ARTICLES

OPEN COMPETITION IN LEAGUE SPORTS

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INTRODUCTION

As this Article goes to print, Major League Baseball has announced plans to contract from thirty to twenty-eight teams, refusing to permit the relocation of a financially-troubled Montreal franchise to our Nation's capital and strongly hinting that the refusal of Minnesota taxpayers to subsidize a new stadium will result in the demise of the Minnesota Twins.[1] At the same time, Los Angeles has more than enough basketball fans to support two teams, but a wealthy mogul continues to steward the Clippers into new lows of mediocrity.[2] When Tennessee wanted a pro football team, they had to shell out over $292 million in taxpayer money to lure the Houston Oilers.[3] The National Hockey League has doled out American expansion franchises so artfully that the Montreal Canadiens pay more than triple the tax bills of all their American rivals combined.[4] Why does this happen?

In 1602, an English judge invalidated a monopoly in playing cards that Queen Elizabeth I had granted to a court crony, finding that the Queen must have been deceived, since monopolies so clearly led to higher prices, lower output, and lower quality.[5] The basic rules of economics recognized almost four hundred years ago remain true today in the world of sports. Facing no real competition, professional sports clubs raise prices, hold down the number of franchises in their leagues, and often fail to put the best possible club on the field or ice. Yet while

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1. Mark Asher & William Gildea, *Selig's Economic Recovery Pitch Elicits Few Takers*, WASH. POST, Dec. 7, 2001, at D1.

2. *See* Richard Hoffer, *The Loss Generation*, SPORTS ILLUSTRATED, Apr. 17, 2000, at 56.

3. Gordon Forbes, *Oilers Ready to Pull Trigger on Move*, USA TODAY, Nov. 2, 1995, at 4C.

4. *See* James Deacon, *Faded Glory*, MACLEAN'S, Feb. 5, 2001, at 40.

5. Darcy v. Allen, 77 Eng. Rep. 1260 (K.B. 1602).

Major League Baseball is talking about contracting, there are twenty or more cities with populations in excess of one million that could host a major league team in each of the major sports.[6] This amounts to a potential fan market between twenty-five million (for baseball) and fifty million (for football) people, most of whom are unlikely to see a major league team in their city in their lifetime.

One reason for this is that in North America, sports leagues are closed ventures. Membership in the league is a gift from the existing members, who typically grant the right of entry only in exchange for a substantial fee. (And baseball owners are prepared to pay $250 million to each owner of the teams to be eliminated by the proposed contraction,[7] an amount significantly higher than the market value of the teams.[8]) This is fundamentally different than the structure of team sports in the rest of the world. Elsewhere, sports leagues are usually open: membership in the league is contingent on success. Professional sports leagues in soccer, rugby, basketball, and cricket are organized in ascending tiers (generally called divisions), and every year the teams with the worst record are relegated to a lower division and replaced by the most successful teams from that lower division.

This structural difference has significant consequences for the conduct and performance of sports leagues. Because the leagues[9] are almost always the sole providers of the highest quality club play in each sport, and in North America the leagues do not face reasonable substitutes for consumers' patronage,[10] the closed structure also has

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6. Data on population is based on metropolitan area data published by the Census Bureau and is available at http://eire.census.gov/popest/archives/metro/ma99-02.txt (last visited May 20, 2002).

7. *See* Mark Asher & Dave Sheinin, *Union and MLB Talk Over Plans*, WASH. POST, Nov. 13, 2001, at D3.

8. The Minnesota Twins, for example, have been valued at $99 million. *Braves No. 3 in Total Value Behind No. 1 Yankees, Mets*, ATLANTA J. CONST., Mar. 31, 2001, at 3E. A detailed list of all franchise estimates is available at http://www.forbes.com/basesball/free_forbes/2002/0415/092tab2.html (last visited Apr. 29, 2002).

9. This Article focuses on the four dominant sports leagues in North America—the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL).

10. A variety of courts have concluded that the sports leagues that are the topic of this Article are sufficiently different from other forms of entertainment and that the dominant league exercises market power. *See, e.g.*, Fishman v. Wirtz, 807 F.2d 520, 531 (7th Cir. 1986) (NBA); L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1393 (9th Cir. 1984); U.S. Football League v. NFL, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); Mid-South Grizzlies v. NFL, 550 F. Supp 558, 571 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983); Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 500-02 (E.D. Pa. 1972) (NHL). The authoritative Supreme Court case on point is *International Boxing Club of N.Y., Inc. v. United States*, which held that world championship bouts

potentially important antitrust consequences. However, perhaps owing to the ethnocentric American view that sports-related structures not known on these shores must not be relevant here, there has been very little research on the impact of openness on the organization of sports leagues.

This Article argues that the practice of "promotion and relegation" tends to raise consumer welfare by increasing effective competition among the teams in a league. Teams that are relegated to a lower division after an unsuccessful year will play a lower standard of competition and generate less interest among fans, and therefore will reduce the revenue-generating potential for their owners. Because teams seek to avoid relegation as well as to win championships, they have a greater incentive to invest in players than teams participating in closed competitions. For lesser teams in lower divisions, the allure of promotion to the top division enhances the incentive to invest in players and provides fans with new and innovative professional league competition, distinct from and qualitatively superior to the current minor leagues. Moreover, promotion provides a market-based means of permitting new entry, which will check the power of incumbent clubs to exercise market power. These effects involve a direct gain for consumers (sports fans), since the additional efforts of their team enhance the quality of play, while at the same time the excitement of promotion and relegation struggles add an extra dimension to league competition.

The competitive check provided by new entry is particularly significant in the sports industry, because the particular interdependence that sports teams have with other economically separate firms within the same league has led courts to be much more permissive in their antitrust scrutiny of trade restraints among members of sports leagues than in the case of most businesses. Rules involving limitations on competition for players and sharing revenue between rival clubs, as well as restrictions on entry into the league joint venture, on the sale of broadcast rights, and on the internal business structure of member clubs, are all tolerated unless demonstrably unreasonable in the sports context. Yet such rules would probably be unacceptable under the antitrust laws if employed in other industries. This legal generosity stems from the recognition that teams need to cooperate to some degree in order to produce their output[11] and that a more balanced competition requiring cooperation is

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were in a separate market from other major professional boxing fights. 358 U.S. 242 (1959). This reasoning supports the lower court cases cited *supra* as well as a finding of Major League Baseball's market power.

11. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984).

more interesting to consumers.[12] Restraints that promote balance are therefore deemed justifiable, and reasonable forms of those listed above have all been accepted as legitimate.[13]

However, numerous commentators have expressed concern about the potential for abuse of market power that has been created by the permissive regime applied to sports leagues.[14] Examples of such abuses include escalating ticket prices, indifference to the interests of committed fans, exploitation of players, and racial discrimination. But perhaps the most notable abuse has involved public subsidies for new stadia. Since 1960, almost every major league team has benefited from a public subsidy of some kind.[15] In most cases, these subsidies have been the result of a bidding war between municipal authorities. Noll and Zimbalist characterize the situation thus:

> All major sports are controlled by monopoly leagues. Like monopolists anywhere, these leagues profit from a scarcity of teams. By creating a situation in which several cities that are viable franchise sites do not have teams, the leagues set up competitive bidding for any team that becomes available, whether through expansion or relocation. Cities that lack a team then become credible threats to induce an existing team to move, as well as to provide a hungry pack of suitors when a league decides to expand. This situation bids up the price for franchises and the subsidy that a city must expect to pay in order to capture or to retain a team.[16]

Presently in baseball, the only area prepared to subsidize a stadium is the Washington, D.C. area,[17] although owners are reluctant to approve a relocation because of the objections of the nearby Baltimore Orioles.[18]

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12. *Id.* at 117-20; Mackey v. NFL, 543 F.2d 606, 621 (8th Cir. 1976); United States v. NFL, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

13. *See generally* Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 537-49.

14. *E.g.*, JAMES QUIRK & RODNEY FORT, HARD BALL: THE ABUSE OF POWER IN PRO TEAM SPORTS (1999); GERALD W. SCULLY, THE MARKET STRUCTURE OF SPORTS (1995); ANDREW ZIMBALIST, BASEBALL AND BILLIONS (1992); Thomas A. Piraino, Jr., *The Antitrust Rationale for the Expansion of Professional Sports Leagues*, 57 OHIO ST. L.J. 1677 (1996).

15. *See* Roger G. Noll & Andrew Zimbalist, *"Build the Stadium—Create the Jobs!"*, *in* SPORTS, JOBS, AND TAXES 2 (Roger G. Noll & Andrew Zimbalist eds., 1997).

16. *Id.* at 26-27.

17. *See* John Henderson, *Contraction on Deck for Baseball*, DENVER POST, Nov. 6, 2001, at D4.

18. Richard Justice, *No Easy Answers; Owners' Contraction Plan Means Questions, Controversy, Legal Issues*, HOUSTON CHRON., Nov. 8, 2001, at 10B.

So, owners propose contraction in hopes of recreating the cycle of bidding for franchises among have-not municipalities.

A system of promotion and relegation places a significant limit on the monopoly power of sports leagues. The system preserves the integrity of the league itself and indeed allows leagues to legitimately expand or contract to most effectively market the product. At the same time, a club's threat to relocate without tax subsidies is diluted by the possibility that the team itself may be relegated and, more importantly, by the creation of alternative entry routes for cities that do not possess a major league team. In other words, both the expected benefit of the subsidy for the municipality and the expected benefit to the team of its other option (relocation) are diminished. As a result, the ability of teams to extract subsidies is either reduced or eliminated altogether.

Given its advantages, would a system of promotion and relegation ever be adopted in North America? We think it unlikely that clubs themselves would voluntarily introduce such a system. Thus, some form of government intervention is probably necessary to achieve this result. Promotion and relegation is in fact an ideal structure for surgical intervention to promote entry, since it involves replacing the least efficient incumbent (in terms of wins) with the most efficient entrant. Moreover, entry is only conditional on continuing success, so that a relegated incumbent has an opportunity to recapture its position the following season.[19] Indeed, in the current controversy over baseball's contraction, government-ordered promotion and relegation seems clearly preferable to either the continued monopolistic exploitation by owners or to some court-supervised freeze on franchises, mandatory relocations, or other highly regulatory approach.

This Article elaborates on our proposal for legislative or judicial antitrust intervention to require dominant North American sports leagues to implement a system of open competition such as that used in most of the professional sporting world. Part I provides a basic analysis of the economics of promotion and relegation. Part II outlines the way that promotion and relegation operates in English soccer, where it has existed since the nineteenth century, and the implications of the English experience for North American leagues. Part III discusses how closed leagues might be challenged under the Sherman Act, and Part IV considers the details of implementing a system of promotion and

19. In this sense, promotion and relegation is analogous to a rule developed by leading economists for contestable markets—the so-called Baumol-Willig efficient components pricing rule—which requires incumbents to grant access on terms that ensure that only entrants more efficient than the incumbents can enter the market. *See, e.g.*, William J. Baumol et al., *Parity Pricing and Its Critics: A Necessary Condition for Efficiency in the Provision of Bottleneck Services to Competitors*, 14 YALE J. ON REG. 145, 151-53 (1997).

relegation.

I. THE ECONOMICS OF PROMOTION AND RELEGATION

In general, a larger league is more attractive than a smaller one. A world championship title is more prestigious than a national title, which is more prestigious than winning a regional competition. The more inclusive the competition, the more gratifying the victory. However, there are limits to the optimal size of a league. If the clubs all play each other at least once during a season, there are limits imposed by the physical ability of the players to perform in a sequence of matches, and by the total supply of talent. A larger league leads to a skewed distribution of talent, creating more unbalanced contests. If expansion leads to more unbalanced contests, it can be argued that very large leagues will sacrifice quality for quantity. Finally, even if player talent were evenly spread across all clubs, the talent level for each team would be diluted. Although in many cases the value-added for the fans of the additional clubs outweighs the marginal decline in attractiveness for the fans of the existing teams, at some point this ceases to be the case. These are reasons why members of a league would want to control access in order to maintain an optimally sized league, and why society's laws should find such control to be desirable.

However, there are reasons to suppose that league members will tend to restrict access to a point below the socially optimal level. The major North American sports leagues are organized as joint ventures, where entry and other major business decisions are made jointly by clubs seeking to maximize their own profits, as opposed to a "single entity," where entry and other decisions would be made by an executive or board seeking to maximize overall league profits.[20] Thus, while a single entity league would ordinarily be expected to expand franchises until the point where marginal revenue equals zero, the objective of teams in the league will be to choose the number of franchises so as to maximize average revenue per club.[21] This is analogous to prior

20. *See* Ross, *supra* note 13, at 549-55.

21. The point is easily made with a simple model. Suppose each team in a league has a profit function of the form $\pi_i = V + w_i(t_i) - t_i$, where $w_i = \frac{t_i}{\sum_{j=1}^{n} t_j}$ is the success of the team (expressed in the form of win percent), t is the playing talent that produces success (at a constant marginal cost normalized to unity), and V is some fixed utility associated with the presence of a sports team in a particular location (which the team is assumed to extract through stadium subsidies or other means). Social welfare in this model is simply $n\pi$, where n is the number of teams. The symmetric profit

observations by labor economists that a labor-managed firm will not expand employment as far as a profit-maximizing firm.[22]

Even though expansion franchises can be assessed a fee to compensate the existing teams for the loss of expected income (reduced probability of winning a championship, reduced percentage of revenue from league-wide ventures), there are several reasons why leagues will still tend to engage in under-expansion. Transaction costs in estimating and agreeing upon expected losses from future entry may lead the league to set the fee too high to attract efficient entry. Most significantly, league members have an incentive to expand sub-optimally in order to provide clubs with a credible threat to move to economically viable open markets unless local taxpayers provide generous tax subsidies. Any expansion can be expected to remove the most viable markets as threatened relocation sites, thus reducing the ability to acquire subsidies.[23] These points have been illustrated most vividly by the recent judgment of baseball owners that they are better off paying two of their fellow members $500 million in order to contract the number of teams.[24]

When monopoly leagues do expand, it is often not to be responsive to consumer demand but rather as a strategic move to deter entry from a rival league. As Fort and Quirk put it, "[m]onopoly profits earned by leagues invite entry, so that one critical aspect of league decision making is acting to inhibit entry."[25] The monopoly league is likely to respond to threatened entry by creating new franchises in locations most likely to be attractive to an entrant league.[26] Moreover, if and when a rival league

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maximizing talent investment for each team $t^* = (n-1)/n^2$, and hence $\pi^* = V + 1/n$. Clearly profits are decreasing in n. However, total welfare is simply $nV + 1$ and so social welfare is increasing in n. This is the basis of the under-expansion result.

22. *E.g.*, J.E. Meade, *Labour-Managed Firms in Conditions of Imperfect Competition*, 84 ECON. J. 817 (1974); Benjamin Ward, *The Firm in Illyria: Market Syndicalism*, 48 AM. ECON. REV. 566 (1958).

23. *See, e.g.*, Stefan Fatsis, *Seven Strikes and Still Swinging: St. Petersburg Still Hopes to Get a Major-League Team*, PLAIN-DEALER (Cleveland), July 14, 1993, at 5F, *available at* 1993 WL 4300853 (listing five existing franchises that threatened to relocate to the St. Petersburg-Tampa area alone, only to remain in their current city after receiving tax subsidies).

24. *See supra* note 7 and accompanying text.

25. Rodney Fort & James Quirk, *Cross-Subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. ECON. LIT. 1265, 1292 (1995).

26. This observation is illustrated by Major League Baseball's experience in the period from 1959-62. Despite a huge population growth and a major population shift away from the northeastern United States, the American and National Leagues had remained constant at eight teams each since the turn of the century. In 1960, legendary baseball executive Branch Rickey sought to create a new "Continental League" with franchises in New York (which at the time had only one club, the Yankees), Houston, Minneapolis-St. Paul, and five other locations without any established major league

does manage to enter the market, the incumbent can absorb all or part of the new league: "If a rival league is successful, the inevitable outcome is merger with the existing league in order to exploit the resulting market power over players, TV networks and stations, and local governments."[27] Thus, even if strategic entry deterrence considerations lead to expansion beyond the point that maximizes average franchise revenue, it is unlikely over time to result in optimal expansion and will continue to result in significant opportunities to obtain monopoly rents.

In contrast to the closed league structure featured in North America, an open league system with promotion and relegation will significantly dissipate rents, as well as inefficient rent-seeking activity such as the creation of sub-optimal entry restrictions, without causing the problems that might be associated with over-expansion. The prospects of demotion for teams in the major leagues and promotion for teams in the junior league both induce an increase in investment, raising the quality of competition. Not only will individual clubs have a greater incentive to improve the quality of their product by obtaining better players, but the total talent level is likely to increase as well. Even if all the best baseball, basketball, football, and hockey players in the entire world already play in the North American major leagues,[28] the existing talent pool is likely to improve through increased expenditure on training and coaching. This is driven by the fact that failure would potentially involve a significantly heavier price than simply "waiting until next year." An additional advantage of promotion and relegation would be a consistent average talent level in the major leagues, in contrast to alternatives that rely on significant expansion.

The system of promotion and relegation will also significantly increase the quantity as well as the quality of competition. The system will introduce an entirely new level of competition available for mid-sized cities, suburban areas, and growing metropolitan areas, that is

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team. *See* Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 719 (1989). Many felt this league would have been viable, but the two established leagues responded by adding additional teams in New York (the Mets) and Los Angeles (the Angels) as well as new teams in Houston and Minneapolis-St. Paul. *See id.* This move deprived Rickey of sufficient markets to operate at minimum viable scale and thus forestalled entry. *See id.*; *see also* Jay Weiner, *Baseball Contraction; The Rise, and Then the Fall*, STAR-TRIB. (Minneapolis-St. Paul), Nov. 11, 2001, at C1.

27. Fort & Quirk, *supra* note 25, at 1294. As one of us has argued elsewhere, the outcome is "inevitable" only in the sense that it is the clearly preferred option for owners seeking to regain monopoly power, and one that society has in the past permitted by allowing the Supreme Court to create a special antitrust exemption for baseball and via special congressional legislation authorizing the NFL to merge to monopoly. *See* Ross, *supra* note 26, at 715-33.

28. This assumption is questionable in light of the increased globalization of sport.

qualitatively distinct from and superior to that provided by minor league farm teams, where young players compete solely to develop skills to be used at the discretion of the parent club.

Another advantage of promotion and relegation is a significant increase in the attractiveness of the second half of each season for fans of teams not in contention for the championship, by creating a new aspect of competition: avoiding relegation. The problem of end-of-season ennui has become even more acute in recent years, as teams that have lost hope rush to trade players whose contracts are expiring to pennant contenders in return for young prospects, thus rendering the remainder of their season even less interesting for fans.[29]

One of the most significant economic implications of the system of promotion and relegation is its effect on the opportunity for incumbent clubs to obtain rents because of franchise scarcity.[30] It is arguably efficient to extract the quasi-rents associated with maintaining a team of high quality through some form of public subsidy (like the fixed fee of a two-part tariff), to the extent that teams cannot extract, through conventional means of ticket pricing, broadcasting rights sales, and merchandising, the consumer surplus associated with reading about the local team in the newspaper or talking about it with friends.[31] However, it is socially wasteful to extract pure economic rents by threatening to relocate unless a heavily subsidized facility is provided. This wasteful extraction is possible only because of franchise scarcity, and the amount of the rent extracted matches the willingness to pay of the unserved location (and if this is larger than the willingness to pay of taxpayers/voters in the current location, the team moves). The existence of an unserved location enables all of the teams to extract economic

29. *See* Ross Newhan, *Giants Masters of All Trades*, L.A. TIMES, Aug. 1, 2001, at D1. In contrast, in the final week of the 2000 English Premier League season, for example, Manchester United had long since clinched the league championship and the other meaningful places at the top were settled (in England, the top four-to-five finishers are eligible for invitation to European club tournaments), but sports fans followed with interest as the two highlighted games selected for telecast featured the two teams on the verge of relegation. *See, e.g.*, Simon Barnes, *Kitchen-Sink Drama Gives Me Double Vision*, TIMES (London), May 15, 2000, at 30, http://www.times-archive.co.uk/news/pages/tim/2000/05/15/timfoofoo01002.html.

30. The repeated use of this threat is well documented in Noll & Zimbalist, *supra* note 15, at 4.

31. In other words, it is efficient for teams to extract revenues from fans even if they pay in excess of marginal cost, if these excess revenues pay to produce a team of a quality responsive to what consumers demand (what appear to be economic rents are dissipated in the costs of production, hence the term "quasi-rent"). One way to extract these quasi-rents is through a club membership fee, which is independent of the cost of going to the game, so that fans pay a two-part tariff: membership fee plus entry fee. One could imagine treating public subsidies as similar to a membership fee, only paid out collectively by the municipality.

rents from their existing location, whether or not any of them actually move.

Once a system of promotion and relegation is instituted, all credible locations will be served, even if only by teams competing in a lower tier. The threat of relocation would then have limited value. The only credible relocation scenario in the open system would arise when a team in a small drawing location currently in the top tier offers to relocate to a large drawing area. However, the amount of rent would be much smaller, because: (a) second-tier competition has a value; (b) a second-tier team can be promoted in the future (and will be likely to do so if it is from a large drawing area that will generate revenue sufficient to support investment in a major league payroll); and (c) a team currently in the top tier might end up getting relegated at some point in the future. All of this suggests that relocation is quite unlikely with a system of promotion and relegation.

Compare the economic choices facing civic officials wishing to obtain a major league franchise under the two systems. In a closed system, the government will likely have to construct a new stadium at public expense and provide it to an existing or expansion franchise on heavily subsidized terms. Even then, a local owner will have to be found who is willing to invest a significant amount of capital in paying an expansion fee or purchasing an existing franchise. In an open system, several local owners anxious to eventually enter the major leagues may well compete for the local land development rights to build a new stadium (or, if civic officials choose to build a public stadium, to pay market-based rent). The winning owner's investment will not be used to pay a huge fee to other owners, but rather to acquire the front-office and on-field talent necessary to succeed in the junior league and secure promotion to the major league.

An open system also provides the proper incentives for owners in a monopoly league to efficiently, and without the need of government regulation, determine the optimal number of teams playing at the top level. For example, if baseball owners believed that competitive balance could be enhanced or the quality of pitching improved by reducing the number of teams, fans would be assured that this judgment was not pretextual. Competition on the field, rather than willingness to subsidize new stadia, would identify those teams to be relegated.

The foregoing analysis also suggests that promotion and relegation is a more efficient and consumer-responsive means of allocating franchises than allowing the owners of a fixed league to accept or reject requests for individual franchises to relocate. Teams would be optimally located in markets where consumer demand for major league sports is most intense. With closed leagues, relocating to reflect a change in

demand requires: (a) an owner's ability to identify the change; (b) the owner's willingness to incur transaction costs to make the change; and (c) the other owners' willingness to agree to the change. With open leagues, local entrepreneurs who may have better information about their market's ability to support a major league team, and who may have ancillary reasons for wanting to bring a major league club to their town, can do so at a lower cost.[32] Modern architectural techniques permit the construction of modest-sized stadia viable for junior league competition that can, without prohibitive expense, be expanded to accommodate major league capacities.[33]

Indeed, relocation is almost unheard of in Europe, where the promotion and relegation system operates. As detailed below, the economic performance of professional soccer clubs in Europe, and in England in particular, provides further support for the welfare-enhancing and rent-dissipating effects of promotion and relegation.

II. PROMOTION AND RELEGATION IN ENGLISH SOCCER

When the twelve-team English Football League was founded in 1888, it was agreed that the four worst-performing teams should have to seek re-election by a vote of the remaining members, a system borrowed from county cricket.[34] From the beginning it was intended that a second division should be created, but its provisional title—the "second class" —clearly indicated its status.[35] Five years later, the second division came into being and potential aspirants could apply to join either division.[36] In 1898, the system of automatic promotion and relegation from Division One to Division Two was introduced for the two best/worst performing teams in each Division.[37] This basic principle of hierarchical openness has been adopted throughout the soccer-playing world and in most other team sports played in Europe. Indeed, the "system of promotion and relegation is one of the key features of the European model of sport." [38] In theory teams can start at the lowest

32. *See* Roger G. Noll, *The Economics of Promotion and Relegation in Sports Leagues: The Case of English Football*, 3 J. SPORTS ECON. 169 (2000).

33. *See, e.g.*, Erik Spanberg, *Knights Take Swing at Building Ballpark Uptown*, BUS. J. OF CHARLOTTE, Feb. 11, 2000, at 1 (describing design of proposed stadia in Charlotte and Buffalo), *available at* 2000 WL 14788227.

34. The Football League, *The History of the Football League*, at http://www.football-league.co.uk/club/view/third_feature/0,,10794,00.html (last visited May 23, 2002).

35. *Id.*

36. *Id.*

37. *Id.* For further history of the league's evolution, see STEFAN SZYMANSKI & TIM KUYPERS, WINNERS & LOSERS (1999).

38. EUROPEAN COMM'N, DIRECTORATE GEN. X, SPORT UNIT, THE EUROPEAN

rung of the ladder in a regional competition and by dint of sporting merit alone they reach the top.

English soccer provides a case study to evaluate the impact of promotion and relegation on league structure and performance. A full financial evaluation is uniquely possible in England because of a legal requirement that all limited companies file standard financial accounts that contain details of revenues, wages, and profits, and make them available for inspection by the general public.[39]

Mobility between the divisions is more than a theoretical possibility. In any one year, there are ninety-two league clubs, and over the seasons 1976-77 to 1997-98 there have been ninety-nine teams participating in four professional divisions (there have been a small number of demotions to the lower semi-professional divisions).[40] Of these ninety-nine teams, only five were never relegated or promoted over the period.[41] Furthermore, over the same period, more teams have moved between three divisions (forty-three) than have played only in two (thirty-two), while twelve teams managed to visit all four divisions over the space of twenty-two years.[42] Moreover, many promoted teams become championship contenders even in their first year after promotion. Between 1991 and 2000, three newly-promoted teams finished third in the Premier League and two finished fourth (also giving these teams a lucrative entry into European competition)—accounting for 17% of all promoted teams over the decade.[43] In all, 50% of all promoted teams succeeded in surviving at least one season in the top division over the decade, with 27% of these teams finishing in the top half of the table.[44]

Expenditure on players represented the largest single cost item for all teams.[45] In the Premier (top-tier) League, salaries accounted for 52% of total income, while wages in the second-tier league (confusingly called the Football League First Division) averaged 68% of income.[46] In the Second and Third Divisions, teams traded at a loss, spending

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MODEL OF SPORT 4 (n.d.), http://europa.eu.int/comm/sport/doc/ecom/doc_consult_en.pdf (last visited Apr. 29, 2001).

39. The usefulness of these accounts is enhanced by the fact that all of the companies that operate English soccer clubs have virtually no other business interests separate from soccer. SZYMANSKI & KUYPERS, *supra* note 37, at 23.

40. The data reported in this paragraph are compiled from *id.* app. at 340-78.

41. Four of these teams have remained in the top division (Arsenal, Coventry, Everton, and Liverpool) while one has remained in the lowest division (Rochdale). *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

respectively 84% and 97% of their income on salaries.[47] Only three Premier League teams reported an average operating surplus in excess of $10 million per year over the five seasons between 1993 and 1998.[48] Of the seventy-two teams comprising the top four tiers of English soccer, only eight reported an operating surplus at all.[49] Of all the English clubs, only Manchester United can be considered to have reported significant and consistent profits.[50]

These figures, representing modest profitability, were reported not against a background of relative decline, but one of considerable growth. Between 1990 and 1998, aggregate attendance at league matches rose by 27% to 24.7 million.[51] In 2001, capacity utilization averaged nearly 93% in the Premier League[52] and almost 69% in the First Division.[53] Ticket prices rose at an annual rate of around 15% in the 1990s, well in excess of the rate of inflation, and by the late 1990s the average ticket price for a Premier League match (when tickets were available) was around $40.[54] Television broadcasting income rose from less than $10 million per year (for the entire league) in 1983 to a more plausible figure of around $250 million per year in 2001.[55] Furthermore, low profit figures are explained in part not only by high levels of player spending, but also by significant increases in stadium expenditure made by the clubs themselves, which has in part made possible the increasing levels of match attendance.[56]

American economists have documented the many ways in which teams can understate their true profitability,[57] and skeptics of profit

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47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.* at 43 fig.2.5, 52 tbl.2.4.

52. *See* Soccer-Stats.com, *Premier Attendances*, *at* http://www.soccer-stats.com/divisions/attendances.asp?divno=1&orderby=8 (last visited May 24, 2002).

53. *See* Soccer-Stats.com, *Division 1 Attendances*, *at* http://www.soccer-stats.com/divisions/attendances.asp?divno=2&orderby=8 (last visited May 24, 2002).

54. *See* Jennie James, *The Money Game*, TIME EUROPE, June 5, 2000, http://www.time.com/time/europe/magazine/2000/0605/football.html. *Cf.* John Reid, *Reclaim the Game: Ten Seasons of the Premier League Swindle* (stating that it would cost £100 for a family of four to attend a premier league match), http://www.socialistparty.org.uk/ReclaimTheGame/ReclaimtheGame.htm.

55. *See* SZYMANSKI & KUYPERS, *supra* note 37, at 57.

56. *See id.* at 55.

57. *See, e.g.*, ROGER G. NOLL, THE ECONOMIC VIABILITY OF PROFESSIONAL BASEBALL: REPORT TO THE MAJOR LEAGUE PLAYERS ASSOCIATION (1985). The profitability of sports teams is an issue that has sparked particular controversy in North America given the disputes between owners and player unions about the clubs' ability to finance wage increases. *See, e.g.*, Richard Justice, *Labor Pains: With Owners and*

figures issued by sports teams on this side of the Atlantic point to the very large values attached to franchises when they are sold.[58] Such sales are infrequent in England, but in the mid-1980s around twenty English clubs floated at least part of their equity on the financial markets.[59] According to financial markets theory, the market value of a stock should reflect the net present value of anticipated earnings.[60] In mid-1999, only three teams had a market capitalization in excess of $100 million (Manchester United, Newcastle, and Chelsea).[61] Of the remaining Premier League teams, those that seldom fall into the bottom of the division had capitalizations just under the $100 million mark (Tottenham, Leeds, and Aston Villa).[62] Three teams that have recently moved between divisions or repeatedly faced the threat of relegation (Sunderland, Leicester, and Southampton) had market capitalizations of $50 million, $20 million, and $17 million respectively, which is little different from comparable teams in the (lower tier) First Division.[63]

The relatively low market value of teams at the bottom of the Premier League does not simply reflect the fact that England is a smaller market than North America. Since 1998, Manchester United has been valued at over $1 billion, making it the most valuable sports team franchise in the world.[64] The income of clubs at the bottom of the Premier League is between five and ten times smaller than that of Manchester United, but in 1998 still amounted to around $30 million per year, whereas the average baseball club's income approached $80 million in the same year.[65] Yet the least valuable baseball franchise would sell for well in excess of two and a half times the market value of an English club threatened with relegation.[66] Conversely, there can be little doubt that if Leicester City or Southampton were promised

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Players Locked in Another Collective Bargaining Dispute, Strike Clouds Are Hovering over the 2002 Season, HOUS. CHRON., May 22, 2002, at 1.

58. *Cf.* Justice, *supra* note 57. The Boston Red Sox sold for $670 million in 2001. Leonard Shapiro, *O's Future Programming May Start at Home Base*, WASH. POST, May 7, 2002, at D1.

59. *See* SZYMANSKI & KUYPERS, *supra* note 37, at 18, 72-75.

60. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 39 (3d ed. 2000).

61. SZYMANSKI & KUYPERS, *supra* note 37, at 289 tbl.8-2.

62. *Id.*

63. *See* DELOITTE & TOUCHE, ANNUAL REVIEW OF FOOTBALL FINANCE (2000).

64. Peter Finney, *Yankees Getting World Serious; Champs Unite with England's Manchester United Soccer Franchise in Global Marketing Venture*, TIMES-PICAYUNE (New Orleans), Feb. 26, 2001, at 1 Sports.

65. *Compare* SZYMANSKI & KUYPERS, *supra* note 37, at 289 tbl.8-2 (English soccer), *with* Michael K. Ozanian, *Selective Accounting*, FORBES, Dec. 14, 1998, at 124, 126 (baseball).

66. *See* QUIRK & FORT, *supra* note 14, at 212 (showing that the Phoenix and Tampa expansion baseball franchises sold for $135 million each in 1997). This is about seven times the market value of Southampton and Leicester.

perpetual membership in the Premier League, their market values would rise sharply.

Finally, it is worth observing that while all English soccer clubs have increased their investment in stadium facilities, and several teams have moved to entirely new stadia, none of these investments have been supported directly by local government and no team has moved out of the local area.[67] Even if a local authority had the power to fund such a move, it would make little sense to invest money in this way, since every local authority of any size has at least one local team and could plausibly invest in developing its existing team with a view to promotion up through the divisions.

In sum, despite the strong monopoly position of English soccer,[68] a brief overview of the economic performance of English soccer teams supports the economic theory that promotion and relegation will dissipate monopoly rents and increase relative spending on players. An industry where profits are plowed back into improving the quality of the product for sports fans would appear to be better for overall economic welfare than one where profits are pocketed by owners. In the United States, arrangements that permit economic actors who face no meaningful market competition to pocket excess profits instead of making their products more responsive to consumer demand are normally thought to violate federal antitrust law. A promising means to secure the implementation of a promotion and relegation scheme in North America would be to consider an antitrust challenge to the very structure of a closed league.

III. AN ANTITRUST CHALLENGE TO THE STRUCTURE OF A CLOSED LEAGUE

Because clubs forming sports leagues must, of necessity, reach agreements on a variety of rules and regulations, the U.S. Supreme Court recognized in *NCAA v. Board of Regents* that these agreements should not be summarily condemned as conspiracies in restraint of trade in violation of the Sherman Act, as they might be in other industries.[69] Where rivals' collaboration has efficiency-enhancing potential, the proper legal framework to analyze their joint venture is the doctrine of

67. *Cf.* Peter Ferguson, *Plans Won't Sink Us, Says Everton Chief But Fans Are Left Feeling Relegation Issue*, DAILY MAIL (London), July 24, 2001, at 75 (describing Liverpool-based Premier League club's plan to privately finance new £155 million stadium).

68. For example, expenditure on soccer broadcast rights accounts for about 50% of all sports broadcasting expenditure in the UK; no other sport accounts for more than 10%. *See* KAGAN EUROPEAN SPORTS (2000).

69. 468 U.S. at 102.

"ancillary restraints." The doctrine, which originated in the English common law on restraint of trade, was imported into American antitrust law by William Howard Taft's landmark decision in *United States v. Addyston Pipe & Steel Co.*[70] This decision remains today the most coherent explanation of Supreme Court decisions in this area of antitrust law.[71] The ancillary restraints doctrine requires courts to evaluate whether challenged agreements among competitors are ancillary to an efficiency-enhancing collaboration and, if so, whether the restraints are reasonably necessary to achieve the benefits of the lawful collaboration.[72]

The Supreme Court effectively incorporated the ancillary restraints doctrine into its analysis of sports league conduct in the *NCAA* decision. Having rejected the plaintiff's claim that an agreement to restrain output of televised games was illegal per se, the Court examined the restraint to determine its effect on price, output, and the responsiveness of output to consumer demand.[73] Finding adverse evidence on all three counts, the Court nevertheless proceeded to consider the defendants' arguments that the agreement was justified. In doing so, the Court in effect examined whether the challenged restraints were ancillary to the lawful purposes for which the NCAA was organized.[74]

The economic analysis detailed above suggests that the decision by member clubs to operate as a closed league bears these hallmarks of an unreasonable restraint of trade. The closed league structure allows the league to restrict the number of franchises below an efficient level, and this scarcity allows the league to increase the prices paid by consumers (in areas where exclusive territories bar competition) and taxpayers (in terms of stadium subsidies). Local taxpayers would have no reason to provide substantial subsidies to attract or retain sports franchises if there were reasonable substitutes. Similarly, clubs guaranteed the permanent protection of a closed league would not enjoy their immunity from new entry if fans in their communities had reasonable substitutes.[75] The saga

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70. 85 F. 271, 282-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

71. This analysis is detailed in STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 121-43 (1993). Across the spectrum of antitrust ideology, the *Addyston Pipe* decision has been described as the "true precursor" of the per se rule and "a rational and useful way of distinguishing lawful and unlawful restraints," LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST 191-92 (2000), and "one of the greatest, if not the greatest, antitrust opinions in the history of the law," ROBERT H. BORK, THE ANTITRUST PARADOX: POLICY AT WAR WITH ITSELF 26 (1978).

72. *See, e.g.*, *Addyston Pipe*, 85 F. at 284; FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS § 3.36(b) (2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

73. *See NCAA*, 468 U.S. at 114-15.

74. *Id.*

75. Virtually no teams in the recent history of major sports have folded, in

of the Houston Oilers/Tennessee Titans illustrates this point. The Oilers were founded in 1959 as part of the maverick American Football League.[76] At the same time, the incumbent NFL had awarded one of its own franchises to Houston.[77] Because the market was insufficient to support two teams, the Oilers prevailed by offering to spend money to refurbish a local stadium (the NFL franchise went to Minnesota).[78] Four decades later, with no rival league to engage in bidding, the same team owner relocated the franchise to Tennessee for nearly $300 million in subsidies.[79]

The guarantee of permanent presence in a dominant sports league renders output unresponsive to optimal consumer demand in two respects. First, it allows firms to pocket profits, rather than using them to improve the quality of their teams, as fans would prefer. Second, to the extent that fans in another market place greater value on having a major league team, the permanence of major league franchises renders the allocation of franchises among locations in North America unresponsive as well,[80] thus rendering output unresponsive to optimal consumer demand. Where, as in North America, the dominant league in each sport has expanded to the point that entry by a new league is unlikely because of the scarcity of remaining viable markets,[81] the potential for new entry is not sufficient to prevent the exploitation of economic power. Under *NCAA*, therefore, it would appear that the

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contrast to the experience of sports leagues in earlier years when they did not have monopoly power, and in contrast to minor sports leagues like the Continental Basketball Association, which have experienced constant instability.

76. *See* Ross, *supra* note 26, at 655 n.52 (citing HOUSTON POST, Oct. 30, 1959, § 5, at 2).

77. *Id.*

78. *Id.*

79. Gordon Forbes, *Oilers Ready to Pull Trigger on Move*, USA TODAY, Nov. 2, 1995, at 4C.

80. Allocating franchises entirely on market-based principles might be socially undesirable if the result was a concentration of all the best teams in a few major cities. The European experience, however, does not bear this out. London has five of the twenty teams in the Premier League, but is only slightly overrepresented with twenty percent of the national population. *See* Planet Football, *English Barclaycard Premiership*, *at* http://www.optasoccer.com/table.asp?cpid=8 (last visited May 23, 2002); World Gazetteer, *United Kingdom: Top Cities*, *at* http://www.gazetteer.de/t/t_gb.htm (last visited May 23, 2002). Only Manchester and Liverpool (the eighth and fourth largest cities in England) have had multiple teams recently (actually, Manchester City was relegated last year). *See English Barclaycard Premiership*, *supra*; *United Kingdom: Top Cities*, *supra*. Sixteen Italian and Spanish cities host the eighteen teams of the Seria A and La Liga, with only Rome, Milan, Madrid, and Barcelona having two entries. *See* Planet Football, *Italian Serie A*, *at* http://www.optasoccer.com/table.asp?clid=&cpid=21 (last visited May 21, 2002); Planet Football, *Spanish La Liga*, *at* http://www.optasoccer.com/table.asp?cpid=23 (last visited May 23, 2002).

81. QUIRK & FORT, *supra* note 14, at 136.

closed league system could be successfully challenged as an unreasonable restraint of trade.[82]

Although North American sports leagues have faced numerous legal challenges over the years, the decision by member clubs to operate as a closed league has never been subjected to judicial scrutiny. The leading case concerning entry is *Mid-South Grizzlies v. NFL*.[83] In that case, the plaintiff sought entry into a closed league.[84] The court concluded that this was not a case of rivals conspiring to eliminate other competitors, because the new entrant did not propose to compete with the incumbents.[85]

The court's rationale would be inapplicable if, instead, the plaintiff had challenged the NFL's refusal to create an open league structure that would give it the opportunity to enter the top-tier league through promotion. Viewed in this light, the existing clubs in the NFL *are* in competition with each other in two important respects. First, by agreeing to a closed league structure, existing clubs are excluding potential rivals for stadium subsidies now obtained through threats of relocation. For example, such a structure effectively excluded other firms who might have been willing to pay a higher rent to play in Tennessee Stadium in return for the chance to build the team up and secure promotion to the NFL.[86]

Second, in an open league structure all teams would be competing with each other to remain in the top tier; the decision to operate as a closed league thus constitutes an agreement to foreclose competition among existing clubs. Because this challenge has never been considered by a court in the United States, there are no American precedents directly on point. Obviously, an agreement among firms that have never competed against each other in a relevant market not to do so in the future is as much a horizontal agreement in restraint of trade as an agreement by current rivals to cease competition.[87]

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82. Regarding the closed league system in Major League Baseball, the textual analysis assumes that a plaintiff could successfully argue that the antitrust laws should apply to baseball. The current application of the theory espoused in this Article and other potential antitrust challenges to baseball practices is detailed in Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133 (2001).

83. 720 F.2d 772.

84. *Id.* at 775.

85. *Id.* at 779, 787.

86. *Cf.* Piraino, *supra* note 14, at 1687-88 (arguing that teams now engage in intense competition to obtain the most favorable stadium packages). Piraino suggested that one of the reasons Browns/Ravens owner Art Modell left Cleveland even before a vote was taken in an Ohio referendum proposing tax subsidies to build a new football stadium was to beat other teams to Baltimore. *Id.* at 1688 & n.46.

87. Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990). Competition

The foregoing analysis is consistent with Professor Herbert Hovenkamp's general approach to the antitrust evaluation of the exclusion of rivals from joint ventures.[88] Applying *Addyston Pipe*'s ancillary restraint doctrine to this issue, Hovenkamp's approach first dictates that the rule of reason, rather than per se illegality, should apply because leagues have legitimate efficiency-based reasons for imposing *some* limits on entry.[89] Under the rule of reason, the economic analysis in Part I above shows that the major league's exclusion of entrants who are willing to qualify by demonstrating success in junior league competition does indeed threaten to reduce output, raise prices, and render output unresponsive to consumer demand. The analysis also demonstrates that, comparing the venture's output when the league is closed with the output after applicants are admitted, including the output from new entrants, it is promotion and relegation rather than a closed league structure that will increase venture-wide output.[90]

Like Hovenkamp, we acknowledge the general principle that compulsory access rules invite legitimate concerns that firms may underinvest in risky ventures, either because the advantage of innovation will be lost to latecomers whom they must admit to their ultimately successful venture, or because firms themselves will wait for others to innovate and then seek mandatory access.[91] However, we do not believe that these "free riding" concerns are substantial in the case of dominant sports leagues facing no reasonable substitutes. Free riding is solely an *ex ante* concern that legal rules requiring firms to do business with others will lead to inefficient output reduction through lack of investment. In the case of any specific sport, however, our analysis suggests that promotion and relegation will lead to more efficient output through *increased* investment.[92] There is also the theoretical possibility that our proposal could create a disincentive to new investment in new sports—the argument might be that people will be less willing to invest

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among clubs to remain in a top-tier league has been recognized as a relevant market for rivalry under Australian competition law. News Ltd. v. Austl. Rugby Football League Ltd., 139 A.L.R. 193, 338-39 (1996).

88. Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1.

89. Hovenkamp's analysis initially asks courts to determine whether exclusion should be considered per se illegal because its only rational purpose is price fixing or similar trade restraints. *Id.* at 122. As demonstrated in Part I, *supra*, unlimited entry is not optimal for sports leagues, and per se condemnation is therefore inappropriate. In any event, *NCAA*'s language about the need to evaluate all sports restraints under the rule of reason given the close need for some cooperation among club members, probably forecloses this analysis in the sports context. 468 U.S. at 103.

90. *Cf.* Hovenkamp, *supra* note 88, at 123.

91. *Id.* at 96.

92. *See supra* Part I.

in a new cricket league if they knew that, once established and highly profitable, they will be subject to promotion and relegation rules and thus be deprived of monopoly rents.

We are unpersuaded for three reasons. First, antitrust law does not allow collaborators to exclude others from the market for the purpose of recouping initial investment.[93] Suppose the United States Cricket League was formed in eight cities, and with a huge promotional investment the sport proved wildly successful. The antitrust laws would still prevent the owners from engaging in boycotts or other conduct designed to prevent the formation of a rival American Cricket League, and antitrust judges would reject the argument that—absent congressionally recognized protection akin to a patent or copyright—maintenance of the incumbent league as the only cricket league was necessary to permit the owners to recoup their investment in promoting the sport.[94] Secondly, because the incumbent league could not use anticompetitive means to forestall a rival league, its original investors could be assured of rents only if the league carried out a successful strategy of entry-forestalling expansion. Leagues are not always so prescient. Third, the first-mover advantages in sports, like in many other businesses where new products are developed and promoted, are likely to provide sufficient incentive to warrant investment where the market is likely to support it. Thus, there is no significant likelihood of investment-chilling free riding from this proposal. To the extent that a portion of a club's prior investment in the major leagues can be considered as capital specific to membership in that league, a reasonable fee might be imposed when clubs are promoted to the major league, to be paid to those clubs being demoted (similar to the capital fees paid by and to attorneys or accountants upon admission to and exit from partnership at their firms).[95]

The Supreme Court's decision in *United States v. Terminal Railroad*[96] provides further support for a finding that the closed league structure violates the Sherman Act. In that case, the Court held illegal an agreement by a number of leading railroads to invest in a corporation that acquired control of the only two bridges and one ferry providing railroad transportation across the Mississippi River at St. Louis.[97] The Court stated that the "fact that the Terminal Company is not an

93. *Mackey*, 543 F.2d at 621.

94. *See* Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 464 (1941).

95. Such a fee would also have the desirable effect of cushioning the impact of relegation and providing the team with cash to help it maintain viability while it works to return to the major league.

96. 224 U.S. 383 (1912).

97. *See id.* at 410-11.

independent corporation at all is of the utmost significance."[98] While an independently-owned company—even one with a monopoly—would make its facilities available to all, albeit at a profit-maximizing price, the defendant made access to a means to cross the Mississippi available on a preferred basis to those railroads that were stockholders, and new railroads could be added only by unanimous consent.[99] The Court emphasized the unusual "topographical condition peculiar to the locality" that prevented new entrants from constructing their own bridge across the river.[100] As a remedy, the Court ordered that new entrants be permitted access on "just and reasonable terms and regulations" that would put them "upon as nearly an equal plane" with the defendants.[101]

Although the barriers to entry in baseball, basketball, football, and hockey at the major league level may be based more on economics than on topography, it is clear that for those wishing to compete against current major league clubs, the option of creating their own major league is no more feasible than the option in *Terminal Railroad* of building a new bridge across the Mississippi.[102] Similarly, access to the major leagues is not determined by an independent corporation, but by an entity (the sports league) controlled by rival clubs. Not only would an independent corporation have less incentive to artificially depress the number of clubs below the socially optimal level,[103] but it would also have an incentive to ensure that the clubs in the top-tier league reflect the best possible markets and management available. Therefore, the independent corporation would be willing to replace an inefficient incumbent club with a more efficient new entrant.

There appear to be a few significant, but ultimately non-material, differences between the Terminal Railroad's denial of access and monopoly sports leagues' similar exclusion. In the former case, the

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98. *Id.* at 398.

99. *Id.* at 399-400.

100. *Id.* at 405.

101. *Id.* at 411.

102. Unlike the situation in earlier days, when a new league could form because of the availability of viable markets without any teams belonging to the dominant league, *cf. Am. Football League*, 323 F.2d 124 (4th Cir. 1963), each of the dominant leagues now include thirty or more franchises, covering the entire continent. Direct competition within a market is especially difficult: new entrants would have to compete against entrenched clubs awash in tax subsidies, and local governments are not likely to be eager to subsidize additional teams. *See* Noll & Zimbalist, *supra* note 15, at 27-28.

103. This is because the transactions costs involved in determining whether the net income from the new team is greater than the net losses caused to existing teams are likely to be lower when the determination is made within a single firm. For a general discussion of why a horizontal agreement is more likely to reduce output than a single dominant firm controlling the same dominant share of the market, see ROSS, *supra* note 71, at 152; Hovenkamp, *supra* note 88, at 59-61.

facilities were owned by a variety of separate corporations, while sports leagues have no independent stock ownership. Thus, the Court's requirement in *Terminal Railroad* of non-discriminatory access to ownership seems inapplicable. More significantly, the Court seemed to assume that the bridges and ferries had sufficient capacity to accommodate all who might seek to use them. If the optimal use of these facilities required rationing, presumably it would have to be done on reasonable and non-discriminatory terms. In the railroad context, this could occur through open competition for access (perhaps by charging higher bridge tolls). In the sporting context, one could imagine a circumstance where membership in the NFL each year was determined by auction, but the open competition plan we propose here would appear to be more directly responsive to consumer demand. It is literally true that new entrants are not placed on *immediately* equal terms by a system of promotion and relegation, since initially they would have to compete in a junior league; however, within two years, it is fair to say that any team with sufficient and sound investment to earn promotion could be competing at the major league level. In terms of overall antitrust policy, this seems substantially compliant with the *Terminal Railroad* precedent.

In sum, proper application of antitrust doctrine relating to joint ventures among competitors should lead to the conclusion that the closed league structure maintained by the clubs comprising the four dominant North American sports leagues constitutes an unreasonable restraint of trade.[104] Similarly, an agreement among owners to contract the size of

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104. A common argument raised by sports leagues defending against allegations that their anticompetitive conduct violates section 1 of the Sherman Act is that the leagues are like corporations—they are single economic entities, so that intra-league agreements cannot constitute a contract, combination, or conspiracy in restraint of trade. This issue has been exhaustively rehearsed in the literature. *See* Ross, *supra* note 13, at 549 n.136 (collecting citations). Our analysis comparing the output of a single firm and a joint venture demonstrates why sports leagues whose policies are established by member clubs are not single entities. *See supra* notes 20-22 and accompanying text. Moreover, even if a closed league's decisions on how to allocate labor inputs or how to sell broadcasting rights were to be considered the decisions of a single entity, the decision to form the league as a closed league, and to maintain that structure, ought to be subject to scrutiny under section 1.

In *Fraser v. Major League Soccer, L.L.C.*, the trial court found that Major League Soccer (MLS) was organized differently from the conventional major leagues and was in fact a single entity for purposes of labor restraints. 97 F. Supp. 2d 130, 139 (D. Mass. 2000), *aff'd on other grounds*, 284 F.3d 47 (1st Cir. 2002). Additionally, the court held that the decision to organize MLS as a single entity could not have lessened competition in violation of section 1 of the Sherman Act and section 7 of the Clayton Act, because there was no league in existence prior to formation. *Id.* at 140. In contrast with this holding, the First Circuit's decision affirming the judgment for the defendant on other grounds, poses no obstacles to the imposition of open competition as a remedy for the major North American sports that are the subject of this Article. *See* Fraser v. Major

their league without reasonable access back into the league for excluded or new franchises warrants condemnation under the Sherman Act. Antitrust tribunals should enjoin the operation of closed leagues and require them to establish a system that grants new entrants reasonable access to top-tier competition. Such access must allow a new entrant who makes skillful business and sport-related decisions to be in a position to meaningfully compete with the existing clubs in the top-tier league within two years.[105] How sports leagues might comply with the mandatory access order contemplated in this Part is considered below.

League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002). Most importantly, the court of appeals correctly reaffirmed the significant focus on who controls the operation of the league, finding that Major League Soccer decisions were not necessarily exempt from section 1 scrutiny because the club owners "are not mere servants of MLS; effectively, they control it, having the majority of votes on the managing board." *Id.* at 57. Next, the court concluded, as we do, that the determination of access to a sports league is sufficiently related to the economic integration of the collaborative venture to preclude attack on per se grounds. *Id.* at 59. Further, the court found that in the particulars of that case the plaintiff players, challenging MLS formation on grounds that it lessened competition in the labor market, had failed to demonstrate that the relevant market was for major league players in the United States. *Id.* (The defendants produced evidence, believed by the jury, that in competing for player talent, the MLS faced competition from minor league U.S. clubs and foreign clubs.) We do not believe that juries would reach similar conclusions about baseball, basketball, hockey, or football.

In the course of rejecting the plaintiffs' contention that the designation of MLS by the United States Soccer Federation as the sole major soccer league in the United States constituted a conspiracy to monopolize, and that the MLS's formation was a sham for price fixing, the court emphasized that the league was "formed as a risky venture against a background of prior failure." *Id.* (citing United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 566-68 (E.D. Pa. 1960), *aff'd*, 367 U.S. 567 (1961)). The citation to *Jerrold* is significant, for in that case the court held that a tying arrangement was justified in the early years of a firm's existence, but was no longer justifiable once the firm was well-established. *Jerrold*, 187 F. Supp. at 557-58. Clearly, whatever justification may have existed in 1993 for the creation of a single, closed soccer league does not justify the continuation of single, closed leagues in the four major North American sports. Indeed, the Supreme Court has suggested that, to justify an otherwise unreasonable closed league structure, owners of monopoly sports leagues would have to demonstrate that they would lack the economic incentive to compete if their leagues were open. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 23-24 n.39 (1984) (justification inapplicable where record showed that desired service would be provided without a tying arrangement).

105. The federal antitrust agencies use a two-year time frame in determining whether new entry will be sufficiently timely to prevent existing firms from substantially lessening competition through a merger. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 3.2 (1997), http://www.usdoj.gov/atr/public/guidelines/horiz_book/32.html.

IV. PROMOTION AND RELEGATION AS A LEGAL REMEDY

Once the agreement among teams in a dominant league to maintain their closed structure is found unlawful under the Sherman Act, the defendant teams should be given the opportunity to propose a remedial plan that maximizes their legitimate efficient goals while complying with the law's requirement to provide reasonable access. An antitrust tribunal should not mandate the form that reasonable access should take absent an unwillingness to cooperate on the part of the defendant leagues. Without presuming to design a reasonable access requirement, we offer in this Part a brief discussion of why we think it likely that sports leagues would select a model roughly maintaining the existing major league as the top-tier league and adding one or two junior leagues, the lowest tier featuring easy entry. We also discuss some implementation issues that would arise in designing such a structure.

A. Structure

The dominant leagues could maintain their closed structure and comply with the antitrust laws in two quite different ways. First, the dominant league could divide itself into two or more closed leagues that would act as economic competitors, while collaborating on rules and a final champion. Assuming that each league made its own intra-league decisions about labor market restraints, expansion, and relocation, a challenger to the closed structure of any individual league would probably be unable to demonstrate that the league's rules had any substantial competition-lessening benefits.[106] Although this result would have a number of pro-competitive effects,[107] we believe it unlikely that a dominant league would choose such an approach. The clubs would lose whatever economic power they currently enjoy in the broadcast and souvenir markets. Moreover, although one of us has previously analyzed the viability of competition between rival leagues,[108] we suspect that many clubs fear that their particular league might be perceived as inferior, with disastrous results, if it were then excluded from the dominant, closed league.

Second, a league would be unlikely to face antitrust liability if it voluntarily admitted any minimally qualified entrant that could establish a viable plan for success in a new market. There are a variety of reasons why we believe clubs in a dominant league would find this remedy unattractive as well. Overall output might well decline as fans

106. *NCAA*, 468 U.S. at 115 n.55.
107. *See generally* Ross, *supra* note 26.
108. *Id.*

found it difficult to follow all the teams in the league. Because this alternative would require the admission of new clubs on relatively equal terms, existing dominant clubs would play each other fewer times. Easy entry into a closed league would exacerbate competitive imbalance, which would either result in a loss of fan interest or the need to substantially increase the amount of revenue sharing from the wealthier clubs, a prospect they are likely to oppose. Clubs in local geographic markets potentially capable of supporting additional teams would face immediate competition (while under promotion and relegation new entrants in their area would have to first earn entry into the top tier).[109]

Thus, we believe the most likely scenario would see the current leagues comply with the antitrust laws by facilitating the creation of a junior league that has no significant obstacles to entry and that allows successful teams in that league to gain promotion to the higher-tier league.[110] Such an approach is, we suggest, the most acceptable method

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109. The first three reasons stated in the text are also sufficient to reject an argument that this sort of open entry, rather than the open competition we propose, is required by the antitrust laws. Advocates of open entry would likely fail in an effort to demonstrate that output would be higher and more responsive to consumer demand under such a structure. In two thoughtful articles, Thomas A. Piraino, Jr., argued that application of the essential facilities doctrine would require open entry. *See* Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 948 (1999); Piraino, *supra* note 14, at 1692-93. Indeed, he suggests that restrictions on the total number of franchises are illegal per se because they are not justified by any legitimate efficiency objective. *See* Piraino, *supra*, at 944. Piraino concedes that leagues operating at "full capacity" could legitimately limit new franchises, but he seems to define that concept too broadly, based on whether scheduling effectively is "impossible" or whether the number of franchises exceeds the pool of available players. *Id.* at 944-45. Rather, the efficient "capacity" of a sports league, measured properly in terms of optimal consumer demand, is much smaller. Indeed, it is arguable that with the type of open competition we propose here, overall consumer demand would increase if the number of clubs in the major leagues were reduced.

110. The so-called "essential facility" cases cited by Piraino would not support a finding of liability if a monopoly sports league permitted entry via promotion from a junior league. *See* Piraino, *supra* note 109, at 946-48; Piraino, *supra* note 14, at 1690-92, 1707-08. In each of these cases, the courts found, either on the facts or in theory, that granting access to the new entrant would not affect the ability of the existing firms to service their customers. Many of the cases also involved situations where otherwise open entry could be blocked by particular incumbents. For example, in *Associated Press v. United States*, the "essential facility" was membership in a joint venture with unlimited capacity, and the government did not seek unlimited access but only elimination of by-law provisions giving local competitors the right to veto requests for admission. 326 U.S. 1, 3-4 (1945). (This case would be applicable, for example, if the NBA had a rule permitting anyone who paid a fixed fee to join the league, but gave an individual veto to each existing franchise so they could keep out local competition.) Similarly, in *Silver v. N.Y. Stock Exchange*, membership in the defendant stock exchange did not have a consumer-optimal capacity, and therefore exclusion from the exchange's services was unreasonable. *See* 373 U.S. 341, 347-48 (1963). *Radiant*

Burners, Inc. v. Peoples Gas Light & Coke Co. involved a group boycott of those lacking a company's "seal of approval." 364 U.S. 656, 658 (1961) (per curiam). Because the boycott was unrelated to any efficiency, it was per se illegal. *See id.* at 659. Here, it is clear that excluding a potential entrant from a sports league cannot be considered to be unrelated to any efficiency. *Cf.* N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 297 n.7 (1985) (finding that joint venture's exclusion of rival was unreasonable where the exclusion was "not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices").

Two lower court cases apply the essential facilities doctrine to sports, but neither is directly on point, and their holdings tend to support a remedy of open competition rather than a remedy of open entry. In *Hecht v. Pro-Football, Inc.*, the court found that Washington D.C.'s RFK Stadium was an essential facility and therefore concluded that the prospective owner of a franchise in the rival American Football League should have been allowed to share the use of the stadium with the NFL's Washington Redskins. 570 F.2d 982, 992-93 (D.C. Cir. 1977). The court emphasized that the essential facilities doctrine "must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." *Id.* To support its proposition, the court cited the Supreme Court's decision in *Otter Tail Power Co. v. United States*. *Id.* (citing 410 U.S. 378, 381 (1973)). In *Otter Tail*, the Court made clear that the essential facility in question there—wholesale power transmission lines subject to regulation by a federal agency—need not be opened to new entrants "if to do so 'would impair [the utility's] ability to render adequate service to its customers.'" *Otter Tail*, 410 U.S. at 381 (quoting 16 U.S.C. § 824a(b)). However, because another team could use RFK Stadium in the Redskins' absence, a denial of access was held illegal in *Hecht*. *Hecht*, 570 F.2d at 993.

Unlike the situation in *Hecht*, Piraino's proposal for open entry in league competition would indeed impair the league's ability to render adequate service to its existing fans, because such entry would lower overall quality. On the other hand, our open competition plan meets the *Hecht* test: (1) membership in Major League Baseball, the NFL, NBA, or NHL is essential to operate a club at the major league level; (2) this membership cannot be practicably duplicated through creation of a new league; (3) entry will not impair the league's ability to serve customers; and (4) the closed league structure prevents "equitable" sharing of league membership by potential competitors. *See* 570 F.2d at 993.

Another case Piraino cites is *Fishman v. Estate of Wirtz*. *See* Piraino, *supra* note 109, at 948 (citing 807 F.2d 520 (7th Cir. 1986)). This decision is complex and somewhat troubling analytically. The court held that a bidder for the Chicago Bulls should have been offered a lease for the Chicago Stadium because the stadium "could not feasibly be duplicated." *Fishman*, 807 F.2d at 539. The reason that the plaintiff was not offered a lease was that the defendant, who controlled the Stadium, also had an ownership interest in a rival investment group seeking to purchase the Bulls. *Id.* at 529. Consumers presumably benefit when different firms compete to be the local monopolist because the result is that service is provided by the most efficient monopolist. *See id.* at 534-35 (quoting Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) (antitrust laws protect "competition to be the firm to enjoy a natural monopoly")). But *Fishman* does not support a claim for open access where such access would impair the quality of the product for other customers. Indeed, to the extent that membership in a league can be seen as a natural monopoly (*but see* Ross, *supra* note 26, at 715-33), *Fishman* supports the argument that open competition for a spot among the optimal number of franchises, not unlimited access, is the preferred antitrust result.

to the clubs, because it minimizes the effect on the wealthy and powerful teams in the current dominant leagues. The likelihood that these teams would be relegated is rather remote. It is also the most efficient way to identify those clubs that should participate in the top-tier league.[111] Promotion and relegation allows the clubs to maintain their current schedule of contests against traditional rivals and ensures that revenues shared by the wealthy teams with poorer ones actually are spent on improving competitive balance rather than simply enhancing the profits of the weak teams' owners.[112]

In order to meet the standard of meaningful entry within two years, open entry must be available at no lower than the "third division" within each sport. Leagues can be expected to determine whether to have one or two junior leagues, and to determine the size of each league, based on their own assessment of the net gains and costs for larger leagues.[113]

B. Issues of Implementation

Under the antitrust laws, joint ventures are permitted to impose entry limits that result in lower prices, higher output, or output more responsive to consumer demand.[114] This standard provides guidance as to whether a variety of ancillary rules are reasonably necessary for the efficient operation of the joint venture.

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111. One of the doctrinal difficulties with applying the essential facilities doctrine to sports league entry is that the most likely plaintiffs are not government enforcers seeking a macro-remedy in the public interest, but private plaintiffs simply seeking their own entry into a dominant league. Especially before a sympathetic local judge, each plaintiff may well establish that (1) the league is a monopoly; (2) it has artificially limited the number of franchises; and (3) the plaintiff can viably operate a club in the local market. Thus, relief ordering the mandatory entry of the plaintiff club would be sought. The problem with this approach is that it ignores the very real possibility that, assuming the addition of another franchise would be welfare-enhancing, the franchise should be located elsewhere. *See* Ross, *supra* note 26, at 709-11 (discussing State v. Milwaukee Braves, Inc., 1966 Trade Cas. (CCH) ¶ 71,738 (Wis. Cir. Ct., Branch 5, Civ. Div., Milwaukee County), *rev'd on other grounds*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966)).

112. For example, the Montreal Expos maintain profitability by pocketing shared revenues and maintaining a low payroll. T. R. Sullivan, *Upstairs, Downstairs; With Arizona's Ordination into the Upper Crust, It's Easy to See Baseball Has Its Favorites and Outcasts*, STAR-TELEGRAM (Fort Worth), Sept. 20, 1999, at 5C.

113. The clubs would recognize that additional second-tier teams will increase revenues. Each expansion, though, modestly dilutes the quality of talent available for the remaining second-tier clubs and modestly reduces the attractiveness of the product to fans of the other clubs by decreasing the number of contests between top rivals and by lessening the chance that each team will be promoted.

114. *See NCAA*, 468 U.S. at 103 (sports league rules analyzed under the rule of reason). The hallmark of this analysis is the effect of the challenged rule or practice on output, price, and responsiveness of output to consumer demand. *Id.* at 106-09.

Currently, closed leagues periodically choose to expand, and then as a separate and secondary consideration they take steps to ensure that a new franchise is acquired by an owner who meets acceptable criteria. Reasonable access—with an eye toward maximizing the ability of the public to reap the fruits of competition, rather than protecting specific competitors—means that objective limits to ensure that new owners possess personal integrity and have structured new clubs on a financially sound basis would be permissible. Rules requiring that entrants play in stadia with capacities likely to generate income sufficient to compete at the lower level would also be reasonable. These rules are likely to make the sport more attractive to fans and are unlikely to eliminate so many would-be entrants as to harm competition. Limits must be fair and non-pretextual, however. Thus, for example, rules limiting indebtedness must apply to existing clubs as well as potential entrants, and standards dictating the criteria for stadia and facilities required for entry must not be so high as to preclude meaningful entry.

The benefits from open competition would be lost if incumbent firms were able to forestall entry by depriving rivals of the inputs necessary for success—primarily players. Although the player talent available to a club that seeks, or has just achieved, promotion to the major league varies with each sport, each major league currently has rules, embedded in the collective bargaining agreement with its players' union, that limit the ability of clubs to bid for the services of most players, even at the expiration of their contracts.[115] Moreover, virtually all minor league baseball players sign contracts that are renewable by their major league employer for up to seven years.[116] If new entrants were subject to these agreements, it could well foreclose their ability to compete meaningfully. For entry to be likely, timely, and effective, new clubs must have reasonable access to existing talent so that incumbent teams cannot simply sink costs in player contracts and thereby reestablish entry barriers.

Under the Sherman Act, a standard player contract that bound players to their current employer for at least three years was held to unlawfully foreclose competition with a rival league.[117] Under the

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115. *See generally* HOWARD L. GANZ & JEFFREY L. KESSLER, 1 UNDERSTANDING BUSINESS & LEGAL ASPECTS OF THE SPORTS INDUSTRY 13-148 (2001) (NBA and NFL collective bargaining agreements); *Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association*, *reprinted in* Jeffrey S. Moorad, *Negotiating for the Professional Baseball Player*, *in* 1 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 5.05 & app. 5A (Gary Uberstine ed., 2001); Nat'l Hockey League & Nat'l Hockey League Players Ass'n, Collective Bargaining Agreement (on file with authors).

116. *See* Moorad, *supra* note 115, § 5.04.

117. *Phila. World Hockey Club*, 351 F. Supp. at 467. In many industries,

common law, a good argument can be made that, for teams that are not part of the major leagues, the lengthy contractual right to renew that exists, for example, in minor league baseball is simply unenforceable.[118]

One acceptable remedy to this problem would be to follow the international practice (and one that prevailed in Major League Baseball prior to World War II) of allowing the sale of players for cash. Cash sales are rare in all sports and were seemingly prohibited by the Commissioner of Baseball once veteran players were free to seek competitive bids for their services.[119] With approximately thirty teams in each league, new junior league clubs should not have difficulty acquiring necessary player talent, if cash sales of minor league players are permitted, and the major league teams do not collude.[120]

Cash sales of players play an essential element in a system of promotion and relegation for at least three reasons. First, the ability to purchase key players for cash is critical to the ability of junior league clubs to achieve—through increased investment—success at the lower levels and thus secure promotion to the major league. Second, once promoted to the major league and thus eligible for the vastly increased revenue accompanying major league sports, a club must be able to significantly increase the quality of its roster in order to compete at the top level. The only way to do this quickly is by spending its new-found

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concerns about how truly "unique" talented employees are, and the desire to allow individuals to work where they please, may well trump antitrust concerns that the hiring of a particular individual may contribute to monopolization. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 141-44 (2d ed. 2000). But the systematic refusal by all clubs to sell the rights to players' services more closely resembles the exclusionary practice of raising rivals' costs—the strategy of sacrificing short-term profits (in this case through higher payrolls) in order to impose higher costs on rivals, so that the rivals' ability to effectively compete is significantly impaired. *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

118. *See, e.g.*, Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914) (monopoly enjoyed by National and American Leagues precluded injunction preventing White Sox star from jumping to Buffalo club of rival Federal League).

119. *See, e.g.*, Finley & Co. v. Kuhn, 569 F.2d 527, 536 (7th Cir. 1978). At a recent conference, however, Major League Baseball General Counsel Thomas Ostertag suggested that *Finley* was a more limited precedent, and that the Commissioner would consider approving cash sales that demonstrably improved competitive balance among the clubs—as would certainly be the case with a sale to a recently promoted team. This topic is discussed in detail in Stephen F. Ross, *Light, Less-Filling, It's Blue Ribbon!*, CARDOZO L. REV. (forthcoming 2002).

120. To the extent that prohibitions on cash sales to clubs that are wealthy and successful is perceived as improving competitive balance, league rules that maintained the limit on sales from existing major league clubs to the league's top teams pose no obstacle to effective entry as outlined in this Article.

income on additional player talent.[121] Third, the sale of players is essential to allow clubs relegated from the major league to avoid bankruptcy and remain viable pending their return to the top tier in later years.

Similarly, incumbent firms should not be able to foreclose access to markets necessary to gain revenue. Under the doctrine of *Hecht v. Pro-Football, Inc.*,[122] a club that controls access to an essential facility must grant reasonable access to the facility if it would not interfere with its own use.[123] Although modern techniques of stadium construction would ordinarily preclude a finding that use of an existing stadium is essential, short-term use might well be necessary in specific cases to permit effective entry in two years.

Exclusive contracts regarding the local broadcast rights for games have many legitimate purposes but can potentially foreclose access to new entrants in certain markets. Here, the key issue would be the length of the contract. Unduly long contracts, or contracts that required the broadcaster to maintain exclusivity even if the incumbent club were relegated, may be unreasonably foreclosing in markets where there are no realistic alternatives.[124]

Another key issue of implementation concerns the need to modify existing collective bargaining agreements with players' unions to accommodate promotion and relegation. Although the labor exemption removes most matters agreed to by clubs and players from antitrust scrutiny,[125] unions and dominant firms cannot use the collective

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121. *See, e.g.*, Anne Hyland, *Charlton Has £10m to Spend; Relegation Cuts £4.5m from TV and Gate Receipts*, GUARDIAN (London), June 24, 2000, at 25, http://www.guardian.co.uk/Archive/Article/0,4273,4033083,00.html. The Charlton soccer club, upon promotion to the English Premier League, raised £5.74m to acquire two or three top quality players in order to compete at the higher level. *Id.* The strategy worked: the team finished tenth among the twenty teams in the league and can still obtain further financing for continued improvement. *See* David Bond, *The Grass Isn't Always Greener on the Other Side of the River*, EVENING STANDARD (London), May 10, 2001, at 83. The complete 2001-02 English soccer table is available at http://www.fl.net.au/~steve/table.htm (last visited May 24, 2002).

122. 570 F.2d 982.

123. *Id.* at 992-93.

124. Local affiliates of major television networks are disinclined to broadcast local sporting events in prime time because of the conflict with regular series programming, and in many local markets there may be only one independent over-the-air station and one cable sports station interested in providing local programming. *See, e.g.*, Steven Herbert, *KTLA Channel 5 Calls Its New Identity a Hit*, L.A. TIMES, July 12, 1993, at 6F (explaining that TV station that had carried Dodger baseball games since the team arrived in Los Angeles in 1958 gave up rights because of conflict with network programming).

125. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231 (1996); Wood v. NBA, 809 F.2d 954 (2d Cir. 1987); McCourt v. Cal. Sports, Inc., 600 F.2d 1193 (6th

bargaining process to agree to exclude rival firms from the market.[126] The precise contours of the limits on a hostile union's ability to frustrate promotion and relegation would require case-by-case analysis, with pathmarking litigation likely. However, we do not believe this scenario is probable, for the likely way that promotion and relegation would be implemented—by maintaining the current number of major league teams and introducing a new tier of junior league competition—would be highly attractive to players. Current major league players would see an increase in the demand for their services from teams that need talented players to forestall relegation. The demand, and the consequent salaries, for junior league players would vastly exceed the paltry sums now paid in the minor leagues.

Although the need for continuing supervision of the operation of a promotion and relegation system would be minimal, antitrust tribunals would ensure that incumbent clubs are not retaining economic power by imposing unduly restrictive criteria on club ownership or stadium size. In addition, standard application of the antitrust proscriptions on foreclosing agreements are necessary to ensure that new clubs can obtain necessary personnel and have access to markets in order to make their entry timely, likely, and effective.

V. CONCLUSION

An economic model comparing incentives for professional sports teams demonstrates that a structure of open competition, whereby new entrants have an opportunity to displace existing clubs in the top-tier league, is likely to increase incentives to invest in player talent. Further, this model would decrease the ability of clubs to extract monopoly rents from state and local governments by threatening to relocate. Media interests and sponsors should generally welcome the increased attention that end-of-season races for relegation attract. Competition for promotion from the lower tier would also generate new programming that would likely be much more exciting than the current minor leagues because the rewards for successful teams will be so much greater. Indeed, open competition is likely to benefit almost everyone besides the current owners, who would have to spend more of their monopoly profits on improving their product and would lose much of their leverage over local taxpayers.

Cir. 1979); *Mackey*, 543 F.2d at 606.

126. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975); Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1945).

But, after all, the Sherman Act is a "consumer welfare prescription,"[127] and the most relevant conclusion we draw is that open competition appears to be good for sports fans. We predict that sports leagues would respond to an antitrust tribunal's finding that their closed league structure violates the Sherman Act by creating one or more lower-tiered leagues. Sports leagues would also promote the top teams from the second-tier league into the major league each season, while relegating the worst teams from the major league. Whether this system was implemented in response to a consent decree or to express legislation, potential fans in unserved cities would have a realistic prospect of having their own team appear in the majors. Fans of existing teams are also likely, on balance, to be more satisfied. While supporters of mediocre teams currently have little to root for after mid-season, fans of teams that successfully stave off relegation are treated to more exciting seasons, not to mention the increased investment in the quality of their teams. Whether or not the teams with the highest payrolls increase their investment further because of fears of relegation, their fans would benefit from the overall improvement of competitive balance due to other teams' increased investment. Even fans of doormat teams are potentially better off with an occasional relegation and the consequent excitement of success at the lower level, as well as increased investment in the quality of the team. This would be in contrast to perpetual mediocrity with no chance of success in a closed league. Taxpayers surely will benefit as well: instead of completely subsidizing a relocation, a public-private partnership with minimal public investment can, using new architectural techniques, build a smaller stadium to support a second-tier team that can then be expanded if and when the team is promoted. Finally, sports fans in unserved cities who currently have the option of seeing only minor league sports, where players are simply there to train for "the Show," would now be able to watch a new, exciting level of professional sports, with young talent and some aging stars vigorously competing for a shot *next year* at the major leagues.

To be sure, a requirement of open competition for monopoly sports leagues does occasion a government-mandated restructuring of sports leagues. Right now, however, consumers pay billions of dollars in tax subsidies, and fans continue to suffer through too many games played by teams with no real prospect for a championship and no real incentive to improve. There ought to be a better way, and an economically sound application of established antitrust principles provides one.

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127. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 71, at 66).