe they did not have the social power to change it?⁷³

One would have to face other extraordinarily difficult normative issues as well: What methods do we use to “weigh” distinct preferences if, for instance, those who dislike the name subjectively experience it as extremely painful while others who react to the name more favorably barely care? What if, for the many who experience the team’s name as a racist assault, its ongoing use has a profoundly alienating and dispiriting impact on their lives, while few others benefit in ways that have important impacts on their overall functioning? Can we weigh conflicting preferences about end-states by any method other than accounting, somehow, for their “intensity”? My hypothetical centrist consequentialist student, if concerned with the impact of the use of the name on the capability set of the affected parties, would have to examine how the use of various forms of pejorative labels for subordinated groups by dominant social groups has affected both the capacity of members of those subordinated groups to flourish and the attitudes of members of the dominant groups toward members of the subordinated group.⁷⁴

It may seem puzzling to plead that our students embrace methods that will leave them far less certain and confident about how best to resolve the

73 For a particularly trenchant general discussion of the nature of adaptive preferences, and the problems they pose for unabashed preference utilitarians who believe people are better off so long as their preferences are satisfied, see Martha Craven Nussbaum, *Adaptive Preferences and Women’s Options*, 17 *ECON. & PHIL.* 67 (2001). For another canonical formulation see JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983). Some of the pieces that focus specifically on the question of whether preferences that are adaptive to oppression are especially troubling include Anita Superson, *Deformed Desires and Informed Desires Tests*, 20 *HYPATIA* 109 (2005); Sandrine Berges, *Why Women Hug their Chains: Wollstonecraft and Adaptive Preferences*, 23 *UTILITAS* 87 (2011). Not surprisingly, there is also a rich literature criticizing the claims that people’s ostensible adaptive preferences misrepresent their actual preferences or that even true adaptive preferences would be troubling. See, e.g., Donald W. Bruckner, *In Defense of Adaptive Preferences*, 142 *PHIL. STUD.* 307 (2009); Harriet Baber, *Adaptive Preference*, 33 *SOC. THEORY & PRACTICE* 105 (2007).

74 For a thorough summary of the literature on the deleterious impact of Native American mascots on both Native and non-Native people exposed to the mascots, see Laurel R. Davis-Delano et al., *The psychosocial effects of Native American mascots: a comprehensive review of empirical research findings*, 23 *RACE, ETHNICITY & EDUC.* 623 (2020). A particularly interesting study, finding that even though Native students had positive associations with mainstream pop cultural Native American archetypes like mascots, exposure to them nonetheless depressed self-esteem, community worth, and the capacity to imagine a fuller range of future selves, is Stephanie A. Fryberg et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 *BASIC & APP. SOC. PSYCH.* 208 (2008).

More generally, it could well be helpful for students to consider whether the presence of these sorts of mascots resembles other forms of “microaggressions” and to confront more generally both the literature that sees microaggressions as a pervasive and consequential problem (see, e.g., David Wing Sue et al., *Racial microaggressions in everyday life: Implications for clinical practice*, 62 *AMER. PSYCH.* 271 (2001)) and the literature that is far more skeptical of the claims made by those who have urged us to treat microaggressions as a serious social problem (see, e.g., Scott Lilienfeld, *Microaggressions—Strong Claims, Inadequate Evidence*, 12 *PERSP. IN PSYCH. SCI.* 138 (2017)).

issues that they face. But uncertainty need not quell the motivation to act. The gratification of identifying with a political team and of transparently performing a set of basic political commitments may look, on reflection, like a cheap thrill, purchased at the cost of losing the chance to take advantage of the time spent at school to develop the critical analytical skills and dispositions that permit us as lawyers to claim some measure of special expertise not just in dispute resolution but value clarification and policy evaluation.