Monopoly Sports Leagues

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TABLE OF CONTENTS

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HeinOnline -- 73 Minn. L. Rev. 643 1988-1989

Politicians and the public often view sports as a luxury or pure recreation. Major professional sports are businesses, however, and their impact on the economy warrants national attention. The cost to taxpayers of subsidizing sports teams' facilities runs into the hundreds of millions of dollars annually.[1] League decisions concerning the location of franchises have significant impacts on local economies.[2] The allocation of players among teams interests every fan who desires that the hometown team acquire the talent necessary to make the team a championship contender rather than an also-ran. Decisions on the broadcasting of games have a profound effect on consumers/fans.[3] Imagine, for example, the public reaction if next year's Super Bowl were available only on a pay-cable station!

The economic policy of the United States, as expressed in our antitrust laws, provides that firms should compete in an open and free marketplace to supply consumers with the best possible product at the lowest possible price and to allocate society's resources efficiently.[4] Professional baseball and, to a

1. *See infra* notes 22-28 and accompanying text.
2. *See infra* note 22 and accompanying text.
3. *See infra* Part I(D).
4. *See generally* Lande, *Wealth Transfers as the Original and Primary*

HeinOnline -- 73 Minn. L. Rev. 644 1988-1989

lesser degree, football are shielded from the antitrust laws. The Supreme Court expressly exempted Major League Baseball from the antitrust laws.[5] The National Football League (NFL) achieved its monopoly status in 1966 when Congress enacted a specific statute permitting the league to merge with its one major rival, the American Football League (AFL).[6]

Economic theories underlying the federal antitrust statutes suggest that monopolies result in higher prices, lower output, and a transfer of wealth from consumers to the producer/monopolist.[7] Therefore, when economic or political considerations lead Congress to suspend application of the antitrust laws for particular industries, some form of government regulation designed to protect consumers from the harms that monopolists inflict almost always accompanies such exemptions.[8] Major League Baseball and the NFL are glaring exceptions to this practice. They operate as monopolists with no significant governmental check upon their ability to exercise monopoly power.

The results of these policy decisions exempting professional baseball from antitrust scrutiny and allowing professional football to achieve monopoly status through merger have been predictable. As lessees of stadiums built and paid for by taxpayers' dollars, sports monopolists obtain favorable contract terms that require the public treasury to subsidize stadium operations.[9] Monopoly sports leagues grant fewer franchises than would exist in a competitive market.[10] To hold salary levels below the competitive level, leagues adopt restrictions on the mobility of players that limit the efficient

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Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65, 67-68 (1982).

5. Federal Baseball Club v. National League, 259 U.S. 200 (1922).

6. Act of Nov. 8, 1966, Pub. L. No. 89-800, 80 Stat. 1515 (1966) (codified as amended at 15 U.S.C. §§ 1291-1293 (1982)).

7. *See* Lande, *supra* note 4, at 71-80.

8. *See generally* P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 221-223 (1978) (reviewing application of antitrust analysis to regulated industries). Indeed, regulated firms have faced antitrust liability for conduct in areas beyond the scope of agency regulation. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 375-77 (1973) (finding antitrust liability for monopolistic refusal to deal despite claim that required dealing was beyond power of regulatory agency to issue); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-52 (1963) (finding that bank mergers valid under federal regulatory scheme remain subject to antitrust challenge).

9. *See infra* notes 24-35 and accompanying text.

10. *See infra* Part I(B).

HeinOnline -- 73 Minn. L. Rev. 645 1988-1989

allocation of players among teams.[11] On the horizon, the distinct possibility exists that sportscasts will shift from free television to cable, forcing fans to pay for what they now receive for free.[12] Finally, monopoly sports leagues tolerate inefficient and wasteful management practices by franchise owners that leagues facing the pressure of competition could not endure.[13]

This Article argues that the government should break up both Major League Baseball and the NFL to provide for competing economic entities in each sport. The competitive market resulting from the divestiture will correct the harms that the monopoly sports leagues inflict on taxpayers and fans.[14] Competing leagues would vie against each other for the right to play in public stadiums, driving rents up and tax subsidies down. Leagues would be more eager to add new expansion markets, lest those markets fall into the hands of a rival league. Because the competing leagues would bid on players, salaries would reflect more accurately the players' fair market value, and no one league would unduly restrict intra-league mobility of players. Teams thus could obtain more readily the right player for the right position. Leagues would hesitate to move prime games to cable for fear of losing their audience, as well as the loyalty of their fans, to a league whose games remained available on free television. The pressure of competition would force each league to maintain intelligent and efficient management.

This Article develops in five parts its thesis that the government should break up the leagues and that the antitrust laws provide a workable structure to govern competition between rival leagues. Part I details the harm monopoly sports leagues cause in several different markets, and explains why a

11. *See infra* Part I(C).

12. *See infra* notes 225-28 and accompanying text.

13. *See infra* Part I(E).

14. This Article considers only major league professional baseball and football. Part I, *infra*, details a host of effects demonstrating that both Major League Baseball and the National Football League (NFL) exercise monopoly power in economically relevant markets. Although it is posssible to argue that the National Basketball Association (NBA) and the National Hockey League (NHL) possess monopoly power, their rivalry with other products and their ability to exact monopoly profits in the various markets discussed in Part I is less clear. Because the import of this Article is that government should break up *monopoly* leagues in any sport, the Article leaves to another day the question of whether this thesis should apply to those leagues. The economic and litigation experiences of the NBA and the NHL, however, are discussed because of their relevance to this Article's discussion and its conclusions.

HeinOnline -- 73 Minn. L. Rev. 646 1988-1989

competitive league structure can correct such harms. Part II discusses why regulatory solutions are poor substitutes for competition as a means of redressing these harms. Part III explains why neither baseball nor football is a "natural monopoly" and argues that no persuasive evidence suggests that rival leagues cannot exist in those sports. Part IV examines how the antitrust laws provide a workable framework for regulating conduct between competing leagues. Finally, Part V explains why legislation effectuating the divestiture is preferable to a judicial decree.

I. MONOPOLY SPORTS LEAGUES HARM TAXPAYERS, FANS, AND PLAYERS

Monopoly sports leagues and their member teams operate in a variety of markets. Local owners of stadiums, usually public stadium authorities,[15] lease their facilities to individual teams. Leagues organize, with limited membership, to sponsor exhibitions of major league talent. Teams contract for the services of players. Leagues and individual teams sell the broadcast rights for these exhibitions to radio, television, or cable stations or networks.

In each of these markets, the monopoly sports leagues or their member teams exercise monopoly power. No league other than Major League Baseball features franchises that regularly can fill between one and three million seats over eighty-one dates.[16] No league other than the NFL can fill stadiums to near or total capacity for eight Sundays.[17] Localities regard

15. Okner, *Subsidies of Stadiums and Teams*, in GOVERNMENT AND THE SPORTS BUSINESS 325, 326 (R. Noll ed. 1974) (stating that in 1970, public authorities owned 53 of 73 professional sports stadiums).

16. THE SPORTING NEWS, OFFICIAL BASEBALL GUIDE 284 (1988) (stating that all 26 major league baseball teams had home attendance figures between one and three million in 1987).

17. THE SPORTING NEWS, PRO FOOTBALL GUIDE 399 (1988). The football and baseball seasons overlap only briefly during the months of September and October. *Compare* THE SPORTING NEWS, OFFICIAL BASEBALL GUIDE 524-27 (1988) (providing 1988 Major League Baseball schedule) *with* THE SPORTING NEWS, PRO FOOTBALL GUIDE 393-95 (1988) (providing 1988 NFL schedule). College football teams usually do not play on Sundays because they simply cannot compete with what the public views as a superior professional football product. *See* 1988 NCAA FOOTBALL 375-80. Division I-A or I-AA college football teams played only three games on Sundays during the 1988 season. In September, San Diego State played Air Force on a Sunday. In November, Boston College and Richmond met in London, England on a Sunday, although it was Saturday in the United States. In December, Oklahoma State played Texas Tech on a Sunday in Tokyo, Japan, although again it was Saturday in

HeinOnline -- 73 Minn. L. Rev. 647 1988-1989

neither a minor league professional baseball team, nor a major college football program, nor a professional football team in a new league as a sufficient substitute for their fans. As a result, local officials and civic groups organize to beseech the monopoly sports leagues for expansion franchises.[18] A special exemption from the antitrust laws permits league members to agree among themselves to limit the games they each televise and to offer a single package of broadcast rights to television networks.[19] For many fans, no acceptable substitutes for Major League Baseball and NFL televised contests exist. Monopoly sports league members agree among themselves to limit competition for the services of players; for most professional athletes, no other employment offers a realistic alternative to professional sports.[20] This portion of the Article details the injury that local treasuries, fans, and players suffer because of the exercise of monopoly power Major League Baseball and the NFL possess.[21]

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the United States. *Id.* Indeed, their inability to compete has led college football to lobby for, and receive, legislation that significantly inhibits professional football from scheduling games on Friday nights or Saturdays. *See* 15 U.S.C. § 1293 (1982); HOUSE COMM. ON THE JUDICIARY, TELECASTING OF PROFESSSIONAL SPORTS CONTESTS, H.R. REP. NO. 1178, 87th Cong., 1st Sess. 3-4 (1961).

18. *See* Wendel, *Shake Out*, SPORTS, INC., Mar. 13, 1989, at 24-28.

19. *See* Sports Broadcasting Act, 15 U.S.C. § 1291 (1982). A package sale grants one or more networks exclusive or semi-exclusive rights to broadcast NFL games. Prior to the enactment of the statute, a district court held that an agreement among NFL owners to prohibit the broadcasting of football games in a league city when the home team played away was an unreasonable restraint of trade. United States v. NFL, 116 F. Supp. 319, 326-27 (E.D. Pa. 1953).

20. *See, e.g.*, Nack, *What Goes Up Comes Down*, SPORTS ILLUSTRATED, Dec. 14, 1987, at 68, 76 (relating sentiments toward professional football of replacement player for New Orleans Saints during 1987 NFL strike: "It sounds greedy, but it's addictive. You want more and more and more. Once you get into it, once you taste the life, once you get the money, . . . there's not one other thing you want to do in the world.").

21. The exercise of monopoly power may not necessarily result in monopoly profits for each league owner. The absence of monopoly profits, however, does not justify the continued existence of a monopoly. United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945). A team owner in a monopoly sports league may fail to enjoy monopoly profits for a number of reasons—the team may operate inefficiently; the league or the team owner may have bargained away monopoly profits in negotiations with the players' union or individual players; or the future stream of monopoly profits may have been built into the purchase price of the team. For example, San Francisco 49ers owner Edward DeBartolo, Jr., who purchased the team in 1977 for $17 million, must use revenues to service a significant debt, especially when compared to Pittsburgh Steelers owner Art Rooney, Jr., who purchased his team in 1933 for

HeinOnline -- 73 Minn. L. Rev. 648 1988-1989

A. TAXPAYER SUBSIDIES

United States cities eagerly seek professional sports franchises. The teams confer "major league" prestige upon the city, its citizens, and its public officials. Many believe that a franchise brings the city significant economic benefits as well.[22] To attract and retain sports teams in their communities, local governments find it necessary to provide the franchises with substantial subsidies, paid for out of the public treasury.[23] Franchises may insist on large subsidies because cities lack bargaining power when dealing with members of monopoly sports leagues.

Tax subsidies may take a number of forms. These typically include rents priced below the economic value of a facility or forgone taxes on stadium property.[24] Other types of subsidies include the development and construction of new stadiums and improved highway and parking facilities.[25]

In a major study of this issue for the Brookings Institution, economist Benjamin Okner concluded that in 1971, stadium subsidies exceeded eight million dollars.[26] From the taxpayers'

$2,500. *See* 1 R. BERRY & G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 59 (1986).

22. *See Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 2 (1985) [hereinafter *Danforth 85 Hearings*] (statement of Sen. Slade Gorton); *id.* at 125 (testimony of Maryland Gov. Harry Hughes). Some economists dispute this. *See, e.g.*, R. BAADE, IS THERE AN ECONOMIC RATIONALE FOR SUBSIDIZING SPORTS STADIUMS? 18 (Heartland Institute Policy Study No. 13, Feb. 23, 1987) (arguing that sports franchises do not cause true economic growth, but merely serve to realign existing jobs and spending from manufacturing economy to service economy); Okner, *supra* note 15, at 347 (concluding that 83% of sports facilities run at loss and benefits probably accrue disproportionately to upper and middle classes).

23. *See* Johnson, *Municipal Admininstration and the Sports Franchise Relocation Issue*, 43 PUB. ADMIN. REV. 519, 519 (1983).

24. *See* Okner, *supra* note 15, at 325. In special situations, subsidies may be even more direct. Faced with the imminent sale of the San Diego Padres to an owner bent on moving the team to the east coast, the San Diego City Council voted to advance the team enough cash to cover bonus payments owed to 10 players, while efforts to find a local owner continued. *See* L. SOBEL, PROFESSIONAL SPORTS & THE LAW 531-32 (1977).

25. Rosentraub, *Financial Incentives, Locational Decision-Making, and Professional Sports: The Case of the Texas Ranger Baseball Network and the City of Arlington, Texas, reprinted in*, HOUSE SELECT COMM. ON PROFESSIONAL SPORTS, INQUIRY INTO PROFESSIONAL SPORTS, H. REP. NO. 1786, 94th Cong., 2d Sess. 202 (1977) [hereinafter SISK REPORT].

26. Okner, *supra* note 15, at 341. Economic theory predicts that a monopoly lessee will be able to extract concessions until the rent paid to the lessor covers only the direct (*i.e.*, marginal) costs of operating the facility on the day

HeinOnline -- 73 Minn. L. Rev. 649 1988-1989

perspective, recent developments are even bleaker. A 1983 study reported that in the preceding two years alone, teams in at least thirteen of the forty-two localities hosting sports franchises demanded increased subsidies.[27] Recent examples abound.[28]

Team owners use their significant advantage in bargaining power to extract subsidies from local treasuries. The number of cities desiring teams greatly exceeds the number of major league franchises.[29] Incumbent owners thus use the threat of

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of the game. *Id.* at 331-32. Indeed, Okner concluded that stadium rents generally cover only marginal operating costs and relatively insignificant fixed administrative expenses. *Id.* at 340-41. Fixed costs other than debt servicing include office and administrative expenses, routine maintenance not directly related to games, and insurance. Okner estimated these costs to be $250,000 annually, in 1971 dollars, for a stadium used for both baseball and football. *Id.* at 340.

27. Johnson, *supra* note 23, at 520.

28. Recent examples of wealth transfers from taxpayers to sports team owners include:

New Orleans Saints—The State of Louisiana decided to remit to the Saints all Superdome revenue the team generated, except for a rental fee based on ticket receipts, and abolished an amusement tax on tickets. These measures annually add $2.5 million to the Saints' treasury. R. BAADE, *supra* note 22, at 9 (citation omitted).

Philadelphia Phillies—Philadelphia phased out a ticket tax, provided the Phillies with $1 million for a new outfield scoreboard, and assumed $745,000 annually in debt service payments for a Panavision scoreboard the Phillies installed. The city also allowed the Phillies to construct special baseball suites and to keep 60% of the related revenue, resulting in a $2.5 million revenue reallocation from the city to the Phillies. *Id.*

Philadelphia Eagles—At the same time, Philadelphia constructed between 50 and 80 skyboxes for the Eagles. The team retained all lease revenues from the boxes. The city also deferred the Eagles' rent payments until 1994, and took over responsibility for game-day security, at a total cost of $30 million. *Id.*

Los Angeles Rams—The City of Anaheim provided the Rams with 95 acres of prime real estate valued at $25 million, at no charge, to induce their move from downtown Los Angeles. Johnson, *supra* note 23, at 521-22.

Texas Rangers—To induce the relocation of a professional baseball team, the City of Arlington purchased local broadcasting rights for 10 years from the team owners for $3 million more than it could recover. Arlington also publicly funded the renovation of Texas Stadium and provided a highly advantageous lease. The total price tag was estimated at $21 million. *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259, and S. 298 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 260 (1985) [hereinafter *Thurmond 85 Hearings*] (testimony of Joseph Tydings); SISK REPORT, *supra* note 25, at 201-15.

29. *Antitrust Policy and Professional Sports: Oversight Hearings on H.R. 823, H.R. 3287, and H.R. 6467 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 618 (1982) [hereinafter *Rodino 82 Hearings*,] (testimony of City of Oakland

HeinOnline -- 73 Minn. L. Rev. 650 1988-1989

relocation to a city currently without a major league franchise to extort concessions from local taxpayers.[30] For example, the City of Philadelphia gave the Eagles a new lease with additional concessions of thirty million dollars after the football team's owners threatened to move to Phoenix.[31]

In addition, leagues use the scarcity of franchises to wring concessions out of potential expansion cities. For example, in 1975, the NFL, after considering proposals from a host of cities, tentatively decided to expand to Tampa and Seattle.[32] When the initial terms Seattle offered for the lease of its publicly-owned stadium were not to the League's liking, the NFL did not mention Seattle in its expansion franchise announcements. Seattle officials soon succumbed to League pressure and shortly thereafter the NFL announced that Seattle would be the latest expansion franchise.[33] Similarly, Baseball Commissioner Bowie Kuhn explained to a Louisiana member of Congress that although the league was considering New Orleans as a possible expansion city, the city's inability to afford parking facilities and other concessions created a roadblock to expansion.[34]

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counsel David Self) (stating that cities compete for few available franchises in seller's market); *see also Danforth 85 Hearings*, *supra* note 22, at 2 (remarks of Sen. Slade Gorton) ("Teams threaten to move not because the present city is not supporting teams in a totally adequate fashion—very frequently at a profit—but simply because the artificial shortage of teams creates a great bidding war . . . .").

30. "Simply put, were there no Denver to threaten to move to . . . , the [baseball] owners could not coerce concessions from existing franchise cities and/or potential expansion cities." *Danforth 85 Hearings*, *supra* note 22, at 143 (testimony of Major League Baseball Players Executive Director Donald Fehr); *see also id.* at 134 (remarks of Sen. Charles Mathias) ("Only the owners can win these bidding wars"); D. HARRIS, THE LEAGUE: THE RISE AND DECLINE OF THE NFL 614-15 (1986) (discussing City of San Francisco's funding of $30 million in concessions after 49ers owner Eddie DeBartolo implicitly threatened to move team); *id.* at 642 (observing that Louisiana significantly reduced lease terms and guaranteed $15 million loan as part of sale of New Orleans Saints to local owners).

31. *See supra* note 28. As Senator Frank Lautenberg from neighboring New Jersey explained, the scarcity of football teams caused the subsidy: "If there was a team already in Phoenix, could the owner have held a gun to Philadelphia's head and to the heads of its many fans on both sides of the Delaware? I think not." *Danforth 85 Hearings*, *supra* note 22, at 6.

32. D. HARRIS, *supra* note 30, at 175.

33. *Id.* at 174-77; *see also* Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1394 (9th Cir.) (discussing evidence showing that in past NFL had "remained expressly noncommitted on the question of team movement" to provide "owners a bargaining edge when they were renegotiating leases with their respective stadia."), *cert. denied*, 469 U.S. 990 (1984). This Article will refer to this case as *Raiders* throughout.

34. 1 *Inquiry into Professional Sports: Hearings Before the House Select*

HeinOnline -- 73 Minn. L. Rev. 651 1988-1989

Some may claim that cities bemoaning the need either to pay tax subsidies or to lose a team have only themselves to blame for poor bargaining. The cities, the argument goes, could protect themselves adequately by entering into long-term leases with the professional sports franchise. The possibility of long-term contracts, however, does not solve the problems that the scarcity of teams creates. Precisely because of the bargaining power that monopoly sports league franchises have over cities, franchise owners usually refuse to enter into long-term leases. For example, when Oakland agreed to provide the Raiders with the stadium improvements owner Al Davis demanded, the city requested a long-term lease to secure bond financing for those improvements, but Davis absolutely refused.[35]

Even if a city were able to negotiate a long-term lease, the team's owner simply could break the lease, pay damages for breach of contract, and receive an indemnity from a new city. Although some courts have found damages an inadequate remedy and have granted injunctive relief to prevent a team from breaching its lease,[36] many other courts, even in the home city of the franchise, have refused to do so.[37] This area of the law is so uncertain that most city officials will grant the concessions demanded rather than risk litigation.

Other observers claim that the league as a whole will protect a city's interests adequately by preventing a team's owner from moving solely to secure more favorable concessions from another city.[38] Indeed, leagues have acted periodically to pro-

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Comm. on Professional Sports, 94th Cong., 2d Sess. 36-37 (1977) [hereinafter *Sisk Hearings*] (testimony of Major League Baseball Commissioner Bowie Kuhn).

35. D. HARRIS, *supra* note 30, at 378. Indeed, Oakland's troubles really began in the early 1960s with the Raiders' initial lease. Then-Raiders owner Wayne Valley refused to sign a 20-year lease that stadium authorities sought and subsequently agreed to a five-year lease with five three-year options of renewal for the Raiders. *Id.* at 60; *see also id.* at 479 (reporting that Baltimore Colts owner Robert Irsay rejected an offer from Maryland legislature to issue $23 million bond to refurbish Memorial Stadium contingent upon his signing 15-year lease).

36. *See, e.g.*, City of New York v. New York Jets Football Club, Inc., 90 Misc. 2d 311, 316, 394 N.Y.S.2d 799, 803 (Sup. Ct. 1977).

37. *See, e.g.*, HMC Management Corp. v. New Orleans Basketball Club, 375 So. 2d 700, 707-12 (La. Ct. App. 1979), *cert. denied*, 379 So. 2d 11 (La. 1980); November v. National Exhibition Co., 10 Misc. 2d 537, 545, 173 N.Y.S.2d 490, 499 (Sup. Ct. 1958); L. SOBEL, *supra* note 24, at 516-21 (citing San Diego v. National League of Professional Baseball Clubs, Cal. Super. Ct., San Diego Cty. No. 343508 (unpublished opinion), *aff'd*, Cal. Ct. App. 4th Dist., Div. 1, No. 12741 (1973) (unpublished opinion)).

38. *See, e.g.*, *Rodino 82 Hearings*, *supra* note 29, at 75-76 (testimony of

HeinOnline -- 73 Minn. L. Rev. 652 1988-1989

hibit a franchise from relocating in search of increased subsidies. The NFL attempted to bar the Oakland Raiders from moving to Los Angeles,[39] and Baseball Commissioner Peter Ueberroth acted to prevent the Minnesota Twins from moving to the Tampa Bay area.[40] Monopoly leagues occasionally, or even frequently, may find it in their self-interest to prohibit franchises from moving, although critics of the leagues can point to other factors that might explain such actions.[41] Such moves may be unpopular among voters in the other cities that currently have franchises, thus exposing the leagues to the risk of legislative retribution.[42] When a team threatens to leave a major media market for a smaller market, television ratings on

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Professor John Weistart) ("there is little evidence that the mechanism of league control is inadequate to limit any potential for abuse" in franchise relocation); *Professional Sports Antitrust Immunity: Hearings on S. 2784 and S. 2821 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 64-65 (1982) [hereinafter *Thurmond 82 Hearings*] (testimony of NFL Commissioner Pete Rozelle) (stating that leagues have incentives to assure that local interests are served).

39. *Raiders*, 726 F.2d at 1385.

40. *Danforth 85 Hearings*, *supra* note 22, at 55 (statement of Major League Baseball Commissioner Peter Ueberroth).

41. For example, testimony in the *Raiders* case indicated that the decision stemmed from personal animosity toward Raider owner Al Davis, *Raiders*, 726 F.2d at 1398, and from a desire to protect the Los Angeles Rams from intrametropolitan competition, *id.* at 1393-94. A desire to preserve Los Angeles as a possible expansion city more valuable than Oakland is also a possible explanation. *See generally* Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1021 n.29.

Shortly after the introduction of S. 2505, co-sponsored by Minnesota Senator Rudy Boschwitz, to regulate franchise movement in Major League Baseball, then-Commissioner Bowie Kuhn, American League President Bobby Brown, and National League President Chub Feeney informed the prospective Tampa purchasers of the Minnesota Twins that the League opposed the purchase and relocation of the franchise. Minneapolis Star & Tribune, May 19, 1984, at A1, col. 1.

42. On at least three occasions, actual or threatened franchise relocations spurred congressional action antithetical to the interests of Major League Baseball owners. Although in each case the proposals did not succeed, these reactions explain why political good will may be an important factor in baseball franchise relocation decisions.

Shortly after the Dodgers and Giants relocated to the west coast in 1958, legislation reported to the Senate proposed to limit Major League Baseball's antitrust exemption. *See* SENATE COMM. ON THE JUDICIARY, PROFESSIONAL SPORTS ANTITRUST ACT OF 1960, S. REP. NO. 1620, 86th Cong., 2d Sess. 1 (1960). By a narrow vote of 45-41, the Senate deleted provisions that Major League Baseball opposed and the legislation died after referral to committee. 106 CONG. REC. 14748-50 (1960).

In response to the relocation of the Washington Senators to Texas, Congress established a Select Committee on Professional Sports, which held ex-

HeinOnline -- 73 Minn. L. Rev. 653 1988-1989

the league's network package may suffer and the league therefore may act to protect its ratings.[43] Moreover, franchise moves may decrease fan loyalty to the detriment of the league as a whole.[44]

Nevertheless, taxpayers cannot rely on monopoly sports leagues for adequate protection. There is no reason to expect that franchise owners routinely will interfere with their joint-venturers' efforts to make more money at the taxpayers' expense.[45] In fact, leagues often have permitted franchises to move when cities without teams offer more lucrative opportunities. The most famous example is the Dodgers' move from Brooklyn to almost 300 acres of free land in Los Angeles.[46] Perhaps a more typical exercise of league authority involved construction of the Hubert H. Humphrey Metrodome in Minneapolis. The Minnesota Vikings desired a domed stadium, but the owners' efforts to get legislative approval of that costly project stalled.[47] When the NFL discovered that opponents of the domed stadium believed that acquiescing to the Vikings' demand was unnecessary because the League would not permit

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tensive hearings and issued a report fairly critical of Major League Baseball's antitrust exemption. *See* SISK REPORT, *supra* note 25, at 35-60.

In 1984, investors from Tampa, Florida, purchased 43% of the stock in the Minnesota Twins, with the possible intent of relocating the franchise. Minnesota Senator Rudy Boschwitz testified that in 1983 he introduced legislation, S. 2505, restricting franchise relocations because of rumors concerning the sale of the Twins. *Professional Sports Team Community Protection Act: Hearings on S. 2505 Before the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. 19 (1984) [hereinafter *Danforth 84 Hearings*].

43. For example, when the Baltimore Colts moved to Indianapolis, the NFL owners voted to take no action, pleading impotence in the face of the antitrust verdict rendered against the NFL for barring the Oakland Raiders' move to Los Angeles. N.Y. Times, Mar. 30, 1984, at A27, col. 1. Conversely, when the Eagles threatened to leave Philadelphia, the fourth largest television market in the country, for smaller Phoenix, the NFL filed suit to bar the move. N.Y. Times, Dec. 15, 1984, at A43, col. 1.

44. *See Raiders*, 726 F.2d at 1396; J. WEISTART & C. LOWELL, THE LAW OF SPORTS 151 (Supp. 1985).

45. *See* Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 J. L. & CONTEMP. PROBS. 42, 47 (1973) ("[F]ranchise moves emerge as a device to permit small city franchises to capture short-run profits in a new market," so "fans in small cities can expect little protection from franchise moves from the self-regulation of the typical sports league.").

46. *See Thurmond 82 Hearings*, *supra* note 38, at 233 (testimony of Howard Cosell); *see also id.* at 181 (testimony of Los Angeles County Coliseum Commissioner William Robertson) (stating that City of Anaheim sold 95 acres of prime real estate valued at $25 million to Rams for fraction of its market value); *Danforth 84 Hearings*, *supra* note 42, at 159-60 (statement of Professor Arthur Johnson) (same).

47. D. HARRIS, *supra* note 30, at 370.

HeinOnline -- 73 Minn. L. Rev. 654 1988-1989

the team to move, Commissioner Pete Rozelle held a special press conference emphasizing the League's willingness to permit the Vikings to move if efforts to obtain a new stadium failed.[48]

Economic theory suggests that if sports leagues did not hold monopoly power in the stadium market, taxpayers would fare better. The existence of competing sports leagues would significantly reduce subsidies. An incumbent team, with its reservoir of good will and fan loyalty, still would obtain some subsidies to prevent it from moving. A city's knowledge that a rival league probably would replace the franchise eagerly, however, would limit the amount of the subsidy. Moreover, competing sports leagues can be expected to expand.[49] As the number of desirable cities *without* a major league team dwindles, a city's current team will be less able to set off a bidding war by threatening to relocate.[50]

Rival leagues battled for sole rights to an expansion city on only one occasion in recent history: in 1960 both the NFL and the fledgling AFL sought to establish a franchise in Houston.[51] In contrast to the demands upon taxpayers described above, Houston Oilers owner Bud Adams secured a five-year lease on an existing stadium by promising to spend $150,000 of his own money to expand the seating capacity.[52] Twenty-seven years later, with a secure membership in a monopoly sports league, the same Bud Adams threatened to relocate the Oilers to Jack-

48. *Id.* at 370-71.

49. *See infra* Part I(B).

50. For example, Colts' owner Robert Irsay negotiated with two cities, Indianapolis and Phoenix, that did not have NFL franchises, while continuing negotiations with Baltimore. D. HARRIS, *supra* note 30, at 601-07. Economic theory predicts that if Indianapolis or Phoenix could support the Colts, those cities probably already would have a franchise in the NFL or in a rival league. *See infra* Part I(B).

51. In the early 1960s, the two leagues competed against one another in several metropolitan areas. By the time of the merger, New York still supported both the Jets and the Giants, and the San Fransciso Bay area still supported both the 49ers and the Raiders. *See Professional Football League Merger, Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary on S. 3817 and similar bills*, 89th Cong., 2d Sess. 82-83 (1966) [hereinafter *NFL 66 Hearings*] (setting forth special terms for merger in these "two team" areas). The AFL also attempted to compete with the already established Rams in Los Angeles, but gave up after one year and moved the Chargers to San Diego. D. HARRIS, *supra* note 30, at 104. In 1963, Lamar Hunt moved his AFL team, the Dallas Texans, to Kansas City, and renamed them the Chiefs. *Id.* The two leagues battled for stadium rights in Houston when the NFL decided to expand there in 1959. *See* Houston Post, Oct. 31, 1959.

52. Houston Post, Oct. 30, 1959, § 5, at 2, col 3.

HeinOnline -- 73 Minn. L. Rev. 655 1988-1989

sonville, relenting only after the Houston Astrodome's operator agreed to add, at *its* expense, an additional 10,000 seats and seventy-two sky boxes, as well as granting Adams a more favorable lease.[53]

Experience demonstrates that Major League Baseball and the NFL have monopoly power in negotiating with stadium authorities for the lease of public sporting arenas and that the monopoly sports leagues exercise that power to the detriment of taxpayers. Economic theory, buttressed by the one example in which two rival leagues both sought to enter a new market, confirms that divestiture of monopoly sports leagues into competing economic entities will significantly reduce taxpayer subsidies. Competition would decrease the ability of team owners to demand that stadiums be built or renovated at public expense and similarly would increase the ability of stadium authorities to secure rent that would cover the cost of operating arenas.

B. INSUFFICIENT EXPANSION

One benefit of a free enterprise system is that the market usually responds to increased consumer demand for a product by spurring increased output of the product.[54] Monopoly sports leagues, in contrast, exercise their power deliberately to hold down the number of available franchises. As a result, fans in cities without Major League Baseball or NFL franchises lose the opportunity to have a team that they may call their own. Leagues exploit fans in cities with franchises by threats of relocation to the many "have-not" areas.[55] Of course, fans in markets capable of supporting expansion franchises but unable to obtain them suffer the major harm of not having a team to follow. Monopoly sports leagues have significant economic incentives to keep the number of franchises below the number that would exist in a free market. The fewer the franchises, the more incentive for have-not cities to provide generous tax subsidies to induce an existing team to relocate.[56] In addition, with fewer available franchises, "the competition among cities for

53. Deford, *This Bud's Not For You*, SPORTS ILLUSTRATED, Nov. 2, 1987, at 70.

54. *See* E. MANSFIELD, MICROECONOMICS 12 (5th ed. 1985).

55. *See supra* Part I(A).

56. *See* 1 *Sisk Hearings*, *supra* note 34, at 236 (testimony of NFL Players' Association Executive Director Edward Garvey); D. HARRIS, *supra* note 30, at 152.

HeinOnline -- 73 Minn. L. Rev. 656 1988-1989

teams will push the rents to essentially nothing."[57]

Even owners with no intention of relocating their own teams have powerful incentives to resist expansion. Limiting the number of teams enhances the value of each franchise.[58] An increase in the number of team owners also means an increase in the number of people who will share the revenues from lucrative national television packages. With more owners, each owner gets a smaller piece of the "pie."[59] Although expansion franchises pay huge sums of money to the existing owners as the price of entry, the smaller share of television revenue offsets the benefit of the one-time entry fee in just a few years.[60]

When a market can support multiple teams, monopoly sports league owners are unlikely to agree to an expansion that jeopardizes a fellow owner's local territorial monopoly.[61] One

57. *See* 2 *Sisk Hearings*, *supra* note 34, at 145 (testimony of economist Roger Noll).

58. S. 287, 99th Cong., 1st Sess. § 302(3) (1985), *reprinted in Danforth 85 Hearings*, *supra* note 22, at 40.

59. American League President Lee McPhail explained this: if baseball owners "share their national television package with two more clubs, that means that there is a lessening of income for them when they do so, so it is no financial bonanza to the existing clubs." 2 *Sisk Hearings*, *supra* note 34, at 424. *See also* S. 287, 99th Cong., 1st Sess., § 302(3) (1985), *reprinted in Danforth 85 Hearings*, *supra* note 22, at 40; *Danforth 85 Hearings*, *supra* note 22, at 105 (testimony of United States Football League (USFL) Players' Association Director Doug Allen); *Professional Sports Team Community Protection Act: Hearing on H.R. 5388 and H.R. 5430 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 89-90 (1984) [hereinafter *Florio Hearings*] (testimony of NFL General Counsel Jay Moyer); D. HARRIS, *supra* note 30, at 148.

If the number of franchises increases, the "pie" also may increase if the national network telecasts receive higher ratings in a city after it acquires a franchise to root for. This increase, however, may be more than offset by the reduced share of the "pie" that each current owner must take when new teams enter a league.

60. *Danforth 85 Hearings, supra* note 22, at 62-63 (testimony of NFL Commissioner Pete Rozelle). A monopoly joint venture in a typical industry would continue to expand and simply allow the expansion franchise to collect marginal increases in revenues attributable to expansion. Such a plan, however, makes it unlikely that the expansion franchise ever will field a contending team, thereby harming the league's long-term goal of competitive balance. *See infra* Part I(C). Accordingly, Major League Baseball and the NFL each divide league television revenues equally among their franchises, with an inexorable adverse effect on expansion. *See Danforth 85 Hearings*, *supra* note 22, at 62-63 (testimony of NFL Commissioner Pete Rozelle) (discussing football expansion); *Baseball Bats Over $300 Million in 1986*, BROADCASTING, Mar. 3, 1986, at 43, 46 (discussing Major League Baseball revenue).

61. *See Rodino 82 Hearings*, *supra* note 29, at 65-66 (testimony of economist Gerald Scully); D. HARRIS, *supra* note 30, at 28 (Redskins' owner blocked

HeinOnline -- 73 Minn. L. Rev. 657 1988-1989

study concluded that franchises sharing a local market "can expect revenues to fall nearly $3.8 million below their monopolistic counterparts."[62] It is no surprise, then, that the location of two franchises within large metropolitan areas is more likely to occur when there are separate competing leagues.[63] For example, the AFL had targeted Anaheim, California, as a prime expansion site prior to the AFL's merger with the NFL.[64] After the merger, however, Southern California waited fourteen years for its second team, and received one only after the Oakland Raiders prevailed in antitrust litigation over the NFL owners' unanimous rejection of the Raiders' proposal to relocate to Los Angeles.[65] Similarly, in 1973, the NFL commissioned a major study to determine the optimal locations for a planned expansion. The Stanford Research Institute study concluded that Long Island, Chicago, and Anaheim ranked "substantially above all the candidate areas, even when dividing

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any southern expansion because he owned extensive broadcast rights in that region, relenting only after future Cowboys' owner bought song rights to "Hail to the Redskins" and refused to sell them without withdrawal of expansion opposition); *id.* at 511 (Raiders' attorney Joseph Alioto claimed that settlement of Raiders' suit granting Los Angeles an expansion team failed because Rams did not want competition).

Both leagues have special provisions in their rules to protect local territorial monopolies. *See* Major League Agreement, art. V, § 2(b)(3)(iii), *reprinted in* BASEBALL BLUE BOOK 507 (1987) ("the transfer of a Club to any city in the Circuit of the other Major League shall require the three-quarters approval of the Clubs in such other League . . . ."); Major League Rule 1(c), *reprinted in* BASEBALL BLUE BOOK 511 (1987) (requiring approval of three-quarters of clubs in other league for expansion into city within circuit of other league); National Football League Constitution and By-Laws, art. IV, § 4.2, *reprinted in Thurmond 82 Hearings*, *supra* note 38, at 83 (exhibit attached to NFL Commissioner Pete Rozelle's testimony) ("Each member shall have the exclusive right within its home territory to exhibit professional football games").

62. Sommers & Quinton, *Pay and Performance in Major League Baseball: The Case of the First Family of Free Agents*, 17 J. HUM. RESOURCES 426, 431 (1982).

63. *Thurmond 85 Hearings*, *supra* note 28, at 404 (written response of Deputy Assistant Attorney General Charles F. Rule to questions of Sen. Charles Grassley and Sen. Charles Mathias).

64. D. HARRIS, *supra* note 30, at 308.

65. *See Raiders*, 726 F.2d at 1401. If the Raiders' move to Los Angeles was in the overall best interests of the league, Al Davis theoretically could have offered his fellow owners enough money to persuade them to permit the relocation. Two reasons, however, suggest that this type of bargaining will not ensure that local monopolists embrace efficient relocations. First, there are significant transaction and information costs to arriving at the correct "price" for the league's permission to move. Second, many owners may be reluctant to set a precedent that would allow a maverick rival to relocate into *their* territory by paying off three-fourths of their colleagues.

HeinOnline -- 73 Minn. L. Rev. 658 1988-1989

data by two or three to account for a shared market."[66] The League's owners summarily dismissed these recommendations.[67]

Some expansion may be sound strategy even for a monopolist. Limited expansion can be a potent political tool. As a monopolist, the NFL faces difficulties when important initiatives cannot go forward without congressional exemptions from the antitrust laws. The NFL has had considerable success in persuading Congress to grant such exemptions and invariably has used expansion teams as a political reward to key legislators.[68] Passage of the Sports Broadcasting Act[69] followed quickly on the heels of the addition to the NFL of the Dallas Cowboys in 1960 and the Minnesota Vikings in 1961.[70] The Act granted an antitrust exemption to sports leagues, allowing them to sell lucrative exclusive packages of broadcast rights to network television.[71] Expansion to Atlanta and New Orleans coincided with the passage of the 1966 legislation allowing the NFL-AFL merger.[72] In 1974, when the NFL succeeded in persuading Congress to forgo additional statutory limitations on the League's ability to black out games in home areas, Tampa Bay and Seattle received franchises.[73] Most recently, in the early 1980s, Commissioner Pete Rozelle resorted explicitly to "dangling"

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66. D. HARRIS, *supra* note 30, at 151-52 (quoting Stanford Research Institute's Report of December 1973, *Socioeconomic Information on Candidate Areas for NFL Franchises*).

67. *Id.* at 152.

68. Expansion was "the principal currency of the League's political influence." *Id.* at 147. *See also Danforth 85 Hearings*, *supra* note 22, at 101 (testimony of NFL Players Association Director Gene Upshaw); *id.* at 129 (testimony of Maryland Gov. Harry Hughes). *But see id.* at 62 (NFL Commissioner Pete Rozelle claimed that all expansions were "without dictate or pressure from Congress").

69. Pub. L. No. 87-331, 75 Stat. 732 (1961) (codified at 15 U.S.C. §§ 1291-1295 (1982)).

70. *See* AFL v. NFL, 205 F. Supp. 60, 62 (D. Md. 1962) (detailing expansion of NFL), *aff'd*, 323 F.2d 124 (4th Cir. 1963). In 1960, Lyndon Johnson of Texas was the Senate Majority Leader. CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 184-A (2d ed. 1976). The Speaker of the House of Representatives was Sam Rayburn of Texas. *Id.* at 178-A. The Senate Majority Whip was Hubert Humphrey of Minnesota. *Id.* at 184-A.

71. Sports Broadcasting Act, Pub. L. No. 87-331, 75 Stat. 732 (1961) (codified at 15 U.S.C. §§ 1291-1295 (1982)).

72. Pub. L. No. 89-800, 80 Stat. 1515 (1966). *See Danforth 85 Hearings*, *supra* note 22, at 129 (testimony of Gov. Harry Hughes); D. HARRIS, *supra* note 30, at 17 (describing explicit quid pro quo between NFL Commissioner Pete Rozelle and Rep. Hale Boggs of Louisiana concerning passage of legislation and expansion into New Orleans).

73. *See Danforth 85 Hearings*, *supra* note 22, at 129-30 (testimony of Gov.

HeinOnline -- 73 Minn. L. Rev. 659 1988-1989

the prospect of expansion before key legislators[74] in an unsuccessful attempt to secure further antitrust exemptions.[75] Although Major League Baseball enjoys a judicial exemption from antitrust scrutiny, it too has used expansion to retain the political good will necessary to maintain favorable antitrust treatment.[76]

The NFL also has nonpolitical incentives for permitting limited expansion. If the NFL leaves too many obvious markets without a franchise, the NFL opens itself to challenge from a rival league.[77] In 1960, for example, the NFL occupied only thirteen of the thirty-one available markets for major professional football franchises.[78] As a result, the AFL was able to enter the market in 1960 and to compete successfully with the NFL.[79]

Because the NFL and Major League Baseball are now so large, however, the threat of entry by a new league featuring franchises in locations currently without teams no longer deters either league from creating an artificial scarcity of franchises. The NFL currently has twenty-eight franchises.[80] Even if a new league could find room for the eight franchises it

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Harry Hughes). At the time, Sen. Warren Magnuson of Washington chaired the committee with jurisdiction over this legislation.

74. D. HARRIS, *supra* note 30, at 516.

75. The NFL sought legislation that would require courts to treat the league as a "single entity" not subject to the provisions of § 1 of the Sherman Act, 15 U.S.C. § 1 (1982), condemning conspiracies in restraint of trade. D. HARRIS, *supra* note 30, at 516-21.

76. In 1982, Rep. Henry Hyde of Illinois made the following remarks to Major League Baseball Commissioner Bowie Kuhn:

> How far along does this legislation to remove the antitrust exemption for baseball have to move before Washington, D.C., is going to get a baseball team?
>
> You do not have to answer that, but I do know that in 1968, when baseball left Kansas City, Senator Symington threatened baseball with the removal of its antitrust exemption, and in response to that threat, or maybe just coincidentally, Kansas City was given another major league baseball team.

Rodino 82 Hearings, *supra* note 29, at 461; *see also Bavasi Says Padres Were Used as Bribe*, L.A. Times, Dec. 14, 1973, § III, at 1, col. 1 (reporting San Diego Padres executive Buzzie Bavasi's claim that commissioner Kuhn admitted urging baseball owners to relocate San Diego franchise to Washington, D.C. to promote political good will).

77. *See* J. MARKHAM & P. TEPLITZ, BASEBALL ECONOMICS AND PUBLIC POLICY 22-23 (1981) [hereinafter J. MARKHAM].

78. *See* AFL v. NFL, 205 F. Supp. 60, 62, 76 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

79. *Id.* at 77.

80. *See 1988 NFL Standings*, The Sporting News, Feb. 23, 1989, at 9 (listing 28 teams currently in NFL).

HeinOnline -- 73 Minn. L. Rev. 660 1988-1989

probably would need to begin operations,[81] the new league would face greater difficulties in competing with today's twenty-eight team league than the AFL faced in 1960 with the thirteen-franchise league.[82] Moreover, as discussed below, a dominant sports league can more easily engage in predatory practices to rebuff new entrants than can a similarly dominant monopolist in a more typical industry.[83] Fear of entry by a rival league therefore no longer deters a monopoly sports league from deliberately restricting the number of its members in order to maintain and exploit its monopoly power.

Some might respond to those protesting sluggish expansion by claiming that the market will not support additional teams. The available empirical evidence suggests, however, that the current number of franchises is artificially small. As Senator Frank Lautenberg has observed: "There is an artificial scarcity of teams that results from joint decisions of league members and their anticompetitive behavior. Demand is not met by supply; it is met by ransom and higher price franchises."[84]

It is difficult, if not impossible, to ascertain precisely the optimal number of franchises in major league sports. Economic models can predict, for example, the population characteristics necessary to produce a given amount of revenue for a team that wins half its games.[85] Models cannot predict, however, whether

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81. The success of the National and American Leagues with eight teams each from 1900 through 1960, the NHL with six teams for most of its history, and the AFL from its formation until its merger with the NFL with eight teams, is strong evidence that the minimum number is not greater than eight. *See* AFL v. NFL, 205 F. Supp. at 65 (minimum of six, but probably eight teams needed for successful operation of a league), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

82. *See* AFL v. NFL, 205 F. Supp. 60, 62 (D. Md. 1962) (listing NFL teams in 1960), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

83. *See infra* text accompanying notes 392-406.

84. *Danforth 85 Hearings*, *supra* note 22, at 6.

85. These models attempt to predict attendance for expansion cities based upon attendance patterns for current franchises. Thus, the models assume that expansion will not cause such a reduction in quality that attendance will drop precipitously. The success of baseball, football, and hockey in expanding without suffering a significant reduction in attendance indicates that this assumption is justified. *See infra* text accompanying notes 99-101.

These models also assume that a team plays its entire home schedule in one metropolitan area. *Cf.* Noll, *Attendance and Price Setting*, in GOVERNMENT AND THE SPORTS BUSINESS 115, 129-30 (R. Noll ed. 1974). Possibly, baseball leagues truly interested in tapping available markets could arrange for a split schedule with teams playing spring games in southern cities and moving north when the weather warmed up. Such an innovation would allow smaller cities to support a team and would increase broadcast revenues, because fans in each city would follow the team on television and radio. Similarly, a split schedule would make season tickets more attractive by reducing their cost.

HeinOnline -- 73 Minn. L. Rev. 661 1988-1989

that revenue is sufficient to enable the owners to make a normal return on their investment. Profitability depends on player salary levels, revenue from national broadcast rights, and other factors unascertainable in advance and not necessarily constant as the number of franchises increases.

Several empirical studies conducted in the 1970s attempted to estimate the number of additional locations that could support a Major League Baseball franchise.[86] Such a study, however, requires an estimate of the amount of revenue a team owner must realize in order to earn a modest but reasonable profit. Since these studies were completed, two major new developments have changed this "bottom line." First, from 1976 to 1985, competitive bidding for players significantly increased salaries.[87] Second, Major League Baseball's revenues from the sale of broadcast rights have increased dramatically. The new network contracts signed in 1983 brought in almost $200 million annually, compared to the 1979 agreement that was worth ap-

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See 1 *Sisk Hearings*, *supra* note 34, at 491 (testimony of Louisiana Superdome official William J. Connick); *cf.* H. DEMMERT, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS 88-89 (1973).

86. Roger Noll conducted the first major effort to determine empirically whether baseball franchise expansion was feasible, based on data from the 1970 and 1971 seasons. Noll concluded that expansion was feasible into Washington, Toronto, and Newark, and that New York City could support a third team. He also concluded, however, that Kansas City, Milwaukee, and San Diego had insufficient populations to support franchises and that San Francisco-Oakland probably could not support their two existing teams. Thus, Noll's data suggested no net expansion of baseball franchises. *See* Noll, *supra* note 85, at 130-31.

In a study commissioned by Major League Baseball completed in 1978, Jesse Markham and Howard Teplitz estimated that baseball feasibly could expand by a net of three teams. J. MARKHAM, *supra* note 77, at 68-69. The economic model for that study estimated that a Standard Metropolitan Statistical Area with a population of 1.25 million could support a team, all "other things being equal." *Id.* at 68. At the time their study was produced, this suggested that Buffalo, Miami-Fort Lauderdale, Denver, Washington, Indianapolis, Newark, New Orleans, and Tampa-St. Petersburg all could support teams, although Atlanta, Kansas City, Milwaukee, and San Diego might not be able to, and that the San Francisco-Oakland area could not support both the Giants and the A's. *Id.* at 68-69. An unpublished study based on 1975-76 data reached similar results regarding the profitability of Atlanta, Milwaukee, San Diego, and San Francisco. R. Lucke, Antitrust Policy and the Professional Sports Industry 18-19 (Aug. 4, 1977) (unpublished honors thesis, Univ. of Cal.).

87. Major League Baseball Players Association, *Average Salaries in Major League Baseball 1967-1987*, at 3 (filed as exhibit in Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 86-2 (Sept. 21, 1987) (Roberts, Arb.) [this Article will refer to this arbitration as *Collusion I* throughout] (average salary increased from $51,501 to $371,157 between 1976 and 1985)).

HeinOnline -- 73 Minn. L. Rev. 662 1988-1989

proximately $46 million per season.[88] Moreover, many individual team owners recently have made money by selling local broadcast rights to cable and pay television.[89]

Some empirical evidence nevertheless shows, at least with regard to baseball,[90] that monopoly sports leagues can comfortably expand. Baseball should expand to any market in which an average team can draw one and one-half million fans per season. This proposition is supported by the 1986 season, in which only nine of the current twenty-six teams drew fewer fans,[91] and by recent evidence indicating that well-managed franchises achieve profitability even when their home attendance is lower.[92] The evidence suggests that at least four of the five smallest population markets that currently have baseball franchises—San Diego, Milwaukee, Cincinnati, and Kansas City—will draw one and one-half million fans when their teams

88. *See It's a Whole New Ball Game*, BROADCASTING, Mar. 7, 1988, at 27 (two networks signed six-year contracts in 1983 for a total of $1.125 billion); *Rights Go Out of the Park*, BROADCASTING, Mar. 10, 1980, at 33 (two networks signed four-year contracts in 1979 estimated at a total of $185 million).

89. *See Baseball Bats Over $300 Million in 1986*, BROADCASTING, Mar. 3, 1986, at 43, 47-50.

90. The economic literature has not provided useful economic models for predicting optimal expansion in football. Although this issue played a key role in determining whether the NFL had committed illegal monopolization by taking the Dallas-Fort Worth and Minneapolis-St. Paul markets away from the AFL, the only trial court findings were the testimony of AFL owner Lamar Hunt that a market of 500,000 population could support a well-managed team and the judge's own conclusory assertion that "700,000 appears more reasonable." AFL v. NFL, 205 F. Supp. 60, 76 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

Reasons for the difficulty in economic modeling for football include the small number of home games played in football and the reliance by professional football on network television packages. *See* 2 *Sisk Hearings*, *supra* note 34, at 149 (memorandum by NFL attorneys). The relative paucity of games suggests that perhaps 100 markets are large enough to entice 50,000-60,000 fans eight times a year. Such a sizable expansion, however, would seriously erode team quality and revenue per team from the network television package. *Id.*

Although discussion of expansion in the NHL is beyond the scope of this Article, *see supra* note 14, one economic model has demonstrated that there are a number of viable locations without NHL franchises. Jones & Ferguson, *Location and Survival in the National Hockey League*, 36 J. INDUS. ECON. 443, 455 (1988). Moreover, if the NHL engaged in more revenue sharing, overall profitability would increase, *id.* at 455 n.18, which could make additional locations feasible for expansion.

91. THE SPORTING NEWS, OFFICIAL BASEBALL GUIDE 286 (1987).

92. *See, e.g.*, Hertzel, *Thrift, Leyland Rewarded as Bucs Leave Basement*, The Sporting News, Oct. 19, 1987, at 23, col. 4 (reporting that Pittsburgh Pirates expected to draw 1.4 million fans and to turn profit).

HeinOnline -- 73 Minn. L. Rev. 663 1988-1989

win half of their games.[93] Moreover, the demographic characteristics of five markets that do not currently have baseball teams—Washington, D.C., Miami-Fort Lauderdale, Tampa-St. Petersburg, Phoenix, and Denver—indicate that teams in those areas could draw at least as many fans as the smaller markets in which franchises already exist.[94] Finally, several commentators have noted that very large metropolitan areas probably can accommodate additional expansion teams.[95]

The major policy argument against expansion is a lack of "sufficient player talent to produce a proper caliber of play in expanded leagues."[96] Any expansion reduces the average caliber of major league players somewhat.[97] Even if this reduction in quality noticeably affects the fans' enjoyment of the game, however, the dramatic increase in satisfaction in the new expansion cities will usually counterbalance any decreased satisfaction among fans in cities with teams. If live gate attendance measures enjoyment,[98] expansion and the alleged dilution of player quality does not appear to have a negative impact on the fans' enjoyment of the game. For example, overall attendance increased in 1962, 1969, and 1977 after each Major League Base-

93. *See* Appendix A, *infra*.

94. *Id.*

95. *See, e.g.*, H. DEMMERT, *supra* note 85, at 93; Noll, *supra* note 85, at 130.

96. *See* 1 *Sisk Hearings*, *supra* note 34, at 64 (testimony of Cincinatti Reds official Robert Howsam). *But see* B. JAMES, THE BILL JAMES BASEBALL ABSTRACT 1988 at 21 (1988) (estimating talent sufficient for Major League Baseball to expand to 60 major league teams and 150 minor league teams). Expansion also may reduce the enjoyment of current fans by reducing the number of games against popular rivals, requiring greater effort by fans to follow all teams, and by cheapening records when stars players attain heights previously thought impossible by playing against players who, but for expansion, would not be major league players. If this reduced enjoyment were significant, it would result in reduced attendance and lower broadcast ratings.

97. *Cf.* Canes, *The Social Benefits of Restrictions on Team Quality*, in GOVERNMENT AND THE SPORTS BUSINESS 81, 96-97 (R. Noll ed. 1974) (citing rising attendance during World War II in cities where teams' records improved, although overall league attendance declined because of lower quality due to military service of many major league players).

Assuming that the ability to play baseball is distributed normally among the population, a slight decrease in the level of quality of players will permit a significantly larger number of men to play on the major league level. This suggests that any realistic expansion plan will not *significantly* lower the quality of play.

98. This Article assumes that the number of people attending a game reflects fan satisfaction and pleasure with the team from an entertainment standpoint. Although the Article does not necessarily suggest this is the only manner of gauging enjoyment, such a measure appears to be roughly accurate and, more importantly, easily quantifiable.

HeinOnline -- 73 Minn. L. Rev. 664 1988-1989

ball expansion.[99] Similarly, overall attendance at NFL games increased after each expansion.[100] Indeed, when the National Hockey League (NHL) expanded overnight from six to twelve teams in 1967, overall attendance at NHL games continued to increase,[101] despite the significant decrease in player quality one would expect with such a rapid expansion.

If competing leagues form, economic theory suggests that all of the leagues would have a greater incentive to expand to available markets.[102] Each league probably would have a separate network television contract whose value ultimately would depend on how many fans viewed the league's games. Each league therefore would be eager to tap into new markets to attract new viewers to its network package. For example, if the NFL had a contract with CBS and the AFL had a rival contract with NBC, CBS's ratings most likely would be higher in NFL cities, whereas NBC's ratings would be higher in AFL areas. In markets distant from any current franchise, such as Memphis, ratings probably would be more equal. The NFL, however, could expect to see a favorable increase in its ratings if it expanded to Memphis. Conversely, NBC's AFL games would attract fewer viewers in Memphis because the fans there would have an NFL team to follow. AFL owners would have the same incentive to expand. Thus, a league stands to profit by expansion and to suffer if it sits by while a rival league expands into a good market.[103]

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99. *See* H. TURKIN & S. THOMPSON, THE OFFICIAL ENCYCLOPEDIA OF BASEBALL 71 (1979) (citing annual attendance figures for 1960-77).

100. *See* THE SPORTING NEWS PRO FOOTBALL GUIDE 391 (1987) (listing NFL attendance figures).

101. *See* NATIONAL HOCKEY LEAGUE, OFFICIAL GUIDE & RECORD BOOK 1987-88 at 130 (1987) (listing NHL attendance figures).

102. *See* 2 *Sisk Hearings*, *supra* note 34, at 286 (testimony of Deputy Assistant Attorney General Joe Sims) (testifying that rival leagues encourage expansion into new cities).

103. For example, in 1983 the Colts were in Baltimore; in 1984 they moved to Indianapolis. NFL football on NBC's Indianapolis affiliate (which shows American Football Conference (AFC) contests) jumped from a 10 rating (29% market share) to a 17 rating (41% market share). During the Colts' last year in Baltimore, the Baltimore NBC affiliate enjoyed a 19-10 rating edge (47% to 27% market share); when the Colts left, the margin decisively narrowed. (NBC had a 15 rating or 34% market share and CBS had a 13 rating or 31% market share). For comparison, in Phoenix the ratings were both lower and more equal. (NBC had a 13 rating or 39% market share; CBS had an 11 rating or 32% market share). *See* ARBITRON RATINGS (1983-84).

These figures provide a useful comparison of the different incentives to expand for a monopoly league and a competitive league. Even without a team, NFL football still drew a rating of 28 in Baltimore after the Colts left, com-

HeinOnline -- 73 Minn. L. Rev. 665 1988-1989

Again, because rival leagues seldom have existed, there is only meager data about the expansion practices of such leagues. The available evidence, however, supports the theoretical argument. For example, Major League Baseball traditionally required a unanimous vote of all the owners in each league to approve any expansion. When the rival Continental League was organized in the late 1950s, Major League Baseball changed its rules to require a three-fourths majority, and both leagues quickly expanded for the first time this century.[104] In addition, Major League Baseball dispensed with its rules protecting exclusive territories and minor league teams.[105]

Fans in areas without franchises suffer without a local team. Monopoly sports league owners, however, face strong economic incentives not to expand, but rather deliberately to restrict the number of available franchises. Economic models nonetheless predict that Major League Baseball, for example, easily could expand. With competing leagues, fans in expansion cities would have something to cheer about.[106]

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pared to a 29 rating during the Colts' last year there. The difference of one rating point is unlikely to motivate 28 owners to reduce their share of the network contract from 1/28 to 1/29. But assuming the Colts were part of an independent AFL, the incentives would be different. Without a team in Baltimore, the independent AFL's ratings would have dropped four ratings points. This suggests that the AFL may have barred the Colts' relocation to Indianapolis or quickly granted Baltimore an expansion franchise.

104. Davis, *Self-Regulation in Baseball, 1909-71*, in GOVERNMENT AND THE SPORTS BUSINESS 349, 371-72 (R. Noll ed. 1974) [hereinafter Davis].

105. *Id.* (noting that expansion decisions were in direct conflict with rules until compromise was reached between American and National Leagues).

106. Insufficient expansion of monopoly sports leagues also causes a divisive debate among elected representatives when scarce teams relocate among cities. During one set of hearings following the Philadelphia Eagles' threatened move to Phoenix, Senator Howard Metzenbaum decried the "unseemly battles that pit friendly Senators against each other, defending their home communities as they are exploited by sports monopolies." *Thurmond 85 Hearings*, *supra* note 28, at 32; *see also id.* at 31 (statement of Sen. Howard Metzenbaum) ("The Nation faces serious problems with the deficit approaching $200 billion. We are in the middle of an arms race . . . . Unemployment has gone up, and the U.S. Senate is here debating sports franchises. Why?").

One virtue of a free enterprise system which the antitrust laws promote is that "competitive market processes solve the economic problem *impersonally*, and not through the personal control of entrepreneurs or bureaucrats. There is nothing more galling than to have the achievement of some desired objective frustrated by the decision of an identifiable individual or group." F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 13 (2d ed. 1980).

HeinOnline -- 73 Minn. L. Rev. 666 1988-1989

C. INEFFICIENT ALLOCATION OF PLAYERS

Sports fans should prefer a system of allocating players among teams that gives their own favorite team the opportunity to win the championship, but at the same time provides for close, competitive games. To maximize both fan attendance at games and ratings for broadcasts, thereby maximizing revenue, leagues have an incentive to establish player allocation systems that create the greatest fan interest. A monopoly league, however, has an anti-consumer incentive for establishing a player allocation system. In sports in which all teams are members of a single league, teams can agree among themselves on rules that create a monopsony[107] in the acquisition of players. Monopoly leagues therefore can create systems of allocating players that do not enhance the fans' enjoyment of the game, but instead allow league owners artificially to hold down player salaries. These restrictions, of course, have the most direct impact on players. In addition, however, these systems do not allocate players to maximize fan interest. This negative impact on the fans may be of greater importance, but often is overlooked.[108]

The following section will discuss systems of allocating players, focusing primarily on the two that have sparked the most debate and litigation: Major League Baseball's reserve clause[109] and the National Football League's Rozelle Rule.[110] The reserve clause, which was modified substantially in 1976, allocated the exclusive rights to the services of each player to one team.[111] Unless a team waived, traded, sold, or otherwise assigned those rights to another team, an individual wishing to play baseball remained property of the team with whom he signed his first contract.[112] The Rozelle Rule, both in its original and its modified form,[113] permits a player to sign with any

107. *Monopsony* is the flip side of monopoly—a single firm buying goods or services from sellers. *See* F. SCHERER, *supra* note 106, at 299.

108. *See, e.g.*, Mackey v. NFL, 407 F. Supp. 1000, 1006-07 (D. Minn. 1975) (finding Rozelle Rule unlawful, although focusing solely on harm to players and failing to address harm to consumer fans), *aff'd in part, rev'd in part*, 543 F.2d 606 (8th Cir. 1976).

109. *See* Flood v. Kuhn, 316 F. Supp. 271, 274 (S.D.N.Y. 1970) (reciting text of reserve clause), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

110. *See* Powell v. NFL, 678 F. Supp. 777, 779 (D. Minn. 1988) (quoting Rozelle Rule).

111. *See* Atlanta Nat'l Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1215 (N.D. Ga. 1977).

112. Flood v. Kuhn, 316 F. Supp. 271, 273-75 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

113. *See* Mackey v. NFL, 543 F.2d 606, 621-22 (8th Cir. 1976). In 1976, sev-

HeinOnline -- 73 Minn. L. Rev. 667 1988-1989

NFL team at the expiration of a contract term.[114] To sign the player, however, the new team must provide significant "compensation" to the player's former team.[115] Originally, the Rule provided that the Commissioner set the compensation.[116] Currently, a team must give up one or two top draft choices for most football players.[117] The modified Rozelle Rule has virtually eliminated any free agency in football.[118]

The player allocation systems that Major League Baseball and the NFL adopted have provided fodder for extensive debate in court,[119] before congressional committees,[120] and among

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eral football players challenged the Rozelle Rule, claiming it violated antitrust laws. The court agreed, holding that parties must engage in collective bargaining before a court could construe such a rule to avoid antitrust liability. *Id.* at 623. Consequently, the modified Rozelle Rule, termed the "Right of First Refusal/Compensation System," gives a player's old club the right to match any offer and keep the player. *Powell*, 678 F. Supp. at 779. If the team refuses to match an offer, it receives draft choice compensation. *Id.* The *Powell* litigation has caused the NFL further to modify its rules, which are subject to still further change during the pendency of the litigation. *See Scorecard—A Semi-open Field*, SPORTS ILLUSTRATED, Apr. 10, 1987, at 14 (describing new NFL plan permitting clubs to reserve 37 players but allowing remaining players to become unrestricted free agents).

114. *See Powell*, 678 F. Supp. at 779 (quoting Rozelle Rule).

115. *Id.*

116. *Id.*

117. *Id.*

118. *See id.* at 779-80 & n.2.

119. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 269-82 (1972) (reviewing legal background of reserve system); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183-88 (D.C. Cir. 1978) (discussing anticompetitive effects of NFL rules on player market), *aff'g in part and rev'g in part*, 420 F. Supp. 738 (D.D.C. 1976); Reynolds v. NFL, 584 F.2d 280, 284-85 (8th Cir. 1978) (evaluating settlement of litigation challenging Rozelle Role); Mackey v. NFL, 543 F.2d 606, 621-22 (8th Cir. 1976) (holding Rozelle Role unduly restrictive and violative of antitrust law); Powell v. NFL, 678 F. Supp. 777, 781-89 (D. Minn. 1988) (renewing challenge to Rozelle Role following expiration of collective bargaining agreement); Kapp v. NFL, 390 F. Supp. 73, 85-86 (N.D. Cal. 1974) (challenging NFL draft and standard player contract), *aff'd in part and appeal dismissed in part*, 586 F.2d 644 (9th Cir. 1978).

120. *See, e.g.*, *Rodino 82 Hearings*, *supra* note 29, at 67 (testimony of economist Gerald Scully) (refuting claims of harm to players and fans should antitrust law apply); *id.* at 454 (prepared statement of economist Jesse Markham) (advising that leagues design player restraints to promote competitive balance, continuity, and local identification with star players); 1 *Sisk Hearings*, *supra* note 34, at 19-20 (testimony of Bowie Kuhn) (arguing reserve system is mandatory for existence of baseball); *id.* at 80 (testimony of Pete Rozelle) (contending NFL system is carefully designed to maintain competitive balance); *id.* at 217 (testimony of Edward Garvey) (arguing reserve clause holds salaries down, not necessarily achieving competitive balance); *id.* at 312 (testimony of George Sisler) (concerning viability of minor leagues without reserve systems); 2 *id.* at 153 (memorandum of NFL) (same); *id.* at 162-63 (letter of

HeinOnline -- 73 Minn. L. Rev. 668 1988-1989

academics.[121] This Article's thesis suggests that monopoly sports leagues, under the present scheme, employ inefficient player allocation systems that harm fans. Competing leagues have much less incentive to adopt such allocation systems, although they might desire to impose some restraints on the free market to promote exciting, competitive seasons. Unfortunately, both industry defenders and critics in the debate do not currently share this view that existing player allocation systems harm fans. Rather, the consensus viewpoint is that player restraints do not result in an inefficient allocation of players. Industry defenders of the current restraints argue that the rules promote competitive balance and thus increase fan interest in the sport.[122] Critics charge that the restraints have no ef-

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Roger Noll) (calculating effects on competitive balance); *id.* at 116 (testimony of Gerald Scully) (alleging financial instability of teams and lowered quality of play after antitrust application).

121. *See, e.g.*, H. DEMMERT, *supra* note 85, at 35, 90-91 (discussing market differences affecting talent distribution and noting practical considerations and effects of athlete mobility, suggesting benefits of collective control over new team entry); J. MARKHAM, *supra* note 77, at 110-11 (arguing that absence of reserve system gives star athletes monopoly power); Daly & Moore, *Externalities, Property Rights and the Allocation of Resources in Major League Baseball*, 19 ECON. INQUIRY 77, 84-94 (1981) (surveying consequences of change in reserve system on competitive balance); Holahan, *The Long-Run Effects of Abolishing the Baseball Player Reserve System*, 7 J. LEG. STUD. 129, 137 (1978) (concluding teams will not suffer financially in absence of reserve system); Hunt & Lewis, *Dominance, Recontracting, and the Reserve Clause: Major League Baseball*, 66 AM. ECON. REV. 936, 937-41 (1976) (using mathematic models in assessing monopsonistic restrictions); Medoff, *On Monopsonistic Exploitation in Professional Baseball*, 16 Q. REV. ECON. & BUS. 113, 116-19 (1976) (expanding on previous economic models to determine player value); Quirk & el Hodiri, *The Economic Theory of a Professional Sports League*, in GOVERNMENT AND THE SPORTS BUSINESS 33, 45-58 (R. Noll ed. 1974) (contrasting theoretical model with historical fact); Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 23 (1986) (analyzing plausible immunity from antitrust enforcement for league practices); Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242, 254-58 (1956) [hereinafter Rottenberg Article] (discussing whether reserve system is needed for competitive balance); Scully, *Pay and Performance in Major League Baseball*, 64 AM. ECON. REV. 915, 927-29 (1974) (measuring economic loss to players due to reserve clause); Topkis, *Monopoly in Professional Sports*, 58 YALE L.J. 691, 696-702 (1949) (discussing monopoly effects, most notably absence of player bargaining equality); Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 430-34 (1967) [hereinafter HARVARD Note] (suggesting alternative antitrust analysis to promote competition); Rottenberg, Book Review, 13 J. ECON. LIT. 87, 88 (1975) [hereinafter Rottenberg Book Review] (commenting on ambivalence about monopsonistic practices).

122. *See, e.g.*, 1 *Sisk Hearings*, *supra* note 34, at 80 (testimony of NFL Commissioner Pete Rozelle).

HeinOnline -- 73 Minn. L. Rev. 669 1988-1989

fect, positive or negative, on player allocation, and serve only to exploit the players.[123] Those on both sides of this chasm are incorrect.

1. The Desirability of Competitive Balance

Virtually all commentators on this subject agree that "competitive balance" is a desirable goal for a sports league.[124] Competitive balance occurs when "there is relative parity among the member teams and . . . each team has the opportunity of becoming a contender over a reasonable cycle of years and a reasonable chance of beating any other team on any given night."[125]

Competitive balance in a league and the close competition it creates enhance fans' enjoyment of sporting events.[126] Economists Roger Noll and Henry Demmert have demonstrated empirically that attendance increases when championship races are closely contested.[127] Similarly, courts have recognized that sports leagues have a unique interest in maintaining competitive balance.[128] The key issue in assessing player mobility re-

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123. *See infra* note 175 and accompanying text.

124. *See, e.g.*, *Smith*, 593 F.2d at 1176 ("Evenly-matched teams make for closer games, tighter pennant races, and better player morale, thus maximizing fan interest, broadcast revenues, and overall health of the sport."); 2 *Sisk Hearings*, *supra* note 34, at 167 (testimony of Gerald Scully) ("Uncertainty of outcome is a necessary feature of competitive team sports, and this uncertainty is determined primarily by the relative playing strengths of the teams.").

125. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 486 (E.D. Pa. 1972).

126. *Thurmond 85 Hearings*, *supra* note 28, at 384 (testimony of Charles F. Rule); Canes, *supra* note 97, at 93 & n.26; HARVARD Note, *supra* note 121, at 421.

127. H. DEMMERT, *supra* note 85, at 11; Noll, *supra* note 85, at 155-56.

Using data from the 1971 Major League Baseball season, Demmert examined the average attendance at contests between two good teams, two bad teams, or a mismatch. His data follow:

Table 6

		Home Team	
		Good	Poor
Visiting Team	Good	24,610 (42)	11,349 (35)
	Poor	16,066 (32)	9,806 (43)

H. DEMMERT, *supra* note 85, at 11.

128. Mackey v. NFL, 543 F.2d 606, 621 (8th Cir. 1976) (noting league's "strong and unique" interest in balance); *see also* NCAA v. Board of Regents, 468 U.S. 85, 117 (1984) (recognizing legitimate interest in "maintaining a competitive balance").

HeinOnline -- 73 Minn. L. Rev. 670 1988-1989

strictions therefore is their effect on competitive balance.[129]

2. Restraints Historically Imposed on Player Mobility Harm Competitive Balance

The reserve clause and the Rozelle Rule are inefficient because cash is superior to barter as a means of allocating goods in a market.[130] Under these rules, any change in the current allocation of players effectively is limited to a direct transaction among two or three teams at most. In many circumstances, the rules therefore result in an inefficient allocation of players.

Suppose, for example, that Baseball Team A has a surplus of outfielders, but needs relief pitching. If Team B happens to have extra relievers but is weak in the outfield, a trade may result. Suppose that Team B can part with a reliever, however, but needs a power-hitting pinch hitter, and that Team C has a power-hitting pinch hitter but needs a utility infielder. In theory, some complex deal involving a number of teams might be arranged, but the transaction costs would be significant.[131] Cash is simply more efficient than trading as a means of allocating players. Team A would pay a premium for relief pitchers, but not for outfielders. Team B could acquire a free agent pinch hitter. Team C could acquire the utility infielder it needs. In this way, all three teams would improve their player talent and satisfy their fans.[132]

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129. A separate argument league officials raise is that player restraints are necessary to protect investment in player development. *See infra* text accompanying notes 200-09.

130. R. EKELUND & R. TOLLISON, MICROECONOMICS 14-15 (2d ed. 1988) (noting that "[b]arter may have been sufficient in primitive societies," but that a common denominator, money, replaces barter as individuals become specialized and the number of commodities grow).

131. *See, e.g.*, Mackey v. NFL, 407 F. Supp. 1000, 1006-07 (D. Minn. 1975) (finding that Rozelle Rule decreases movement of players from one club to another because it effectively restricts number of clubs interested in free agent to those with trading material agreeable to current employer), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976).

132. In this example, Team B no doubt values Team A's extra outfielder more than Team A does. With player restraints, the outfielder remains on Team A's bench unless the teams arrange a direct transaction. Without player restraints, Team B signs the player to a contract. Because Team B values the player more, the salary will be higher. Thus, the player, as well as Team B's fans, suffer from a system that prevents Team B from employing the outfielder. *Cf.* 104 CONG. REC. 12088 (1958) (Remarks of Rep. Roland Libonati) (arguing that there is no reason to deprive star of his maximum earning potential merely because major league club owning him is not yet in need of his services).

Major League Baseball recognizes this inefficiency. Rather than allowing

HeinOnline -- 73 Minn. L. Rev. 671 1988-1989

Relying on trades or other forms of noncash direct transactions also is inefficient and anti-consumer in situations in which a team, perhaps because of bad luck or poor management decisions, has a current shortage of talented players. In such cases, trades are unlikely to be helpful because a team usually must give up quality players to obtain quality players. Intelligent drafting and development of young talent takes a long time.[133] In a free market, however, an owner recognizing that improved player quality will result in increased attendance[134] could get immediate results by acquiring top players in the open market. Thus, fans of teams with inferior talent clearly suffer from re-

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a free market to naturally and efficiently move players to teams on which they are most needed, however, Major League Baseball has adopted an elaborate set of waiver and other rules, including farm systems, designed to prevent the better teams from stockpiling talent. J. MARKHAM, *supra* note 77, at 32 n.6. For example, one rule allows a club to obtain for a small fee the services of a player who has spent several years in the minor leagues and still has not made the parent club's 40-man major league roster. *Id.* at 53. Allowing inferior teams to obtain talent the superior franchises clearly consider surplus in extreme cases is less efficient than allowing all teams to bid on all surplus talent.

Professors Quirk and el Hodiri argue that a draft and a complete ban on free agency or sale of player contracts can secure competitive balance. Quirk & el Hodiri, *supra* note 121, at 69 (proposition 5). Their proposal is inferior to a free agent market for two reasons. First, management talent is not equally distributed among franchises. Teams with superior scouts and player personnel directors and higher salaries will dominate. A free agent market allows individual owners the ability to decide whether it is more efficient to invest in scouts who can identify top-quality players to invest in developing, or whether it is more efficient to outbid other teams for proven veterans. Second, draft selection involves a significant element of chance, because even the best of scouts cannot predict with accuracy how players will develop. A free agent market allows franchises that are unlucky to provide their fans with contending teams.

133. The NFL's draft is a procedure under which exclusive negotiating rights to graduating college football players are allocated each year among the teams in inverse order of the club's standing. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1175 (D.C. Cir. 1978). Although some justify the draft, like the Rozelle Rule, as promoting competitive balance, *id.*, the draft actually limits the ability of poorer teams to quickly improve. If there were no draft, poorer teams could bid for several of each year's top rookies. With a draft, they may bid on only one of the top 28, unless they trade one of the few top players currently on their roster for additional high draft choices.

134. *See* 2 *Sisk Hearings*, *supra* note 34, at 402 (testimony of Milwaukee Brewers owner Edmund B. Fitzgerald) ("the belief of fans that you can improve is one thing that provides attendance").

Studies have demonstrated that a baseball team's win-loss record strongly affects attendance. Demmert concluded, for example, that a club finishing five games behind will draw 253,000 more fans than a similar club finishing 15 games behind. H. DEMMERT, *supra* note 85, at 66. Lucke was even more precise, concluding that each additional victory will attract, on average, almost 19,000 fans through the turnstiles. Lucke, *supra* note 86, at 18.

HeinOnline -- 73 Minn. L. Rev. 672 1988-1989

strictions on player mobility. At the same time, dominant teams with excess talent have no incentive—if cash sales are difficult—to transfer a surplus player to a team that may value the player more. It is ironic that a rule supposedly designed to promote competitive balance actually appears to impede poorer teams' efforts to improve themselves and to become more competitive.

Empirical evidence documenting the extent of competitive balance in Major League Baseball and the NFL corroborates that the reserve clause and the Rozelle Rule are perverse ways to prevent a small number of teams from dominating pennant races.[135] This observation emerges from a comparison between the level of competition in Major League Baseball during the last seven years in which the reserve clause was in effect and a comparable period of time following the *Messersmith*[136] arbitration decision, which effectively abolished the reserve clause.[137] The theory presented above predicts that more teams

135. In *Smith v. Pro Football*, the court found that the NFL "was unable to produce any credible evidence of a significant correlation between the opportunity to draft early in the draft (i.e. the preferred position) and improvement in team performance." 420 F. Supp. at 746. In the three seasons prior to the court's opinion in 1976, nine teams captured 22 of the 24 possible playoff spots. *Id.*

136. Major League Baseball owners historically had construed a Uniform Players Contract provision that gave them the right to renew the contract for one year on the same terms as a right they could exercise after each season in perpetuity. *See* Flood v. Kuhn, 316 F. Supp. 271, 273-74 (S.D.N.Y. 1970) (reviewing baseball history), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972). Arbitrator Seitz, however, construed the contract as giving the team the right to renew the contract for one year only, after which time the player would be free to sign with any baseball team. Twelve Clubs Comprising Nat'l League of Professional Baseball Clubs v. Major League Baseball Players Ass'n, 66 Lab. Arb. (BNA) 101, 110-11 (Dec. 23, 1975) [hereinafter *Messersmith*].

137. The "pre-*Messersmith*" period consists of the 1969-1975 seasons. Prior to 1969, Major League Baseball did not use divisional play; therefore comparisons of team standing or games behind a leader become difficult involving seasons prior to that date. The author then sought to find a comparable seven-year period after *Messersmith*. The 1981 strike season, which involved fewer games and playoff contenders selected based on team performance in two different halves of the season, was eliminated. The author also eliminated the 1986 and 1987 seasons. Two arbitrators have sustained the contentions of the Major League Baseball Players Association that owners conspired not to bid on free agents during these seasons. *In re* Arbitration Between Major League Baseball Players Association and The 26 Major League Clubs, Grievance No. 87-3 (Aug. 31, 1988) (Nicolau, Arb.); *Collusion I*, Grievance No. 86-2 (Sept. 21, 1987) (Roberts, Arb.). This left nine seasons in which there were no significant limits on player mobility (1976-80, 1982-85). To attain a period of seven seasons comparable with the pre-*Messersmith* period, the author eliminated the first two seasons of free agency (1976 and 1977) because the effects of free

HeinOnline -- 73 Minn. L. Rev. 673 1988-1989

should be "in the pennant race"[138] after *Messersmith* substantially impaired the reserve clause and lowered transaction costs for obtaining the talent necessary to improve to the level of a pennant contender. Indeed, in the pre-*Messersmith* period, a total of thirty-four teams were in the pennant race; in the post-*Messersmith* period, forty-eight teams were contenders.[139] According to economist Henry Demmert, a franchise in a metropolitan area of 2.5 million people will attract 275,000 more fans if the team is in a close pennant race,[140] suggesting that abolition of the reserve clause made Major League Baseball more attractive to fans.

Another measure of competition is the number of different teams that win pennants. Fan interest increases if more teams realistically vie for that prize. Roger Noll found that "[w]inning a pennant apparently has a strong effect on attendance in the winning season and also in several succeeding years"[141] due to the positive effect on season ticket sales.[142] Thus, overall league attendance, a proxy for consumer/fan interest, "will be substantially higher if several teams alternate in winning pennants than if one team tends to dominate."[143] If the increased ability to use cash made it easier for teams to build a pennant winner by signing free agents, then a greater variety of teams should win pennants following *Messersmith* than during the era of the reserve clause. Once again, the data support this theory. From 1969 through 1975, the seven years immediately preceding *Messersmith*, eleven separate franchises won division titles;[144] in the seven post-*Messersmith* seasons

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agency would not be as pronounced in the period immediately following a half-century of total monopsony in the major league baseball player market.

The data were compiled from standings in the *Baseball Encyclopedia* and the *Sporting News*. *See* THE BASEBALL ENCYCLOPEDIA 483-585 (7th ed. 1988); THE SPORTING NEWS, 1986 BASEBALL YEARBOOK 139, 147.

138. This Article defines a team *in the pennant race* as one that finished no more than 10 games behind the pennant winner.

139. *See* THE BASEBALL ENCYCLOPEDIA, *supra* note 137, at 438-585.

140. H. DEMMERT, *supra* note 85, at 66. This Article's definition differs slightly from Demmert, who defines being *in the race* as being within 15 games of the leader at the end of the season. *Id.* Demmert provides no explicit rationale for this necessarily arbitrary definition; a 10-game margin seems more accurately to reflect fans' perceptions.

141. Noll, *supra* note 85, at 122-23.

142. *Id.*

143. *Id.* at 123. Noll suggests that the domination of the American League in the 1950s by the New York Yankees explains the wide divergence in attendance between the two leagues during that period. *Id.*

144. *See* S. SIWOFF, THE BOOK OF BASEBALL RECORDS 267-72 (1988) (listing participants in League Championship series from 1969 to 1987).

HeinOnline -- 73 Minn. L. Rev. 674 1988-1989

studied, seventeen different franchises won.[145] The Oakland A's, Pittsburgh Pirates, Cincinnati Reds, and Baltimore Orioles each won their divisions in four of the seven seasons immediately preceding *Messersmith*. In the seven seasons studied when the reserve clause was not in effect, only the Kansas City Royals achieved that level of dominance.[146]

Competitive balance also can be measured by examining the number of pennant races in which the goal of competitive balance failed because no team finished within ten games of the winner. Again, this Article's theory predicts that this dominance would occur less frequently if teams used the free agent market and quickly acquired players needed to stay in the race. The data supports this Article's theory. Eight "blowout" races occurred in the pre-*Messersmith* period, but only three occurred after *Messersmith*.[147]

A common statistical measurement, the standard deviation, also demonstrates that significant player restraints harm competitive balance. The smaller the standard deviation, the greater the degree of competitive balance.[148] Because Major League Baseball has significantly modified its reserve clause, placing relatively modest restrictions on a veteran player's ability to sign with any team, while the NFL retains rules that effectively bar free agency, analysis of competitive balance in the NFL should reveal a much larger standard deviation than in Major League Baseball. Indeed, the standard deviation for NFL teams among the final four during the 18-year period from 1970 to 1987 was 2.74.[149] In contrast, the standard devia-

145. *Id.*

146. *See id.*

147. *Id.*

148. The standard deviation is a common statistic used to measure the dispersal of observed data. R. PARSONS, STATISTICAL ANALYSIS: A DECISION-MAKING APPROACH 79-80 (1974). The standard deviation if the four division titles in the National and American League East and West Divisions were randomly distributed over a 10-year period would be 0.51. If four teams won their division titles every time during a 10-year period, the standard deviation would be 3.6. *See id.* at 80-81 (setting forth formula for standard deviation).

149. During the 1970 to 1987 period, if all NFL teams were equal they would statistically have progressed to the conference championship game 2.67 times. The standard deviation measures the gap between that statistical average and the reality that seven teams never were Super Bowl semi-finalists, while eight franchises were among the final four five or more times. Only six of the 28 NFL franchises went two or three times, as would occur if the league were balanced. *See* SPORTS ENCYCLOPEDIA: PRO FOOTBALL 187-510 (D. Neff & R. Cohen eds. 1987) (listing NFL standings from 1970-86); PRO FOOTBALL GUIDE 6-114 (1988).

HeinOnline -- 73 Minn. L. Rev. 675 1988-1989

tion for Major League Baseball division winners from 1976 to 1985, a period of relatively free player movement, was only 1.66.[150]

Owners in a monopoly league willingly adopt inefficient player allocation schemes because their own profits from eliminating competitive player salaries far exceed any losses due to diminished fan interest in their sport. For example, attendance at Major League Baseball games rose fifty-seven percent, from 29,789,913 in 1975, the last year of the reserve clause, to 46,824,379 in 1985, showing a strong increase in fan attendance after *Messersmith* substantially eliminated the reserve clause.[151] Salaries rose to a competitive level at the same time, however, with the average player's salary increasing from $44,676 to $371,157.[152] In constant dollars, this amounts to a 316 percent increase in costs.[153] Thus, although players and, most important, fans, profit from free agency for baseball veterans, owners do not.

Accordingly, monopoly sports leagues have adopted many rules that increase the league's power in the player market significantly, but which have little effect on league competitiveness.[154] For example, a reserve clause that eliminates almost

150. A team in perfectly balanced Major League Baseball would make it to the League Championship Series 1.53 times during the 10 year period from 1976 to 1985. Fourteen of the 26 Major League Baseball franchises made it one or two times. *See* S. SIWOFF, *supra* note 144, at 267-72 (listing all participants in league championship series from 1969 to 1987).

151. *See* THE SPORTING NEWS OFFICIAL BASEBALL GUIDE 287 (1986) (attendance based on 1985 data); H. TURKIN & S. THOMPSON, *supra* note 99, at 71 (1975 data).

152. *Collusion I*, Grievance No. 86-2, at 3.

153. The Consumer Price Index rose from 161.2 in 1975, UNITED STATES BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 478 (1986), to 322.2 in 1985, UNITED STATES BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 463 (1987). Thus, had average player salaries risen only with inflation, the 1985 average would have been $89,296.57, less than a third of the actual 1985 average.

154. *See* Mackey v. NFL, 543 F.2d at 622 (agreeing that even if some compensation for loss of free agents is essential to maintain competitive balance, "the Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes"); Kapp v. NFL, 390 F. Supp. 73, 82 (N.D. Cal. 1974) (concluding that Rozelle Rule imposes "restraint virtually unlimited in time and extent, goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL . . ."), *aff'd*, 586 F.2d 664 (9th Cir. 1976), *cert. denied*, 441 U.S. 907 (1979).

A classic example of this phenomenon is the NFL's policy of conducting a 12-round draft of college players. *See* Minneapolis Star Tribune, April 28, 1988, at 2C, col. 1 (discussing 1988 NFL college draft). Even accepting arguendo the league's claim that a draft with a reverse selection process (the worst

HeinOnline -- 73 Minn. L. Rev. 676 1988-1989

all free player mobility is unnecessary to achieve competitive balance.[155] If certain teams become dominant—because of location, winning tradition, or size of the market—a league can foster competitive balance by temporarily prohibiting the dominant teams from signing free agents.[156] A system that allows poorer teams to draft players from the rosters of the more successful teams, with minimal compensation paid to the dominant franchise, also could correct any competitive imbalance free agency caused.[157] Also, some form of revenue sharing among franchises could address the fear that teams in cities with larger markets would dominate teams from smaller markets.[158]

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team gets to pick first) allows the poorer teams to tap the best college players and thus improve, most evidence suggests that no difference in ability exists between those drafted after the third round and those undrafted players signed as free agents. *See Rodino 82 Hearings*, *supra* note 29, at 66 (testimony of Gerald Scully).

Neither Major League Baseball nor the NFL ever have claimed that a free market in average or mediocre players would affect competitive balance. Yet the reserve clause and the Rozelle Rule applied to these players as well.

The current NFL rule granting a player's old team the right to retain the player's services by simply matching any offer the player may receive from another team is another example of a rule limiting mobility with no effect on competitive balance. *See Powell v. NFL*, 678 F. Supp. at 779. The ability to sell or buy goods or services as long as one merely equals offers from rivals long has been recognized as anticompetitive. *See, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 12 (1958); International Salt Co. v. United States, 332 U.S. 392, 397 (1947). No reason exists to believe that the team exercising the right will be a poor team seeking to prevent a dominant franchise from gaining further strength. Indeed, common sense suggests the reverse—superior teams will have more top quality players and inferior teams will have a greater incentive to enter the free agent market to improve.

155. *See Smith v. Pro Football*, 420 F. Supp. at 746 (noting that, "even conceding the need for some such system [a college draft], the current structure is significantly more restrictive than necessary. In fact the current system is absolutely the most restrictive one imaginable.").

156. *See* 1 *Sisk Hearings*, *supra* note 34, at 217 (testimony of Edward Garvey) (suggesting that prohibiting top eight playoff teams from signing free agents would promote competitive balance).

157. HARVARD Note, *supra* note 121, at 425 n.35. The NHL used this procedure in the mid-1960s when that league rapidly expanded from six to 12 franchises.

158. A number of league critics as well as league officials strongly advocate revenue sharing as a means for promoting competitive balance. *See, e.g.*, *Thurmond 82 Hearings*, *supra* note 38, at 56 (testimony of Pete Rozelle); 1 *Sisk Hearings*, *supra* note 34, at 651 (testimony of National Basketball Players' Association General Counsel Lawrence Fleischer) (advocating gate revenue sharing to keep rich teams from getting richer); 2 *id.* at 111 (testimony of Roger Noll).

Conversely, other commentators suggest that revenue sharing is anticompetitive because it erodes the individual incentive for franchises to improve

HeinOnline -- 73 Minn. L. Rev. 677 1988-1989

Substantial restraints on free agency like the reserve clause and the Rozelle Rule hurt fans and competition. This is true as a theoretical matter: a cash economy is simply a more efficient way to allocate goods and services than a barter economy.[159] It is also true as an empirical matter: under Major League Baseball's recent regime of free agency, competitive balance and exciting pennant races have flourished; under baseball's ill-fated reserve clause and football's continuous restraints on mobility, there are fewer new champions and greater dominance by a few teams.[160]

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themselves and thus eliminates the need to bid to obtain quality players. *See, e.g., Danforth 85 Hearings, supra* note 22, at 99 (testimony of NFL Players' Association Executive Director Gene Upshaw) (arguing against special antitrust exceptions for professional sports teams to pool revenue); *id.* at 105 (testimony of USFL Players' Association Executive Director Doug Allen); *Thurmond 82 Hearings, supra* note 38, at 384 (testimony of Major League Baseball Players' Association General Counsel Donald Fehr) (opposing "carte blanche to share revenues in any manner"); *Rodino 82 Hearings, supra* note 29, at 36 (testimony of NFL Players' Association Executive Director Edward Garvey); 1 *Sisk Hearings, supra* note 34, at 166-68 (testimony of World Hockey Association (WHA) New England Whalers Hockey Club owner Harrison Vickers) (stating that "the greatest incentive to having a balanced league and competitive teams is to impress upon the owner he must do his job or he won't make it."); 2 *id.* at 142 (remarks of Rep. B.F. Sisk) (expressing concern that across-the-board revenue sharing would cause teams to become lax and deprive them of incentive to promote their product); *id.* at 403 (testimony of Milwaukee Brewers owner Edmund B. Fitzgerald). Revenue sharing deprives each team of a key aspect of the competitive process—the knowledge that higher profits reward a greater investment in producing a superior product. Michael Duberstein of the NFL Players' Association compiled statistics demonstrating the disincentive to invest that significant revenue sharing in the NFL creates. Studying the 1983 to 1986 seasons, he found that the top seven teams in the league averaged 9.6 wins, paid their players an average base salary of $156,400, and received average gross revenues of $27.4 million. Letter from Michael Duberstein to Stephen F. Ross (May 3, 1988). Conversely, the bottom seven teams averaged only 6.1 wins and paid their players an average base salary of only $142,800, yet their average gross revenues were virtually the same as the top teams—$27.0 million. *Id.*

To address these critics of revenue sharing, economist Gerald Scully has advocated a system in which league champions receive a portion of the pooled revenues. *See Rodino 82 Hearings, supra* note 29, at 69; 2 *Sisk Hearings, supra* note 34, at 175; *see also Thurmond 85 Hearings, supra* note 28, at 390-91; (testimony of Acting Assistant Attorney General Antitrust Division Charles F. Rule) (stating that although "some revenue pooling can be an appropriate means for promoting on-field parity under certain circumstances, it can also go too far, creating an unjustified restraint on competition.").

159. *See supra* note 130.

160. *See also* Besanko & Simon, *Resource Allocation in the Baseball Players' Labor Market: An Empirical Investigation*, REV. BUS. & ECON. RESOURCES, Fall 1985, at 71, 74-78 (concluding that empirical research shows "within-season competitive equality has increased since free agency"); *cf.*

HeinOnline -- 73 Minn. L. Rev. 678 1988-1989

3. The Leagues' Thesis: Player Allocation Will Be Distorted Absent Significant Restraints on Player Mobility

League officials argue that restrictions on player mobility serve to promote competitive balance and to enhance fan interest.[161] They observe that the size of the various markets in which major league franchises play differs widely, resulting in a disparity in the revenue each team obtains from live gates and broadcasts.[162] The leagues fear that without restrictions on

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Drahozal, *The Impact of Free Agency on the Distribution of Playing Talent in Major League Baseball*, 38 J. ECON. & BUS. 113, 119 (1986) (reporting mixed results using standard deviations for pooled winning percentages, with decrease in balance in American League and increase in balance in National League).

161. *See, e.g.*, 1 *Sisk Hearings*, *supra* note 34, at 19-20 (testimony of Major League Baseball Commissioner Bowie Kuhn).

Kuhn also justified the reserve clause as necessary to protect against tampering with players under contract to another team. *Id.* at 20. If a player on Team A is negotiating or contracting with Team B for future services, he may not play his best for Team A. This arguably would compromise the integrity of the game. Restrictions such as the reserve clause are totally unnecessary to address this concern. Even if players were free to sign with whatever team they wish at the expiration of their present contract, league rules could prevent other teams from negotiating or contracting during the term of the current contract. Indeed, Major League Baseball has such rules, which Commissioner Kuhn has enforced vigorously. *See, e.g.*, Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1222 (N.D. Ga. 1977) (upholding Commissioner's suspension of Braves owner Ted Turner for one year for prematurely negotiating with player another team previously had employed).

Jesse Markham offers yet another justification for a reserve clause: without significant restrictions on player mobility, the identity between a player and a franchise weakens. *Rodino 82 Hearings*, *supra* note 29, at 454 (testimony of Professor Jesse Markham). Presumably, fans are worse off because their hometown favorite might play for the evil arch-rival next season. Markham does not suggest, however, why an unrestrained market could not address these problems. If a player is beloved in one locale not only for his playing talent but for the history of his service on the local club, he will be more valuable to that club than to others. The local club, therefore, should outbid others to maintain his services. Moreover, teams anticipating problems with instability can offer players long-term contracts to remain where they are. *See id.* at 67 (testimony of Gerald Scully); H. DEMMERT, *supra* note 85, at 91.

162. *See, e.g.*, *Rodino 82 Hearings*, *supra* note 29, at 103 (testimony of Atlanta Braves owner Ted Turner) (noting that New York Yankees received $5 million for local television rights in 1980, while Kansas City Royals—who defeated the Yankees in previous year's league championship series—received less than $1 million); 1 *Sisk Hearings*, *supra* note 34, at 75 (testimony of Oakland A's owner Charles O. Finley) (stating that A's did not receive any money for local television and radio broadcasts while Boston Red Sox earn $2 million annually); *id.* at 123 (letter from San Diego Padres President Emil A. Bavasi) (pointing out that Padres get $23,000 from local television and radio broadcasts and Los Angeles Dodgers earn $1.8 million).

Empirical studies also demonstrate the effect of population on paid attend-

HeinOnline -- 73 Minn. L. Rev. 679 1988-1989

player mobility, the richer teams in major media markets will outbid their poorer rivals for the best players and dominate the league, ruining competitive balance and reducing fan interest.[163] Significantly, monopoly leagues often have avoided adopting other rules—such as restrictions on investments in player development, coaches, or executive talent—that may significantly increase competitive balance, but do not provide the dividend of monopsonization of the player market.[164]

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ance at the gate. *See* H. DEMMERT, *supra* note 85, at 49-50; Noll, *supra* note 85, at 152-53; Lucke, *supra* note 86, at 18. Revenue sharing can significantly mitigate the effects of this disparity. *See supra* note 158.

163. *See Smith v. Pro Football, Inc.*, 420 F. Supp. at 746.

Some economists argue that the problem of competitive balance is purely a function of the league's decision to confer exclusive territories upon their franchises. *See, e.g.*, 2 *Sisk Hearings*, *supra* note 34, at 118-19 (testimony of Gerald Scully). There is some truth to the notion that franchises in New York and Los Angeles would not dominate as they do if they faced multiple rivals from their own metropolitan area. Indeed, under this Article's proposal to establish rival leagues, the major metropolitan areas may host an increased number of franchises. Abolishing exclusive territories, however, will not solve competitive balance problems. Even if a league selects the optimal number of franchises the league and its fans may be better off if franchises are spread throughout the country rather than concentrated in a few major metropolitan areas. Additionally, divisibility problems always will mean that some markets are larger than others. Thus, leagues still must deal with the effects on player allocation, if any, of unequal markets.

164. Major League Baseball and the NFL have failed to adopt rules to promote competitive balance in the following areas:

Revenue Sharing. The control of league decisions by the owners of independent franchises prevents substantial revenue sharing in Major League Baseball. The current decision-making structure creates conflicts between the League's interest and various owners' self-interest. A cartel, which is essentially what a league is, has difficulty with proposals that redistribute income among members, even if the redistribution is best for the overall league or will increase overall profits. *See* E. MANSFIELD, *supra* note 54, at 348. In principle, if all were better off, the owners could devise a compensation scheme to reflect this optimality. In practice, it is extremely difficult to reach agreement on a scheme to compensate the losers. *See* Davis, *supra* note 104, at 352. In the 1950s, Chicago White Sox owner Bill Veeck proposed that the visiting team's share of gate attendance increase to 40%. *Id.* This would help equalize disparities between the cities, and it would appear to preserve a substantial incentive for teams to engage in promotion and to maintain quality. *Id.* at 357. Veeck's proposal failed to receive the three-fourths approval the American League Constitution required because of oppositon from the three richest teams: New York, Detroit, and Boston. *Id.*; *see also* H. DEMMERT, *supra* note 85, at 32 (observing that "the redistribution of playing talent will not be a unanimously acceptable solution within the league, and the rich market clubs may be able to block such a collective policy").

Investment in Minor Leagues. Wealthy teams in large markets have a greater ability to acquire top talent than teams with less wealth in smaller markets. Wealthy teams also have a greater ability to invest in their farm systems. Major League Baseball, however, has no limits on the amount teams can

HeinOnline -- 73 Minn. L. Rev. 680 1988-1989

League officials vigorously reject the contention that an open market will allocate players efficiently.[165] They claim that free agents will flock to cities with the richest teams or owners—to "glamor" cities like New York, Los Angeles, and Miami—and to teams with winning records.[166] The league's critics have denied this claim with equal vigor. For example, former NFL Players' Association director Edward Garvey testified that during the brief period when football teams were free to sign players without penalty, the fears of NFL officials did not come true.[167] Garvey concluded:

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invest in player development. *See* 2 *Sisk Hearings*, *supra* note 34, at 172 (testimony of Gerald Scully).

Investment in Coaches. As one football observer commented, "the greatest threat to competitive influence in the NFL is Don Shula because he keeps winning . . . ." 1 *id.* at 230 (testimony of Edward Garvey). The court of appeals in *Smith v. Pro Football* found that six teams consistently had entered the playoffs and won titles despite receiving some of the lowest draft picks each year, because of continuity under successful coaches. 593 F.2d at 1184-85 n.46. The court specifically noted the experience of four franchises: the Green Bay Packers, Washington Redskins, Miami Dolphins, and Pittsburgh Steelers. *Id.* at 1185 n.46. Each of these teams suffered a number of losing seasons with the continuing reward of top draft choices, but continued to flounder until the arrival of a top coach. *Id.* The court concluded that "the effects of fine coaching swamp whatever effect the draft may have on team performance." *Id.* Similarly, an analysis of the effect of managerial talent in Major League Baseball revealed that top managers, such as Earl Weaver of the Baltimore Orioles, were as valuable to their teams as top superstars such as Sandy Koufax. Porter & Scully, *Measuring Managerial Efficiency: The Case of Baseball*, 48 S. ECON. J. 642, 649 (1982). Yet neither the NFL nor Major League Baseball sets limits on the market for coaches or managerial talent.

Judge MacKinnon, in defending the draft as a promoter of competitive balance, noted that "[i]n only one of 12 seasons from 1964-1975 did those teams in the bottom half of the NFL's standings fail to win a greater number of games in the next season following priority selections in the draft. Statistical analysis shows that this could not have been the product of chance occurring without regard to the draft." *Smith*, 593 F.2d at 1202 n.45 (MacKinnon, J., dissenting). This statistic misses the point: competitive balance is not merely served by devices that minimally improve poorer teams; the goal of competitive balance is to give all teams a realistic chance to vie for the championship. *See Philadelphia Hockey*, 351 F. Supp. at 486 (asserting that competitive balance occurs when "each team has the opportunity of becoming a contender over a reasonable cycle of years and a reasonable chance of beating any other team on any given night"). The data suggest that this is far less true in the NFL with its host of restraints than it was in Major League Baseball during the reign of veteran free agency.

165. *See Smith v. Pro Football*, 420 F. Supp. at 745-46; *see also Mackey v. NFL*, 543 F.2d at 621.

166. *Smith v. Pro Football*, 420 F. Supp. at 745-46.

167. This brief period of free agency existed between the Eighth Circuit's 1976 decision in *Mackey*, 543 F.2d at 609, which upheld a district court judgment enjoining enforcement of the Rozelle Rule, and the 1977 settlement of

HeinOnline -- 73 Minn. L. Rev. 681 1988-1989

> The simple fact is that professional athletes have as many geographical preferences as lawyers, teachers, machinists, or Congressmen. Some people want to live on the coast, some in the Midwest and some in the South. Their choices are based on family background, where their families live, where they went to school, where they wish to raise a family, where they have educational and vocational opportunities. While obviously money is a factor, there are many others. *The primary one that I have found in talking with professional athletes is that they will go where they can perform.*[168]

Veteran Major League Baseball players were not subject to any significant restraints on mobility during a period from 1976 through 1985.[169] An examination of the actual movement of free agents during this ten-year period tests the league officials' claims that unrestricted player mobility results in an exodus of talent to contenders in warm-weather cities with large popula-

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the litigation, reached concurrently with a new collective bargaining agreement between the NFL and its players. *See* Alexander v. NFL, 1977-2 Trade Cas. (CCH) ¶ 61,730, at 72,984 n.2 (D. Minn. 1977). During this period, the Los Angeles Rams, a contender and a warm-weather franchise, re-signed Fred Dryer from their own roster. 2 *Sisk Hearings, supra* note 34, at 215 (testimony of NFL Players' Association Executive Director Edward R. Garvey). Calvin Hill and Jean Fugett left the Super Bowl champion Dallas Cowboys because of a preference for residing in the Washington area. *Id.* at 216. Paul Warfield left the Miami Dolphins to sign with the Cleveland Browns. *Id.* The Kansas City Chiefs signed no free agents, although it was feared that Chiefs owner Lamar Hunt would use his personal fortune to stockpile talent. *See id.* at 215-16 (testimony of Edward R. Garvey).

168. 2 *Sisk Hearings, supra* note 34, at 216 (emphasis added); *see also Smith v. Pro Football*, 593 F.2d at 1183-84 n.46 (repeating evidence that decisive factors affecting free agents' choice of teams included unrelated business opportunities, racial discrimination and general community atmosphere, preference for NFL over rival league, dispute with prior owner, climate, educational opportunities, and disagreements with coaching staff or management); *Smith v. Pro Football*, 420 F. Supp. at 746 (observing that "the little empirical evidence available with regard to the movement of free agents and former World Football League players since the 1975 season ended does not show" a trend to teams offering money, glamour, and success); *Professional Basketball: Hearing Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary on S. 2373*, 92d Cong., 2d Sess. 871 (1972) [hereinafter *Hoop Hearings*] (testimony of National Basketball Players' Association Vice President Bill Bradley) (suggesting that free agency promotes competitive balance because stars are unlikely to switch from team to team but reserves on dominant teams like the Celtics or Lakers would be willing to go to other teams where they could get more playing time).

169. Before the 1976 season, Major League Baseball entered into a collective bargaining agreement with its players' union allowing players with at least six years of major league service to become free agents at the expiration of their contracts with minimal compensation to their former teams. *See* R. BERRY, W. GOULD & P. STAUDOHAR, LABOR RELATIONS IN PROFESSIONAL SPORTS 61-62 (1986). In 1985, however, the owners began to collude with each other to stop the free movement of players. *See Collusion I*, Grievance No. 86-2 (Sept. 21, 1987) (Roberts, Arb.).

HeinOnline -- 73 Minn. L. Rev. 682 1988-1989

tions. First, a multiple regression analysis assessed the impact of the net movement of free agents each year, characterizing each franchise by the population of its home city, previous year's place in the standings, and median temperature in April. This analysis revealed no systematic relationship between a franchise's place in the standings and its ability to sign free agents.[170] Multiple regression analysis also revealed only a very weak positive relationship that was not statistically significant, over the entire ten-year period, between both temperature and population and a franchise's net success in signing—versus losing—players in the free agent market.[171] Even if valid, the analysis shows that a city that is eight degrees warmer than another city will sign only one more free agent *over a ten-year period*, hardly cause for concern. Moreover, franchises in the larger cities have a limited edge in attracting free agents in an open market; for every additional million residents, a team will sign fewer than one free agent a decade.[172] Indeed, over the decade of active free agency, the Los Angeles Dodgers and the New York Mets *lost* more free agents than they signed.

Evaluating the effect of an open market in the NFL is more difficult because there never has been a significant period of time in recent history during which an open market existed in that league. A substantial movement of free agents occurred just prior to the 1976 season when an injunction briefly barred enforcement of the Rozelle Rule.[173] In that year, however, football players did not flock to dominant teams in warm

170. *See* Appendix B, *infra*. Another empirical study actually showed a clear trend of movement of free agents from good teams to poorer ones. Besanko & Simon, *supra* note 160, at 83. This would reflect the natural inclination of owners of inferior teams to seek to improve their teams rapidly by acquiring an established veteran player rather than patiently waiting several years for the possible development of younger talent.

This empirical evidence appears to contradict the anecdotal evidence the NFL presented in *Mackey*, 543 F.2d at 621, that players flocked to winners. *See* 2 *Sisk Hearings*, *supra* note 34, at 153 (reprinting extracts from NFL defendants' post-trial brief).

171. *See* Appendix B, *infra*. For example, San Diego is only 15 degrees warmer in April than Montreal; under this analysis, all other things being equal, the Padres would sign only two more agents than the Expos over the course of a decade.

172. *See also* Drahozal, *supra* note 160, at 117 (stating that empirical study finds "no movement of free agents in the sample from small cities to big cities"). *But see* Besanko & Simon, *supra* note 160, at 82-83 (1985) (noting some movement of free agents from small to larger cities).

173. *See supra* note 167.

HeinOnline -- 73 Minn. L. Rev. 683 1988-1989

weather climates.[174] The empirical evidence appears to discredit the claim that an open market, which tends to improve the quality of other products in our free enterprise economic system, nevertheless diminishes the quality of baseball and football.

4. The Critics' Thesis: Restraints Have No Effect on Competitive Balance

The reserve clause, the Rozelle Rule, and other significant restraints on a free market for players have come under extensive attack from academics who claim that the restraints have no effect on the allocation of players, but merely allow owners in monopoly sports leagues to act collusively so as to reduce the salaries paid to players. These critics argue that a free market does exist because a team can sell a player's contract to another team. The only difference between a system using a reserve clause and a free market system, they maintain, is that under the former, the premium needed to acquire a player is paid to the player's prior team, not to the player himself.[175] These critics conclude that the owners' desire for monopsony power alone motivates any restrictions on player mobility.[176]

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174. The free agents who moved in 1976 are listed at 1 *Sisk Hearings*, *supra* note 34, at 221 (testimony of Edward Garvey). For a description of the collective bargaining agreement provisions reinstating player mobility restrictions, see Reynolds v. NFL, 584 F.2d 280, 286-87 & n.8 (8th Cir. 1978).

175. *See* Mackey v. NFL, 543 F.2d 606, 620 n.28 (8th Cir. 1976) (noting that "Alan Page testified that the Rozelle Rule was a hindrance to free player movement, but that the principal effect is on players' salaries."); SISK REPORT, *supra* note 25, at 47 (illustrating contradiction that although restrictions are justified as necessary to equalize playing stength, teams "have almost complete freedom to purchase contracts of players from other teams"); H. DEMMERT, *supra* note 85, at 35 (concluding that actual effect of draft and reserve clause on distribution of athletic quality is "likely to be quite insignificant"); *id.* at 75-76 (noting that Connie Mack's sales of Philadelphia Athletics' star players during Depression and Kansas City Athletics' constant sale of players to New York Yankees illustrate "the ultimate failure of the reserve system as a tool for impeding the movement of athletic talent to the richer markets"); Canes, *supra* note 97, at 91 (stating that restrictive league rules do not alter the distribution of player talent from what would occur in open market situation); Quirk & el Hodiri, *supra* note 121, at 33; Rottenberg Article, *supra* note 121; Rottenberg Book Review, *supra* note 121, at 88 (adding that "so long as recontracting through trading of players among teams and the purchase and sale by teams of rights to players' services is permitted, monopsony will leave unaffected the allocation of playing talent among teams but will affect only wealth distribution").

176. Economists correctly observe that the exercise of monopsony power by sports leagues does not result—as would be expected for most markets—in an inefficiently low number of quality players willing to play. There is a huge

HeinOnline -- 73 Minn. L. Rev. 684 1988-1989

This argument has two flaws. First, these critics falsely assume that teams freely sell player contracts among themselves. Second, the critics fail to recognize that some restraints on player mobility may be necessary to achieve competitive balance.

Virtually all critics of the reserve system have assumed that teams can and do freely sell players for cash.[177] This may well have been true in Major League Baseball in the early and middle part of the century.[178] Recently, however, this assumption has not held true. The courts now have sustained the commissioner of Major League Baseball's rulings that cash sales are against the best interest of the sport.[179] NFL regulations prohibit cash sales of players.[180]

If the critics' theory were correct, then the type of free market for players that existed after the *Messersmith* decision

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disparity between even the monopsony wage that owners pay and the best wage that most players can attract from any other form of employment. Thus, the industry still will attract nearly all the best athletes even if they receive wages far less than their value. *See, e.g.*, Noll, *The Economics of Sports Leagues*, in THE LAW OF PROFESSIONAL AND AMATEUR SPORTS 17-20 (G. Uberstine ed. 1988).

177. *See, e.g.*, SISK REPORT, *supra* note 25, at 47 (teams "have almost complete freedom to purchase contracts from other teams"); H. DEMMERT, *supra* note 85, at 36 (maintaining that if another team values a player more highly, current club will sell rights to player); Canes, *supra* note 97, at 84 (describing reserve system with assumption that reserve clause rights can be sold); Quirk & el Hodiri, *supra* note 121, at 39-40 (contrasting effect of draft if sale of player contracts were prohibited with present structure); Rottenberg Book Review, *supra* note 121, at 88 (assuming that "the purchase and sale by teams of rights to players' services is permitted").

178. Quirk and el Hodiri estimate that from 1920 to 1950, four of the 16 Major League Baseball franchises had net sales of players exceeding their net profits. Quirk & el Hodiri, *supra* note 121, at 53. In other words, these teams well may have folded without the ability to sell players, or without some other form of wealth transfer from other owners. Holahan, *supra* note 121, at 137. Today, shared revenue from network television contracts provides a substantial wealth transfer. New York and Seattle share equally in network revenues despite more viewers in New York. Drahozal, *supra* note 160, at 115 n.3 (noting that national, but not local broadcast revenues are "divided evenly among the teams"). This may explain the decline in cash sales.

179. Charles O. Finley Co. v. Kuhn, 569 F.2d 527, 539 (7th Cir. 1978) (recognizing broad authority of Baseball Commissioner and concluding that Commissioner Kuhn acted within the scope of his authority when he disallowed sales of Joe Rudi, Rollie Fingers, and Vida Blue in "the best interests of baseball").

180. Letter from Paul Tagliabue (NFL counsel) to Stephen F. Ross (June 7, 1988). *See also* 2 *Sisk Hearings*, *supra* note 34, at 149 (letter from NFL counsel Hamilton Carothers) (stating that sale of players "is not an NFL practice"). *But see* Kapp v. National Football League, 390 F. Supp. 73, 76 (N.D. Cal. 1974) (allowing Redskins sale of Kapp's rights to Vikings for $50,000).

HeinOnline -- 73 Minn. L. Rev. 685 1988-1989

also should have existed prior to that decision and the Commissioner's rulings. The only difference would be that the cash went to the owners, rather than to the players. This free market, however, does not appear to have existed. A free market in player contracts may not have existed because owners were reluctant to sell top players for cash because of the negative press and fan reaction to transactions that so obviously weaken the playing strength of the team solely for the financial sake of the owner.[181] The New York Yankees' experience after the institution of the major league draft for college and high school baseball players is instructive. The Yankees' dominance of the American League came to a halt shortly after the draft began.[182] If the critics' theory were correct, the Yankees should have attempted to reverse that trend by purchasing player contracts from other teams, but the Yankees failed to do so.[183] Indeed, because cash is so much more efficient than barter, one would expect that if teams freely sold as well as traded players, teams would have sold many more players than they traded in the pre-*Messersmith* era. In fact, the opposite was true.[184] Moreover, if the critics' theory were accurate, the frequency of cash sales between teams during the reserve clause era should have approximated the frequency of cash sales and free agent signings after substantial abolition of the reserve clause in 1975. Again, the empirical evidence appears to refute the critics' theory.[185]

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181. Two commentators suggest that the failure to engage in signficant buying and selling of player contracts may be due to "potentially strong press and fan reaction to cash deals, which weaken the playing strength of the home team . . . ." Hunt & Lewis, *supra* note 121, at 936. "Sizeable public indignation over the weakening of a sports franchise could become a political issue, threatening baseball's antitrust immunity, and weakening the perception of baseball as a "sport" rather than a "business," *id.*, or such indignation may simply be bad for good will and public relations. Because of this reluctance to engage in the wholesale buying and selling of players, changes in league rules to permit or even facilitate such transactions will not permit the market to work as efficiently as when players are free agents. Moreover, even if teams willingly participate in an open market for assignment of player contracts, such a system unjustifiably results in a significant wealth transfer from players to owners.

182. *Id.* The first baseball draft was in 1965. The New York Yankees won 14 American League pennants from 1949 through 1964. The Yankees, however, failed to win another pennant until 1976. S. SIWOFF, *supra* note 144, at 326.

183. Daly & Moore, *supra* note 121, at 88.

184. An analysis of trades and sales made between 1969 and 1976 disclosed 593 players traded to other teams and 382 sold for cash. *See* THE BASEBALL ENCYCLOPEDIA, *supra* note 137, at 2253-2709.

185. An analysis by economists David Besanko and Daniel Simon appears

HeinOnline -- 73 Minn. L. Rev. 686 1988-1989

Those who argue that restraints on player mobility have no effect on the allocation of players overlook the need for restraints to achieve competitive balance that results from the interdependence of the individual teams comprising sports leagues. Although any given individual team may profit by becoming dominant, the rest of the league suffers from the resulting competitive imbalance. In economic terms, league balance, like national defense, is a "public good."[186] Although balance benefits all teams, no individual team has any incentive to work toward it. As a result, a league that relies solely on an open market may not achieve competitive balance.[187] Without some limitation on a free market, some franchises will be too strong, some will be too weak, and fans everywhere will suffer from decreased competition.[188]

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to support the critics' theory. Their analysis of "all players changing teams in both major leagues from the end of the 1969 season to the end of 1981" showed the same level of player movement before and after *Messersmith*. *See* Besanko & Simon, *supra* note 160, at 73. A better analysis, however, would distinguish between trades and cash sales. This Article's analysis of the same time period Besanko and Simon studied shows a modest but significant drop in the relative number of trades to cash transactions. Between 1969 and 1975, there were 975 transactions, 593 of which were trades (61%) and 382 of which were cash sales (39%). *See supra* note 184. Between 1976 and 1981, there were 719 transactions, 376 of which were trades (52%), 230 of which were cash sales (32%), and 113 of which were free agent signings (16%). THE BASEBALL ENCYCLOPEDIA, *supra* note 137, at 2253-2709. Because cash is more efficient than barter, the increase in cash transactions since *Messersmith* suggests that the market for allocating players is working more efficiently.

One commentator has suggested that teams evade the rules against cash sales by trading superior players with hefty salaries for lesser players with smaller paychecks. Drahozal, *supra* note 160, at 115 n.4. Thus, he suggests that the critics' theory that restrictions on player mobility do not affect the allocation of players may be correct. This attempted resucitation of the theory is flawed. This Article's thesis that cash is a much more efficient means of allocating resources than direct trades suggests that even if teams did engage in widespread trades of unequal players in lieu of cash sales in the pre-*Messersmith* era, transaction costs probably precluded many *other* efficient player movements.

186. *See* H. DEMMERT, *supra* note 87, at 83; Daly & Moore, *supra* note 121, at 80.

187. As Demmert explains in economic terms:

> [I]ncreases in the relative quality of a better than average team will reduce the degree of competitive equality within the league, and if indeed this is a parameter of product quality, the demand functions for all clubs will, other things equal, shift downward. The total effect will however be largely external to the club which precipitated it, and the effect of decreased competitive equality on its own demand will likely be insignificant in comparison to the benefits derived from winning.

H. DEMMERT, *supra* note 85, at 28-29.

188. Daly & Moore, *supra* note 121, at 81.

HeinOnline -- 73 Minn. L. Rev. 687 1988-1989

In a free market, a player will go to the team that places the highest value on his services. For example, if Rickey Henderson were playing for the Seattle Mariners, but the New York Yankees valued him most highly,[189] he would sign with the Yankees when his contract expires. Acquiring Henderson will, of course, please Yankee fans and further enrich the New York franchise. The acquistion might also, however, make the Yankees too dominant in the American League East, thereby decreasing the enjoyment, and possibly the attendance, of the fans in other American League East cities.[190] In theory, if the adverse marginal effect of the trade upon the Yankees' American League East rivals were greater than the marginal benefits to New York, then the Red Sox, Orioles, Blue Jays, Indians, Tigers, and Brewers could all get together and pay Seattle *not* to sell Henderson to the Yankees. In reality, however, the high transaction costs would prohibit this arrangement. An inefficient allocation of resources results: fans on the whole would be worse off if Henderson moved to the Yankees than if he stayed in Seattle. Maximizing fan interest may necessitate *some* generalized restraint to prevent players from moving freely to the team that values them most highly.[191]

189. In economic terms, a team values a player for his *marginal revenue product*, defined as "the amount of money that adding a particular player would contribute annually to the net revenues of a team." Selig v. United States, 565 F. Supp. 524, 538 (E.D. Wis. 1983), *aff'd*, 740 F.2d 572 (7th Cir. 1984).

190. For example, one economic study suggested that if the average team moves up one place in the standings, it will increase its home attendance by 84,000 fans per year; however, this will reduce the live gate for all other teams by 69,000 fans. Canes, *supra* note 97, at 97-99. Of course, this is an average; thus, it is plausible that a particular improvement in one team could result in a net overall loss when considering its rivals' reduced attendance. Another study demonstrated the external costs of one team's improvement. The study estimated that New York maximizes its profits by securing a team sufficient to win the pennant 80% of the time; the rest of the division is best off, however, if New York wins 43% of the time. Hunt & Lewis, *supra* note 121, at 940.

191. In the 1976 collective bargaining agreement reached after the *Messersmith* arbitration, which included a substantial increase in contributions to the union pension fund, the players agreed to a modified reserve system that ties players to their original club for six years. Staudohar, *Player Salary Issues in Major League Baseball*, ARB. J., Dec. 1978, at 17, 18. After two years of service, players who could not agree to terms with management could submit salary disputes to arbitration. *Id.* at 20. Commissioner Kuhn testified that the players agreed to limit free agency because they recognized the necessity of such limits to the continued welfare of baseball. 1 *Sisk Hearings*, *supra* note 34, at 18.

HeinOnline -- 73 Minn. L. Rev. 688 1988-1989

5. Rival Leagues' Imposition of Player Restraints

Henry Demmert's generally critical economic analysis of major professional sports concedes that clubs may need to act jointly to ensure the equal distribution of playing talent.[192] This joint action likely would fall into two categories: direct agreements not to bid for the services of certain players and adoption of revenue sharing agreements. Revenue sharing agreements reduce a team's financial incentive to acquire a player who would contribute positively to the team's revenue if the acquisition would have a net negative effect on overall league revenues.[193]

In establishing rules restricting player movement, sports league owners have several incentives. For example, they wish to prevent any team from becoming so dominant that overall league competitive balance suffers, decreasing fan interest and owners' collective profits.[194] Rules that limit an individual owner's incentives to acquire the best talent, however, must not go too far in diminishing the rewards for winning, lest the owner lose the desire to improve the quality of the product. If one of several rival leagues adopted overly restrictive rules, the result would be less exciting games, poorer quality teams, and lower ratings. Competition will provide the incentive for each league to strive for the rules that foster the most exciting contests.

Only owners of monopoly sports leagues have an additional, critically important incentive: to eliminate competition for players in order artificially to reduce player salaries and realize greater profits.[195] In contrast, owners in rival sports leagues must pay a competitive salary to a player or he simply will contract with a team from another league.[196] Thus, rival

192. H. DEMMERT, *supra* note 85, at 35. He states that "given existing institutional arrangement in professional sports, without some joint action on the part of the clubs, the distribution of playing talent . . . will not be equal." *Id.*

193. *Cf.* 1 *Sisk Hearings*, *supra* note 34, at 79 (testimony of Pete Rozelle) (NFL shares revenue to prevent teams in major media markets from obtaining economic advantages that would destroy competitive balance).

194. It is hard to envision a monopoly, as opposed to an efficiency, explanation for Major League Baseball rules concerning waiver of players, the minor league draft, and limited revenue sharing. *Cf.* J. MARKHAM, *supra* note 77, at 18-20; Canes, *supra* note 97, at 100.

195. Daly & Moore, *supra* note 121, at 81 & n.3; *see* Medoff, *supra* note 121, at 119 (indicating that 1972 to 1974 data show players receive between 30% and 50% of worth); Scully, *supra* note 121, at 929 (noting that 1967-68 data show players receive 11% of economic worth).

196. *See* Topkis, *Monopoly in Professional Sports*, 58 YALE L.J. 691, 708

HeinOnline -- 73 Minn. L. Rev. 689 1988-1989

leagues would have an incentive to restrict player mobility only if the restraints would promote competitive balance. Given the efficiency of cash as a means of exchange, minimal restrictions on player mobility with some form of revenue sharing would most probably result.[197] The players,[198] as well as the fans, would benefit. Fans would see more balanced competition, retained incentives for individual team improvement, and a more exciting product on the field.

6. Significant Player Restraints Are Not Necessary to Preserve the Minor Leagues

The defenders of Major League Baseball's reserve clause raise an additional argument against an open market in player contracts. Regardless of the effect on competitive balance, they claim that an open market will destroy minor league baseball, depriving consumers in minor league cities of entertainment[199]

(1949) (noting that with competing leagues "players would work for whomever paid them the most.").

197. Atkinson, Stanley & Tschirhart, *Revenue Sharing as an Incentive in Any Agency Problem: an Example from the National Football League*, 19 RAND J. ECON. 27 (1988) [hereinafter Atkinson] (suggesting that *total* revenue sharing can achieve an efficient distribution of talent). Complete revenue sharing, however, deprives individual owners of an incentive to put the best possible product on the field. *See supra* note 158. One factual and one normative error also flaw this analysis. The authors assume that "the league's objective is to maximize league profit, or the joint profits of the owners." Atkinson, *supra*, at 32. In fact, each owner votes on league rules based on whether the rules will maximize his own individual profits. *See infra* notes 241-54 and accompanying text. The authors also assume that an efficient allocation of resources will maximize joint profits. Atkinson, *supra*, at 32. The flaw is that a given scheme relying on a free market for players may be more efficient, yet will not maximize owner profits because the system forces owners to share profits with players in the form of higher salaries. *See, e.g.*, Merwin, *Who's Getting Clipped*, FORBES, Nov. 5, 1984, at 38 (noting that NFL owners were surrendering enormous broadcast revenues to escalating salary competition which USFL brought about).

198. Because owners historically succeed in wielding their monopsony power, *see supra* note 195, players initially will benefit from the freer market that results from competing leagues. A competitive league structure, however, will not necessarily benefit players in the long run. Monopoly sports league owners can obtain revenues in the form of tax subsidies and increased broadcast rights that rival leagues could not. *See supra* Part I(A); *infra* Part I(D). A strong players' union can force the monopoly league owners to share some of these monopoly profits with the players. Thus, in a world of four baseball leagues, tax subsidies and broadcast rights conceivably would be so much lower that even if the leagues competed vigorously for player contracts, the salary level would be lower than the level that would exist in a monopoly league with a strong union.

199. In 1975, minor league games drew 11.7 million fans, more than the

HeinOnline -- 73 Minn. L. Rev. 690 1988-1989

and diminishing the quality of Major League Baseball because the sport will lose a means to develop talent.[200]

Baseball owners decided that, under the current structure of the industry, they can profit by assuming the risk of develop-

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NFL. 1 *Sisk Hearings*, *supra* note 34, at 320 (testimony of Bobby Bragan). Concerns about minor league fans from Major League Baseball officials, however, should be viewed skeptically. Minor league franchises have suffered seriously because of telecasting of major league contests, which keep fans at home in front of the television. *See, e.g.*, *id.* at 383 (testimony of Marvin Miller); H. REP. NO. 1720, 85th Cong., 2d Sess. 9 (1958) (stating that unlimited major league telecasts could destroy the minor leagues); H. DEMMERT, *supra* note 85, at 23 (opinion of Bill Veeck); Davis, *supra* note 104, at 374 (noting that radio and television broadcasts of major league games may be fatal competition for minor league teams). Indeed, minor league officials unsuccessfully attempted to secure governmental approval for limits on major league telecasts. *See* H. REP. NO. 1720, *supra* (antitrust exemption for limiting telecasts during minor league games). Major League Baseball did agree to a blackout at the inception of telecasting in the early 1950s. Shapiro, *Monopsony Means Never Having to Say You're Sorry—A Look at Baseball's Minor Leagues*, 4 J. CONTEMP. L. 191, 194 (1978). Since receiving an exemption for joint agreements, *see* 15 U.S.C. § 1291 (1982), however, the major leagues never have shown any self-restraint in telecasting major league games at the expense of the minor leagues or in agreeing on compensation for minor leagues through a sharing of television revenues. Shapiro, *supra*, at 194.

Roger Noll has observed that minor leagues are not profitable because they do not operate to make profits; rather, they aid their major league parents. 2 *Sisk Hearings*, *supra* note 34, at 135-36. As a representative from a minor league town complained, minor league teams "are robbed of their star-players by frequent raids in season. Thus, the minor league fans, in disgust, lose interest in their teams with loss to the gate and finally the clubs fold up." 104 CONG. REC. 12088 (1958) (remarks of Rep. Roland V. Libonati); *see also* H. DEMMERT, *supra* note 85, at 23 (observing that "many minor league owners claim that the major-minor working agreements, allowing the major league clubs in effect to 'raid' the rosters of their minor league affiliates, are the real causes" of decline in minor league teams). American League President Lee McPhail put this bluntly when he testified that "we have had to restrict to some extent the size of the minor league structure to get it down to a structure that is just large enough to accommodate prospects for the major leagues." 2 *Sisk Hearings*, *supra* note 34, at 408; *see also* B. JAMES, BILL JAMES BASEBALL ABSTRACT 1988 at 19-20 (1988) (suggesting that management's demonstrated lack of interest in winning significantly hurt minor leagues).

The point is not that Major League Baseball should limit telecasts to protect minor league gate or to keep talented players down on the farm for the benefit of local fans. Rather, current policies favor the dominant markets and reflect consumer interest in Major League Baseball. An open market in player contracts would do no more and no less.

200. *See generally* 1 *Sisk Hearings*, *supra* note 34, at 19, 24 (testimony of Bowie Kuhn) (stating that reserve clause is necessary to protect investment and to make it affordable for clubs to subsidize minor leagues); *id.* at 312 (testimony of George Sisler, President of International League) (contending that without reserve system, "the minor leagues . . . would undoubtedly perish in [their] current form").

HeinOnline -- 73 Minn. L. Rev. 691 1988-1989

ing new players. Thus, they underwrite most of the costs of developing player talent, spending millions each year to produce a few players capable of filling spots on their rosters. In 1980, for example, major league clubs spent forty million dollars on their minor league operations.[201] Major league owners generally train players at minor league franchises that the major league parent either wholly owns or operates under exclusive working agreements. These agreements generally provide that the major league club will pay the salaries of all players and coaches.[202] This is a form of what economists call *vertical integration*, which occurs when the producer of a product also controls the production of an important input.[203] For example, a steel company might "vertically integrate" by purchasing a coal mine.[204]

Former Commissioner Bowie Kuhn, among others, has argued that without significant restraints on player movement to guarantee that clubs will recoup their investment in developing players, owners no longer would subsidize the minor leagues.[205] Empirical tests for this contention do not exist because Major League Baseball has enjoyed a monopsony on player talent since the demise of the Federal League in 1915.[206] Although veteran major league players have enjoyed some degree of free agency since 1976, Major League Baseball still guarantees a team a substantial period of time to recover its investment in a player. Major League Baseball continuously has operated a draft assigning college and high school players to one professional team,[207] and unilaterally has prevented these players from becoming free agents until they reach the major leagues or complete six years of minor league service.[208] The collective bargaining agreements signed with the players' union since

201. *Rodino 82 Hearings*, *supra* note 29, at 434 (testimony of Bowie Kuhn).

202. *See id.* at 254 (testimony of Bowie Kuhn) (stating that major league subsidy of minor leagues comes to many millions of dollar each year).

203. *See generally* F. SCHERER, *supra* note 106, at 78-80 (discussing vertical integration in American industry); *see also* Shapiro, *supra* note 199, at 199-200 ("The farm system of the major leagues in an example of vertical integration . . .").

204. F. SCHERER, *supra* note 106, at 78.

205. 1 *Sisk Hearings*, *supra* note 34, at 24.

206. See BASEBALL ENCYCLOPEDIA 13 (1969) (noting that prior to 1916 season National and American Leagues assumed responsibility for $385,000 of Federal League contracts and granted two franchises to Federal League owners).

207. *See* Major League Rule 4, *reprinted in* BASEBALL BLUEBOOK 529-35 (1987).

208. *See* 1 *Sisk Hearings*, *supra* note 34, at 256 (testimony of Bowie Kuhn).

HeinOnline -- 73 Minn. L. Rev. 692 1988-1989

1976 have forbidden free agency for any player with fewer than six years of major league service.[209]

Despite the absence of empirical evidence, Kuhn's argument falters for several reasons. As a matter of antitrust policy, the courts correctly have rejected the argument that owners can conspiratorially reduce players' salaries to recoup the investment made in player development.[210] Such expenses are ordinary costs of doing business and, unlike the need to foster competitive balance, are not peculiar to professional sports leagues.[211] Moreover, Major League Baseball can find alternative means of efficiently developing talent in an open player market.

Major League Baseball's vertical integration is a relatively recent phenomenon. Historically, many teams relied on independent minor league franchises to assume the risk of player development. These independent franchises contracted with players and then sold the contract rights of a proven talent to a major league team, or a higher-level minor league team, for a profit.[212]

This rule, which affects only minor league players, is not subject to collective bargaining with the major league players' union.

209. Major League Baseball Players' Association, *Average Salaries in Major League Baseball 1967-1983*, at 2 (filed as an exhibit in *Collusion I*, Grievance No. 86-2).

210. *See, e.g.*, Mackey v. NFL, 543 F.2d 606, 621 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

211. *Id.* (noting club's "investment in player development costs" are "similar to those incurred by other businesses"); *see also* 2 *Sisk Hearings*, *supra* note 34, at 454 (testimony of Baseball Players' Association Director Marvin Miller) (observing that other industries invest in executive personnel with no guarantee that employee will not leave after short period of time). *But see* Nassau Sports v. Peters, 352 F. Supp. 870, 879 (E.D.N.Y. 1972) (finding that reserve system reflects "the need for some form of protective system to insure the recoupment of investments—often large—made both to develop and to acquire talented players").

212. *See, e.g.*, Davis, *supra* note 104, at 360-61 (discussing the development of the farm system). The founder of the initial development of farm systems was the brilliant baseball legend Branch Rickey. H. DEMMERT, *supra* note 85, at 74. Rickey instituted vertical integration out of frustration while serving as an executive of the St. Louis Cardinals. *Id.* With little revenue sharing, wealthier teams such as the New York Giants, out of respect for Rickey's reputation for sound judgment, automatically topped any offer Rickey made to a minor league team for a promising young player. *Id.*

Later, when major league teams recognized that the lack of integration allowed minor leagues teams to appropriate a significant fraction of a player's value, teams began to create farm systems. Davis, *supra* note 104, at 360-61. It is noteworthy, in light of monopoly sports leagues placing emphasis today on maintaining competitive balance, that those who feared it would unbalance the

HeinOnline -- 73 Minn. L. Rev. 693 1988-1989

In an open market, an unproven baseball player coming out of high school or most college programs will not command a premium salary. Not only will he be paid relatively little, but any team probably will require him to sign a long-term contract.[213] Furthermore, the probability exists that he never will make it to the major leagues.[214] As long as major league teams benefit economically from bearing this risk, despite the increased costs resulting from the slightly increased bargaining power of the most promising young athletes, the teams will continue to do so. Alternatively, if they find it more efficient to purchase the rights to developed talent from others, minor leagues will revert to their traditional organization as independent clubs.[215]

Indeed, if minor league franchises operated as independent economic entities, the number of minor league clubs might increase.[216] In addition to stocking their rosters with players whose contracts probably would be resold to major league clubs, minor leagues would hire popular local players who, although unlikely to go further, still could provide entertainment for local fans.[217] Providing a role for local stars increases the number of players who could play profitably at the lowest minor league levels and thereby increases the number of potentially successful minor league franchises.

Monopoly sports leagues are not necessary to assure the investment in player development needed to maintain the minor

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leagues bitterly—and unsuccessfully—opposed the introduction of farm systems. *Id.*

213. A long-term contract ensures that the club will benefit from any appreciation in the player's value during the contract term. Of course, if the player's performance is disappointing, the contract's terms typically will allow the team to release the player. "All standard player contracts provide for termination rights exercisable by a club if [a] player fails to perform at acceptable levels." 1 R. BERRY & G. WONG, *supra* note 21, at 159-61.

214. Only one of every six recruits entering professional baseball ever makes it to the major leagues, and only one in 50 lasts more than six seasons. J. MARKHAM, *supra* note 77, at 51-52.

215. *See* H. DEMMERT, *supra* note 85, at 34 (noting that in open market burden of training would fall elsewhere than on major league clubs).

216. Presently, minor leagues have shrunk to almost the smallest size possible to continue to funnel sufficient players through the ranks to major league teams. *See* 2 *Sisk Hearings*, *supra* note 34, at 408 (testimony of Lee McPhail).

217. Currently, vertically integrated baseball leagues adopt rules that preclude lower division minor league clubs from employing more than a few players with more than four years of professional experience. *See* Shapiro, *supra* note 199, at 198. Independent franchises that did not exist solely to support the big league parent likely would not retain current rules.

HeinOnline -- 73 Minn. L. Rev. 694 1988-1989

leagues. Obviously, particularly promising athletes or those who have foregone several years of professional ball to demonstrate their skills at top colleges may have greater bargaining power. As long as some major or minor league team, however, is taking the risk of training and developing a player's skills, that team will profit in the open market from successful player development. The owners need not agree among themselves to fix the terms of the individual contracts young athletes sign.[218]

D. PRESERVING OPPORTUNITIES TO WATCH GAMES ON FREE TELEVISION

Competition forces firms operating in a free market to lower the price of their goods and services to cost, although many consumers willingly would pay far in excess of that price.[219] Economists refer to the difference between the maximum amount consumers would pay and the actual price as *consumer surplus*.[220] As one of its principal functions, antitrust laws prevent firms from engaging in tactics that shift wealth from consumers to producers by robbing consumers of this surplus.[221]

Few markets permit consumers to enjoy a greater amount of surplus than the telecasting of major professional sports. The NFL broadcasts virtually all of its games on free television.[222] Each Major League Baseball team broadcasts a large

218. Michael Canes also argues that player restraints hold down costs and therefore increase the number of viable franchises that a league may maintain. Canes, *supra* note 97, at 82 n.2. The NFL has expressly disavowed this argument as a justification for its rules. 2 *Sisk Hearings*, *supra* note 34, at 149 (testimony of counsel Hamilton Carothers). In any event, this argument is unsound for several reasons. First, to hold down costs a league would have to be a monopoly; otherwise rival leagues would bid up player salaries. As demonstrated in Part I(B), monopoly leagues inevitably reduce, rather than increase, the number of available franchises. Second, the argument Part I(C) presents demonstrates that a free market in players actually improves the quality and attractiveness of the product, increasing attendance and broadcast viewership. Thus, a league as a whole will attract greater revenues to sustain higher costs with free agency than with a restricted market. Canes may have assumed that teams in smaller markets might not benefit from the increased popularity of the sport to a degree sufficient to outweigh their higher payrolls. Revenue sharing, however, can solve this problem.

219. E. MANSFIELD, *supra* note 54, at 15.

220. *Id.* at 100.

221. Lande, *supra* note 4, at 140-41.

222. During 1987, for the first time, eight regular season games were shown on the Entertainment and Sports Programming Network (ESPN), a cable network. The rest were shown on free television. *See Antitrust Implications of the Recent NFL Television Contract: Hearing Before the Senate Subcomm. on*

HeinOnline -- 73 Minn. L. Rev. 695 1988-1989

number of its games on free television.[223] Any fan with a television set can watch all post-season playoff contests, the World Series, and the Super Bowl.[224]

As technology makes it more feasible for monopoly sports leagues to capture this surplus, many observers predict that these leagues will do so. Ted Turner, who owns the Atlanta Braves as well as the WTBS cable superstation, testified with characteristic bluntness: "There is going to be more and more movement from over the air, free telecasts to pay television for sports events."[225] He predicted that "the only thing left to go on to pay television will be the World Series and the Super Bowl," and those games will remain on free television only because of congressional action.[226] Major League Baseball recently entered into a major contract with the Entertainment and Sports Programming Network (ESPN) to nationally cablecast six games weekly beginning in 1990.[227]

This anticipated shift to cable probably will have several effects. First, some fans no longer will be willing and able to view games they now can see for free.[228] Second, because many fans will be willing to pay to watch their favorite team on tele-

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Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary on S. Res. 29, 100th Cong., 1st Sess. 20-21 (1987) [hereinafter *Metzenbaum Hearings*] (written statement of Pete Rozelle).

223. For a table of games shown on free and cable television according to baseball team, see *infra* Appendix C.

224. In economic terms, the textual statement is not precisely correct. Consumers pay nothing *directly* for the privilege of watching televised games. They do pay indirectly, however, through the purchase of goods advertised during the games. The cost to advertisers, however, for a 1986 NFL game on CBS, for example, was less than 50 cents per household, a minimal amount even if fans paid the cost directly. *See* Letters from Ronald W. Bess to Stephen F. Ross, July 18, 1988 & Nov. 10, 1988 [hereinafter Bess Letters].

225. *Rodino 82 Hearings*, *supra* note 29, at 97.

226. *Id.* at 97; *see also id.* at 147 (testimony of sports journalist Howard Cosell) (stating that "In a now reasonably forseeable number of years, . . . [n]early all events will be in some form of pay TV or pay/cable TV."); *id.* at 159 (testimony of Lawrence Fleisher) (testifying that "almost everything else" besides World Series and Super Bowl will be on cable).

227. *See* Justice, *ESPN, Baseball Sign Four-Year, $400 Million Deal*, Wash. Post, Jan. 6, 1989, at D1, D5.

228. As the price rises, a growing number of consumers will choose not to pay and will forgo viewing. *Cf.* E. MANSFIELD, *supra* note 54, at 21 (noting that quantity demanded increases as price falls). The cable penetration nationwide is only 52%. *The Wide Wired World of Jim Mooney*, BROADCASTING, May 2, 1988, at 38. Major markets such as Chicago (31%), New York City (38%), and Philadelphia (44%) include a huge percentage of homes without cable. TELEVISION DIGEST, CABLE & STATION COVERAGE ATLAS 4-5 (1987). This lack may result in reduced viewership in these areas.

HeinOnline -- 73 Minn. L. Rev. 696 1988-1989

vision, there will be a significant transfer of wealth from fans to league owners. Fees cable networks generate from charging a few dollars per household for top games will translate into offers to the NFL for broadcast rights that will more than offset the resulting decrease in revenues from contracts with free television networks.[229]

NFL Commissioner Pete Rozelle has acknowledged that a significant shift to cable television would raise serious public interest concerns among fans and their representatives in Congress.[230] Indeed, the District of Columbia Circuit has recognized that the public interest in maintaining programming on free television is so strong that a properly tailored regulation requiring that programming capable of support by commercial advertising remain on free television would satisfy strict first amendment standards.[231]

Not every league decision to shift some games to cable is necessarily inefficient and contrary to the fans' best interest. A cable contract may allow a league to televise nationally some contests—Sunday night football, for example—that do not attract the attention of the major networks. In such a case, fans benefit by gaining the option of watching a cablecast of a contest that otherwise would not be broadcast at all.[232]

Competing leagues would be unlikely, however, to shift to cable if free television has a strong interest in obtaining broadcast rights. Each team's football games would continue to be telecast on free television back to home markets; networks would continue to feature nationally the top weekly games; large numbers of baseball games and a featured game-of-the-week also would remain on free television, as would all post-season contests. This is because if one league shifted to cable, a rival league could remain on free television and pick up many new viewers. A monopoly league, in contrast, would face no retribution in the market for a decision to shift to cable in order to capture the large consumer surplus.

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229. In 1986, for example, networks received between 43 and 56 cents per household from advertisers for broadcasting Sunday afternoon NFL games over the air. *See* Bess Letters, *supra* note 224. Thus, if a monopoly sports league charged only one dollar per household per game, it could increase its profits substantially unless it lost half of its viewership and all of its advertising sponsorship, hardly a possibility.

230. *Thurmond 82 Hearings*, *supra* note 38, at 39 (testimony of NFL Commissioner Pete Rozelle).

231. Home Box Office v. FCC, 567 F.2d 9, 49 (D.C. Cir. 1977) (per curiam).

232. *See Metzenbaum Hearings*, *supra* note 222, at 60 (written statement of Stephen F. Ross).

HeinOnline -- 73 Minn. L. Rev. 697 1988-1989

E. INEFFICIENT MANAGEMENT

Another of the myriad benefits of competitive markets is their tendency to force firms to operate efficiently, providing the highest quality of goods and services to consumers at the lowest possible cost.[233] Indeed, firms that introduce innovations and quality control are rewarded with greater sales, sometimes at premium prices, and higher profits.[234] Firms that operate less efficiently lose business to rivals.[235]

Owners of teams in monopoly sports leagues, however, have substantial room to engage in inefficient behavior. Mounting a challenge to an entrenched monopoly sports league through the creation of a new league is costly and difficult.[236] As a result, monopoly sports leagues do not face the retribution of the marketplace for inefficient decisions about expansion, franchise relocation, player allocation systems, and many other matters.

In fact, monopoly sports leagues are more harmful to consumers and more inefficient than other monopolies. A single corporation that monopolizes an industry may enjoy "the quiet life,"[237] but its managers otherwise will strive to maximize profits for the corporation as a whole. By contrast, franchises are not organized to maximize overall league profits; rather, franchisers join a league to maximize their own individual profits. As Professor Lance Davis explained, "[t]he responsiveness of the cartel to opportunities for profitable innovation will thus be determined by entrepreneurs whose innovative vision is at or below the industry average. As a result, some potentially profitable innovations will be delayed or rejected. . . ."[238] Thus, owners might reject innovations that would be in the best interest of Major League Baseball or the National Football League as a whole. Each league's adoption of rules that require a three-fourths majority to approve any major innovation exac-

233. F. SCHERER, *supra* note 106, at 13-14.

234. *See generally* E. MANSFIELD, *supra* note 54, at 150-82 (discussing theoretical effect of technology on production and profits).

235. *Id.* at 183-229 (discussing effects of fixed and variable costs on product price).

236. Part III, *infra*, addresses this point more fully.

237. *See* Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 ECONOMETRICA 1, 8 (1935) (stating "The best of all monopoly profits is a quiet life."); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2nd Cir. 1945) (stating that "immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress").

238. Davis, *supra* note 104, at 352.

HeinOnline -- 73 Minn. L. Rev. 698 1988-1989

erbates this problem.[239] Other, more specific rules make it virtually impossible to change the status quo to benefit consumers. For example, the American League's constitution virtually prohibits relocation of a franchise within one hundred miles of an existing team.[240]

Legislative hearings and academic writings recount numerous examples of innovations that a minority of owners blocked because of their individual self-interest at the expense of the league and, indirectly, fans.[241] For example, a minority of baseball owners from the larger markets repeatedly has rejected proposals to increase revenue sharing[242] despite the sports leagues' contention that revenue sharing promotes competitive balance and is thus good for the sport.[243] A majority of baseball owners in the 1970s also favored inter-league play; it was never implemented, however, primarily because of opposition from Los Angeles Dodgers owner Walter O'Malley.[244]

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239. The NFL has a general provision requiring a three-fourths vote for any league action, unless otherwise provided. NFL Const. and By-laws, art. V, § 5.6. Major League Baseball requires a super-majority vote for a number of important decisions. *See, e.g.*, Major League Agreement, art. I, § 7, *reprinted in* BASEBALL BLUEBOOK 502 (1987) (three-fourths approval, with at least five clubs from each league to elect Commissioner); *id.* art. V, § 2(b)(1), *reprinted in* BASEBALL BLUEBOOK 506 (majority vote of clubs in each league voting separately required for decisions regarding All-Star Game, playoffs, World Series, playing rules, and broadcast rights); *id.* § 2(b)(2), *reprinted in* BASEBALL BLUEBOOK 506-07 (three-fourths vote of clubs in each league, voting separately, required for decisions regarding inter-league play, changes in two-division structure of each league, or amendments to agreement concerning central Major League Baseball fund); *id.* § 2(b)(3), *reprinted in* BASEBALL BLUEBOOK 507 (three-fourths votes of clubs in league affected and concurrence of majority of clubs in other league required for expansion, sale, or transfer of team control, or most franchise relocations); *see also* Davis, *supra* note 104, at 353; Noll, *Major League Team Sports*, in W. ADAMS, THE STRUCTURE OF AMERICAN INDUSTRY 395 (5th ed. 1977) [hereinafter Noll/Adams].

240. *Danforth 85 Hearings*, *supra* note 22, at 59 (testimony of Major League Baseball General Counsel Ed Durso) (testifying that Yankees' approval would be required for a franchise to relocate within 100 miles of Yankee Stadium); *see also id.* at 168 (testimony of Roger Noll) (asserting that performance of Los Angeles Rams dramatically improved when Raiders moved into market); *cf. Rodino 82 Hearings*, *supra* note 29, at 112-13 (testimony of National Basketball Association Deputy Commissioner Simon Gourdine) (complaining that without exclusive territories entry might occur because owner might think that he could run franchise more efficiently than incumbent).

241. *See supra* note 164.

242. *Id.*

243. *See supra* note 158.

244. *See* 1 *Sisk Hearings*, *supra* note 34, at 451 (testimony of Texas Rangers owner Robert Short).

HeinOnline -- 73 Minn. L. Rev. 699 1988-1989

Defenders of the leagues—especially those affiliated with the NFL—staunchly insist that sports leagues are "single entities." Commissioner Pete Rozelle has testified that the league "is as much of a common enterprise and a business partnership as any law firm partnership."[245] Similarly, Professor Gary Roberts has written that "[o]nly with the *total* cooperation of every league member *on every aspect* of league operations can there be a league product . . . ."[246] Whatever significance this argument may have in other contexts,[247] the league remains none-

245. *Rodino 82 Hearings, supra* note 29, at 189. Professor Myron Grauer has forcefully made this argument. *See* Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983).

An assessment of the merits of this legal argument is beyond the scope of this Article. As a practical matter, however, significant differences exist between sports leagues and law firm partnerships. Principally, it is much easier for one or more members of a law firm to break off from their partners and to go into business for themselves. Indeed, this is a common phenomenon among attorneys who believe their partners are not particularly efficient. *See, e.g.*, *$4 Million Head Start for Morrison & Foerster's New Orange County Branch*, AM. LAW., Mar. 1988, at 19 (reporting that 25 attorneys from branch office of Los Angeles-based firm left to join San Francisco-based firm due to "disagreements . . . over management issues"); *Borod & Higgins Break Up*, AM. LAW., Mar. 1988, at 18 (reporting that 22-lawyer Memphis firm with three principal areas of practice divided into three new firms after each group became dissatisfied with cost control in other groups). It is very difficult, however, and unprecedented in sports history, for sports owners to create a new league in response to inefficiency. Innovative league owners must remain content with staying in the existing league and making as much progress as is possible under the circumstances.

246. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 230 (1984) (emphasis added).

247. The single-entity argument is principally designed to keep courts from reviewing league decisions challenged as violating § 1 of the Sherman Act, 15 U.S.C. § 1 (1982), which bars combinations or conspiracies in restraint of trade. The courts steadfastly have rejected this argument and have held that, because individual owners do not share profits and losses and act in their own interests, the league is not a single entity and ownership decisions that are unreasonable restraints of trade do violate § 1. *See, e.g.*, *Raiders*, 726 F.2d at 1389; North Am. Soccer League v. NFL, 670 F.2d 1249, 1252 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); *cf. NCAA*, 468 U.S. at 99 n.18 (1984) (in finding NCAA television agreement unlawful agreement among competitors, court cited Blecher & Daniels, *Professional Sports and the 'Single Entity' Defense Under Section One of the Sherman Act*, 4 WHITTIER L. REV. 217 (1982), which supports *Raiders* decision).

Resolution of the legal status of sports leagues as single entities is beyond the scope of this Article. Advocates of the single entity argument do not deny that monopoly sports league owners can act against the best interests of the league and consumers. *See, e.g.*, Roberts, *supra* note 246, at 258-60 (arguing that individual members' economic interests sometimes conflict with league's interests as whole, and in such cases league decisions cannot be assumed to

HeinOnline -- 73 Minn. L. Rev. 700 1988-1989

theless a collective of owners who have interests that do not always serve the league as a whole.[248]

League officials—most notably NFL Commissioner Pete Rozelle—have worked tirelessly and with some success to persuade owners to act in the interests of the league as a whole, to engage in "Leaguethink," as author David Harris has described it.[249] Nevertheless, in many cases, a monopoly league accepts intolerable inefficiencies because the owners do not wish to act against one of their own.[250] If a competitive league entered the market with an efficient front-office management team, no incumbent league would permit Baltimore (now Indianapolis) Colts owner Robert Irsay to call plays from his owners' box even though he had no experience in football,[251] or allow a for-

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maximize league efficiency or enhance consumer welfare). Rather, they argue that the standards of § 1 of Sherman Act are so vague that sound antitrust policy should defer to league judgments over those of reviewing judges and juries. *See, e.g.*, *id.* at 223 (asserting that *Raiders* decision exposes leagues to widespread liability and thus seriously diminishes their ability to operate); *id.* at 293 (stating "courts and juries are not well equipped to determine what is in a league's interests."); Roberts, *The Evolving Confusion of Professional Sports Antitrust, The Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 946-48 (1988) (arguing that legal issues would be "intractable" if courts subject monopoly sports leagues to rule of reason antitrust analysis under § 1 of Sherman Act). This argument does not contradict this Article's thesis. Roberts and league officials who argue for "single-entity" status believe that deference to league decisions which do not constitute illegal monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2 (1982), is preferable to "second-guessing" by courts. Whether they are right or wrong, the Article argues that the marketplace is the best reviewer of monopoly league decisions and the force of competition rival leagues cause.

248. The court in *Raiders* recognized:

> Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution, which is to "promote the primary business of League members." Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel.

726 F.2d at 1389. *Compare* Roberts, *supra* note 246, at 263-64 (arguing that rational league will put teams in close proximity if doing so will promote efficiency and increase product marketability) *with Raiders*, 726 F.2d at 1397 (holding league's refusal to allow Raiders to move from Oakland to Los Angeles unreasonable because, "an owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market, regardless of whether the market could sustain two franchises").

249. D. HARRIS, *supra* note 30, at 14.

250. Commissioner Rozelle testified that "*[u]nlike some other team sports*, we have been fortunate in that the NFL has basically moved as one." *Id.* at 453 (emphasis added).

251. *Id.* at 478.

HeinOnline -- 73 Minn. L. Rev. 701 1988-1989

mer owner's wife, who had no experience and had developed a reputation for incompetence, to manage the franchise in the nation's second largest market.[252] Nor would the league tolerate continued mismanagement of the Philadelphia Eagles by owner Leonard Tose as he sought to stay one step ahead of creditors seeking repayment of gambling debts.[253] When Commissioner Rozelle's office was questioned about Irsay's behavior, for example, a spokesperson explained that "the League is not in a position to decide how an owner operates his team."[254]

As with other abuses of monopoly power, fans are the primary victims of inefficient management. Loyal fans of local teams, having no marketplace alternative to which they can turn, have little choice but to endure whatever management chooses to do. The dilemma facing proud fans who must suffer or cease patronizing teams they love is precisely the dilemma that competition, as enforced through antitrust policy, is designed to avoid.

II. REGULATION IS NOT A WORKABLE MEANS OF PREVENTING THE HARMS MONOPOLY SPORTS LEAGUES CAUSE

Goods and services can be allocated in the economy by the free marketplace, by decisions of monopolists, or by government regulation. When society wants a service to be provided universally—such as telephones—or when resources are particularly scarce, or when industries might be expected to cut prices continuously to the point of bankruptcy, legislatures have enacted regulatory schemes to achieve goals they perceive to be unachievable through free competition.[255] Scholars often characterize these industries as "natural monopolies," in which one firm most efficiently can produce the amount of the product demanded.[256] Because competition is unworkable in these industries, society must choose between government regulation and allocation of goods and services by private monopolists.

Regulation is a poor means of addressing the problems monopoly sports leagues cause. One reason is that a regulatory so-

252. *Id.* at 465-66, 572 (describing Los Angeles Rams owner Georgia Frontiere).

253. *Id.* at 111-21, 292-98, 556-62.

254. *Id.* at 190.

255. *See* L. SCHWARTZ, J. FLYNN & H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION: GOVERNMENT REGULATION 26, 65-66 (1985).

256. *Id.* at 65. Part III, *infra*, explores whether sports leagues are natural monopolies.

HeinOnline -- 73 Minn. L. Rev. 702 1988-1989

lution is unlikely to be effective. Regulatory decisions have a far more significant impact on the small number of those subject to regulation—in this case the team owners—than on the rest of the American people. Owners therefore have strong incentives to organize and lobby for regulations that serve their interests. As a cohesive and interested group, owners will lobby effectively.[257] The general populace, with less at stake and with divergent interests, will be less able to lobby effectively. Thus, those officials assigned to regulate the sports industry soon may become "captured" by the very owners that they supposedly are regulating.[258]

Even if these fears are misplaced, however, regulation cannot easily remedy the specific harms monopoly sports leagues cause. Determinations that the regulators would have to make include the location of football franchises, the proper number of baseball franchises, the proper allocation of games between free television and cable, the best method of allocating players among teams, and what constitutes ineffective management. These determinations are enormously difficult, if not impossible, to make in any way other than the way this Article proposes: letting the market decide through competing leagues.

A. Regulation of Franchise Relocation

Recently, Congress has received a number of proposals to subject the relocation of sports franchises to government regulation.[259] Although such relocations cause significant economic and emotional harm to the people in the abandoned jurisdiction,[260] the economic and emotional benefits to the citizens of the new jurisdiction may well offset such harms.[261] Sports

257. *See generally* M. Olson, The Logic of Collective Action (1965) (arguing that those in large groups with little individually at stake will not have an incentive to organize to advance their interests, whereas those in small groups with much individually at stake will actively pursue their common objective).

258. *See generally* Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 724-26 (1986) (discussing evolution of capture theory of regulation); *see also* 2 *Sisk Hearings, supra* note 34, at 117 (testimony of Gerald Scully) (opposing proposal for Federal Sports Commission because prior federal government regulation of industry has not succeeded).

259. *See infra* note 264.

260. *Danforth 85 Hearings, supra* note 22, at 2 (statement of Sen. Gorton).

261. Professor Weistart notes that "[m]uch of the thinking on franchise moves to date has assumed that fan interests are best served by making the club accountable to its host city. It would appear, though, that a regulation that significantly inhibited franchise movements could operate as a disservice to the interests of other groups of fans." *Rodino 82 Hearings, supra* note 29, at

HeinOnline -- 73 Minn. L. Rev. 703 1988-1989

teams, however, usually embark upon such relocations only in response to subsidies that officials of the new jurisdiction offer, transferring substantial sums from local taxpayers to wealthy team owners.[262] For several reasons, the recent legislative proposals do not meaningfully address this problem.

Serious administrative difficulties arise in evaluating when to permit teams to relocate.[263] Most of the recent legislative proposals respond to these problems by requiring a government official to determine, under varying standards of review, whether a relocation is "reasonable," after considering a host of factors.[264] Many of the factors are impossibly vague[265] or sub-

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79. Indeed, the willingness of taxpayers in a city without a team to outbid the residents of a team's current home may suggest that a relocation would increase the net economic and emotional benefits to society.

262. *See supra* notes 22-34 and accompanying text.

263. *See Thurmond 85 Hearings*, *supra* note 28, at 388-89 (statement of Assistant Attorney General Charles F. Rule) (stating that it is extremely difficult to determine whether a particular franchise relocation benefits or hurts consumers). Rule added:

> Proper evaluation of [consumer] trade-offs would require estimates of the likely expansion of output in the city into which the team moved, along with the increased consumer surplus in that city; similar estimates for decreases in output and consumer surplus would be required for the city from which the franchise is moved. Expert testimony would be necessary in each of these areas; but these are areas where the ability of economists to make empirical judgments is limited.

Id. at 389 n.8.

264. Four members of Congress introduced significant regulatory proposals in 1984 and 1985 in light of the *Raiders* decision, the move of the Colts from Baltimore to Indianapolis, and the threatened move of the Eagles from Philadelphia.

Senator Danforth's proposal provided that the league make an initial determination, subject to judicial review under the substantial evidence test. *See* S. 259, 99th Cong., 1st Sess. § 6(a)(2) (1985), *reprinted in Danforth 85 Hearings*, *supra* note 22, at 14. This proposal would require the league to weigh a number of factors in determining whether relocation is appropriate and reasonable. *Id.* The adequacy and potential for improvement of the existing stadium and neighboring facilities, the extent of prior tax subsidization, profits and losses, fan support, the extent of ownership contribution to the team's plight in its current city, the existence of other teams in the current site, and the willingness of a local owner to purchase the franchise would be among the factors to be considered. *Id.* § 6(b).

Under Senator Gorton's bill, relocations could occur only after an arbitration board determination that the action was *necessary* and appropriate, in contrast to *reasonable* under the Danforth bill. The arbitration board would include representatives from the league, the home city, and a neutral arbitrator. S. 287, 99th Cong., 1st Sess. § 104(a)(1) (1985), *reprinted in Danforth 85 Hearings*, *supra* note 22, at 24. Relevant factors were similar to those in the Danforth bill. *Id.* § 104(b).

Senator Specter introduced legislation that would prohibit franchises from

HeinOnline -- 73 Minn. L. Rev. 704 1988-1989

ject to team or league manipulation.[266] Given these problems, cities currently hosting sports franchises probably will not be willing to take the chance that a regulator ultimately will find a move "unreasonable."[267] Faced with the choice of losing teams unless they prevail in the regulatory proceedings or agreeing to concessions paid for out of the local treasury, many cities will opt for the latter solution. Thus, regulation does little to check the transfer of wealth from the public to owners by tax subsidies.[268]

Moreover, the legislative proposals fail to address certain major problems. Most of the proposals provide no meaningful review of intra-metropolitan relocations, from downtown to a suburb, for example, which involve the same type of bidding and exploitation of taxpayers as inter-metropolitan moves.[269]

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relocating unless the stadium authority had significantly breached contractual promises to the team, the stadium was irreparably inadequate, or the franchise had lost money during the previous three consecutive years. S. 172, 99th Cong., 1st Sess. § 4 (1985), *reprinted in Thurmond 85 Hearings*, *supra* note 28, at 5-6. Cities that fall victim to relocations would have a cause of action in federal court to enforce the legislation. A similar approach was proposed by Representative Mikulski. *See* H.R. 5430, 98th Cong., 2d Sess. (1984), *reprinted in Florio Hearings*, *supra* note 59, at 4-16.

For an analysis and critique of these proposals, see Note, *Keeping the Home Team at Home*, 74 CALIF. L. REV. 1329, 1361-67 (1986).

265. *See, e.g.*, S. 172 § 4(2), S. 259 § 6(b)(1)&(2), S. 287 § 103(b)(1), H.R. 5430 § 5(b)(2)(A) ("adequacy" of stadiums and facilities); S. 259 § 6(b)(6), S. 287 § 103(b)(4) (whether owner has contributed to plight of club that might justify relocation); S. 259 § 6(b)(9), S. 287 § 103(b)(2) ("extent" of fan support).

266. *See, e.g.*, *Danforth 85 Hearings*, *supra* note 22, at 102-03 (testimony of Gene Upshaw) (arguing that it is difficult to use financial failure as justification for franchise relocation without looking at owners' personal debt and excessive salaries to family members); *id.* at 166-69 (testimony of Roger Noll) (asserting that profit data and other financial information are unreliable); *Thurmond 82 Hearings*, *supra* note 38, at 49 (testimony of Pete Rozelle) (stating that "manipulative deals on income" in which owner hires family members or runs club so that consistent loss could be shown is method of evading regulatory guidelines); *id.* at 173 (testimony of Kansas City Mayor Richard Berkley) (arguing that owner wishing to relocate could lose money by discouraging fans); *Rodino 82 Hearings, supra* note 29, at 77 (testimony of John Weistart) (owners could demonstrate lack of profitability necessary to justify franchise relocation by trading key player, changing coaching staff, failing to pursue free agents, or selecting poor draft choices).

267. NFL Commissioner Pete Rozelle noted that regulatory standards will "promote bitter and protracted litigation." One can interpret lease provisions, profitability, and competitiveness in different ways to suit one's view of the merits. Rozelle pointed out that trial courts in Milwaukee and Atlanta took predictably different approaches to the propriety of the Braves' move from the former city to the latter. *Thurmond 82 Hearings*, *supra* note 38, at 64.

268. *See supra* Part I(A).

269. *See* S. 259, 99th Cong., 1st Sess. § 3(1) (regulating teams wishing to

HeinOnline -- 73 Minn. L. Rev. 705 1988-1989

In addition, the standards provide no mechanism for allowing new cities to obtain a major league franchise even if they could financially support one. If the regulatory proposals have any effect, it will be to make it somewhat more difficult for existing teams to move to new venues by requiring that teams seeking to relocate justify their decisions. Although supporters of the proposals assume that deserving new cities will receive expansion franchises and therefore need not "steal" teams from other cities, few proposals address that issue.[270] Thus, the regulatory solutions do not address the social cost fans suffer in "have-not" cities.[271]

B. REGULATION OF EXPANSION

To increase the value of existing franchises and to exploit taxpayers for subsidies by threatening to relocate a scarce franchise to another locale, monopoly sports leagues create fewer than the optimal number of franchises.[272] The principal regulatory cure for this malady would be a governmental order requiring Major League Baseball and the NFL to expand. Such a solution, however, has numerous problems.

First, expansion makes a new league's possible future entry even more difficult than it is today.[273] Modest expansion poses no difficulty for future entrants when a large number of open

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relocate from their "home territitories," as defined in league by-laws); S. 287 § 103(6) (same); H.R. 5430, 98th Cong., 2d Sess. § 5 (regulating relocation from territory or metropolitan area where team has agreed to operate). *But see* S. 172, 99th Cong., 1st Sess. § 8 (defining relocation as changing municipality in which team plays its home games, and defining municipality to include city, county, or other political subdivision).

270. The only proposal to deal with the expansion issue was Senator Gorton's bill, which required Major League Baseball to expand by two teams and the NFL to expand by four teams, designating Baltimore and Oakland as two of the NFL expansion sites. *See* S. 287, 99th Cong., 1st Sess. § 303(a).

271. Senator Frank Lautenberg of New Jersey remarked:

> I, for one, cannot stand by while legislation proceeds that satisfies the haves in baseball and not the have-nots. I would guess that the Senators who represent the long list of cities that are begging for franchises at the doorstep of baseball and football, and the other sports will be there with me.

Danforth 85 Hearings, *supra* note 22, at 115.

272. *See supra* Part I(B).

273. *See* Mid-South Grizzlies v. NFL, 720 F.2d 772, 786 (3d Cir. 1983) (arguing exclusion of football team from NFL favors competition because it leaves site and team for a competing league's franchise); J. WEISTART, *supra* note 44, at 734 n.318 (arguing that court order which encourages expansion is inconsistent with goal of antitrust laws to foster competition).

HeinOnline -- 73 Minn. L. Rev. 706 1988-1989

markets exist.[274] Entry becomes much more problematic, however, when a new league must compete against an incumbent league in many cities where the incumbent already has a franchise.

Second, no objective standard exists that allows a regulator to determine when expansion is in the public interest. Expansion is justified when the benefits to the residents of a new location of seeing major league play in their locale exceed the reduced enjoyment to fans in cities with existing franchises. As the experience of the NHL demonstrated, even significant dilution of talent through rapid expansion can result in a net increase in societal welfare, where overall attendance increases.[275] Accurately determining the proper balance between adding teams for the benefit of new fans and maintaining player quality for the benefit of current fans, however, is extraordinarily difficult.

One proposal would be to make no determination. Any team that wished to enter a league could do so.[276] Such governmentally-mandated open entry is undesirable. If anyone could put together a roster of players and have the legal right to play against the Washington Redskins or the Los Angeles Dodgers, the result would be devastating. Henry Demmert notes that a sandlot baseball team probably could cover the costs of playing the New York Yankees, but if such teams generally could enter Major League Baseball, "the legitimacy of athletic competition and thus the very existence of the professional sport would be threatened."[277] Thus, he concludes that some undefined "minimum acceptable quality criteria" must be developed before entry can be permitted.[278]

Recognizing the difficulties with totally open entry, Congress could adopt a regulatory standard along the lines of Roger Noll's estimate of a competitively determined price for an expansion team.[279] Such a proposal would allow any new team to join Major League Baseball or the NFL if it compensated the

274. *See* AFL v. NFL, 205 F. Supp. 60, 77 (D. Md. 1962) (noting existence of many open markets for development by new leagues), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

275. *See supra* note 101 and accompanying text (discussing positive experience of NHL resulting from overnight doubling in franchises).

276. *See* 2 *Sisk Hearings*, *supra* note 34, at 448-51 (testimony of Rep. John Seiberling) (arguing that marketplace should determine where teams locate).

277. H. DEMMERT, *supra* note 85, at 91.

278. *Id.*

279. *See* Noll, *Alternatives in Sports Policy*, in GOVERNMENT AND THE SPORTS BUSINESS 414-15 (1974).

HeinOnline -- 73 Minn. L. Rev. 707 1988-1989

existing owners for any reduced revenues its new entry caused. Reduced revenues for existing teams are likely to occur for two reasons. Expansion would reduce each existing owner's share of the network television contract. Moreover, an existing team's live gate revenues usually will decline for contests against expansion teams.[280]

Requiring new franchises to compensate existing owners for lost revenues has a number of significant flaws. A recent NFL network television package provided each of the twenty-eight owners with $15.6 million in annual revenues.[281] Under the proposal, expansion franchises would receive no network revenue other than the additional revenue that higher ratings generated in their particular localities.[282] This additional revenue, however, will pale in comparison to the existing owners' shares of the overall network package. If an expansion franchise could not share equally in the television "pie," it could not maintain a competitive team that would attract fans. Network revenue comprises approximately half of total club revenues.[283] A franchise cannot realistically spend close to the league average for players, coaches, scouting, and other expenses if its only revenues are gate attendance, concessions, and parking. Thus, an "open-entry with compensation" policy is in essence a "no entry" policy.[284]

More fundamentally, an open-entry with compensation policy would be an administrative nightmare. Compensating existing owners for their share of network television revenue is simple enough. Noll correctly understands, however, that an efficient expansion system requires compensation for reduced gate attendance.[285] Games between the Los Angeles Dodgers and the San Francisco Giants, for example, probably will draw more people than contests between the Dodgers and an expan-

280. *See id.*

281. *The Pluses and Minuses of the NFL*, L.A. Times, Jan. 25, 1988, Part III, at 3 [hereinafter L.A. Times Chart].

282. For example, the overall league ratings for Sunday football in Indianapolis increased 50% (from 20 in 1983 to 30 in 1984) after the area obtained the Colts' franchise. Source: ARBITRON RATINGS (1983 and 1984). *See supra* note 103 (discussing ratings increase after Colts moved to Indianapolis).

283. *See* L.A. Times Chart, *supra* note 281 (listing network revenue and total club revenue for each NFL team).

284. Owners in rival leagues have an incentive to share revenue with expansion teams to induce such expansion teams to come into their league, instead of another league. Of course, owners in monopoly sports leagues have no such incentive. *See supra* text accompanying notes 102-03 (arguing economic theory suggests rival leagues will compete for expansion teams).

285. Noll, *supra* note 279, at 415.

HeinOnline -- 73 Minn. L. Rev. 708 1988-1989

sion team, for example, the Denver Bears. But how many more? Denver, of course, will argue that any reduced attendance at Dodger Stadium is the result of factors other than the mediocre quality of the Denver franchise. Measuring the precise amount of economic loss due to expansion is extraordinarily difficult.[286]

Another proposal would permit a court to order a monopoly sports league to admit an expansion franchise whenever the court determines from objective evidence that the expansion site can support a major league team. The trial court in *State v. Milwaukee Braves, Inc.*[287] used this theory to hold that the failure of Major League Baseball to expand to Milwaukee constituted illegal monopolization in violation of Wisconsin's antitrust laws.[288] Professor John Weistart correctly observes that, although semantically framed as an antitrust decision, this holding requires courts to supervise in a quasi-regulatory fashion, substituting their business judgment for the judgment of the league regarding the profitability of expansion.[289] As Weistart points out, there are substantial problems with this approach. First, it assumes that critical issues—such as the proposed club's ability to generate a reasonable profit in the

286. John Weistart also has criticized the "open entry with compensation" proposal on the ground that it will ruin competitive balance. Weistart correctly observes that competitive balance is necessary to maintain the quality of a league's product and fan enthusiasm and that league owners in larger markets often provide subsidies to fellow owners in smaller markets to maintain such balance. *See* J. WEISTART, *supra* note 44, at 737; *see also supra* text accompanying note 186 (arguing competitive balance is a public good). Weistart hypothesizes that expansion will exceed the willingness or ability of current owners to continue this subsidy, and concludes that expansion therefore would harm competitive balance. J. WEISTART, *supra* note 44, at 737.

Henry Demmert's analysis undercuts Weistart's critique. Demmert notes that free entry assumes the abolition of territorial rights which franchises now possess. Accordingly, teams will both enter and relocate into areas with excess profits, which will eliminate the differences in market strength among the various franchises. H. DEMMERT, *supra* note 85, at 82. If a metropolitan area can support more than one team but not two, franchises might split their season between two areas. *Id.* at 88-89. If Demmert is correct, there will be no need for the cross-subsidy that Weistart seeks to preserve. Indeed, teams such as the Los Angeles Dodgers or Chicago Bears will not be in a position to subsidize others because they will be competing against one or more new franchises in their own metropolitan area.

287. 1966 Trade Cas. ¶ 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, *cert. denied*, 385 U.S. 990 (1966).

288. *Id.* at 82,411.

289. J. WEISTART, *supra* note 44, at 737 n.335 (noting trial court undertook detailed analysis of economic feasibility of locating franchise in Milwaukee).

HeinOnline -- 73 Minn. L. Rev. 709 1988-1989

market—are capable of objective verification. A regulating judge evaluating this question would consider not only "hard" data, such as the population of the city, but also more amorphous factors, such as the enthusiasm of the local sports press, the degree of support from local business, and the general level of fan interest.[290] If the court ordered a league to accept an expansion franchise against its will, the court also would have to supervise the price and other terms upon which the franchise joined the league.[291] Otherwise, the defendant league could frustrate the court's order by imposing an excessively high entry price, by failing adequately to share revenue from network contracts, by failing to allow the expansion team to stock its player roster with adequate talent, or by imposing other terms so onerous that potential owners would be dissuaded from seeking an expansion franchise. In performing this supervisory function, however, the possibility of a court erring is great and the risks of an incorrect decision are significant.

The *Milwaukee Braves* case-by-case litigation approach has another flaw. Even if the court were correct in concluding that Major League Baseball could expand,[292] it failed to consider whether Milwaukee was the best expansion site.[293] Courts cannot make such decisions in a vacuum. Allowing those who happen to win the "race to the courthouse" to prevail does not serve the public interest. Conversely, if a court were to find that modest expansion was possible and then left the choice among the contenders for expansion to the monopoly league, a bidding war would result among eight to ten cities for the new franchises, thus exacerbating the tax subsidy problem.[294]

Although monopoly sports leagues inflict significant harm on fans by refusing to expand, regulatory solutions are a highly suspect means of correcting the problem. The difficulties in determining the optimal number of franchises by judicial regulation are enormous, and should not be tackled absent clear

290. *Id.* at 738; *see also* HARVARD Note, *supra* note 121, at 427 (arguing in principle, courts should require leagues to base expansion decisions on "how fast the league can expand without serious injury to the sport as a whole").

291. J. WEISTART, *supra* note 44, at 739 n.344.

292. *See State v. Milwaukee Braves*, 1966 Trade Cas. at 82,411 (concluding expansion was feasible).

293. *See* J. WEISTART, *supra* note 44, at 739 (arguing that if court ordered expansion it first would have to evaluate franchise locations other than plaintiff city).

294. *See Danforth 85 Hearings*, *supra* note 22, at 140 (testimony of Donald Fehr).

HeinOnline -- 73 Minn. L. Rev. 710 1988-1989

evidence that a marketplace approach is unworkable.[295]

C. ALLOCATION OF PLAYERS

Precisely defining the optimal allocation of players within a league is an almost insurmountable problem.[296] When a desire to exercise monopsonistic power over players does not motivate a league, the league will select an allocation scheme that allows for ample play of market forces with some modest limits to promote competitive balance.[297] The precise contours of an optimal allocation scheme are unknown, and are probably subject to constant change.[298] Competing leagues will continue to experiment and innovate with different systems of player allocation in an ongoing effort to achieve the best system.[299]

Establishing such a system by regulatory decree has several major drawbacks. Regulation rigidifies the process of innovation because changes require regulatory approval. In addition, because the parties most interested in the player allocation system are the owners and the players, monopoly sports league owners and their players have an incentive to agree on a mutually beneficial collective bargaining package. Such an arrange-

295. *See* HARVARD Note, *supra* note 121, at 427-28 (suggesting that "To avoid the uncertainties of judicial supervision of the details of expansion, it might be appropriate to leave expansion decisions to the existing league, but use antitrust policy to foster new leagues."). Because entry is so difficult, however, new leagues often pose no credible threat to existing monopoly sports leagues. Thus, divestiture may be necessary to foster new leagues.

296. *See supra* Part I(C) (discussing incentives favoring and opposing efficient allocation of players); Cairns, Jennett & Sloane, *The Economics of Professional Team Sports: A Survey of Theory and Evidence*, 13 J. ECON. STUD. 3, 33 (1986) (noting that empirical research is probably unable to distinguish between player allocation rules that increase monopsony power and rules that foster competitive balance).

297. *See supra* text accompanying notes 196-98 (arguing competitive sports leagues would have less incentive to restrict player mobility).

298. For example, legislation the Senate considered in 1960 would have permitted Major League Baseball to maintain its perpetual reserve clause and allowed baseball owners to "draft" any player within another team's farm system without compensation, excluding those on the expanded 40-man major league roster and players with four years or fewer of minor league experience. *See* 106 CONG. REC. 14,738-39 (1960). Although such a proposal would have made an inroad against the particularly inefficient practice of "stockpiling" that richer teams conduct, recent developments demonstrate that this perpetuation of the reserve clause was hardly the optimal solution for player allocation in baseball. *See supra* Part I(C) (arguing monopoly sports leagues adopt inefficient player allocation systems that harm farms).

299. *See supra* Part I(C) (discussing schemes competing leagues might use in allocating players).

HeinOnline -- 73 Minn. L. Rev. 711 1988-1989

ment might not necessarily result in the player allocation most conducive to exciting league contests.

For example, without the pressure of competing leagues, the owners and the NFL Players' Association agreed in 1977 on a package that included neutral arbitration of player grievances, pension benefits for all players, a dues check-off system desired by the union, as well as an allocation system that prevented any significant player mobility.[300] Major League Baseball's collective bargaining agreements have allowed for greater player mobility, but baseball players probably would not insist upon free agency at any price. If the baseball owners were to offer players a sufficiently generous package of pension benefits, minimum salaries, guaranteed contracts, injury protection, and other desirable benefits in return for significant limits on player mobility, baseball players probably would not decline the offer out of any concern for its effect on overall competitive balance. A regulatory board is unlikely to reject a scheme that a unified phalanx of players and owners presents.[301]

D. Preserving Games on Free Television

Because monopoly sports leagues have the ability and incentive to exploit new technologies and shift the broadcasting of games from free television to pay or cable television,[302] policymakers might consider regulating broadcasting as a means of preventing the harm to consumers that monopoly sports leagues might cause. Like regulation of other aspects of the industry, however, broadcast regulation is likely to be ineffective. Indeed, with respect to broadcast regulation, historical support exists for this conclusion; the federal government al-

300. *See* Collective Bargaining Agreement Between NFL Players' Association and NFL Management Council, *reprinted in* PRACTICING L. INST., REPRESENTING PROFESSIONAL AND COLLEGE SPORTS TEAMS AND LEAGUES 17-111 (1977) (containing text of collective bargaining agreement); *see also* Alexander v. NFL, 1977-2 Trade Cas. (CCH) ¶ 61,730, at 73,001 (D. Minn. 1977) (restrictions on player mobility have "been agreed to by the union as a trade-off or *quid pro quo* . . . in return for numerous other direct benefits to the employees it represented."), *aff'd sub nom.* Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978).

301. In contrast, if there were competing leagues, each league's players and owners should have an incentive to agree on an efficient system of player allocation. If, for example, the American League's system appeared to be more effective at creating exciting races, this excitement might generate more revenue, resulting in more profits for owners and more money for player compensation. The National League would be foolish not to copy this scheme; their failure to do so might result in less money for both players and owners.

302. *See supra* Part I(D).

HeinOnline -- 73 Minn. L. Rev. 712 1988-1989

ready has tried to regulate sports broadcasting, and has failed miserably.

In the 1970s, the Federal Communications Commission (FCC) attempted to regulate the television industry based on a policy that sought to "channel . . . sports material to its intended recipients over broadcast television, rather than pay cable, whenever the economics of advertiser-supported programming permit."[303] The FCC immediately encountered the problem of predicting which games a league would show on free television if restricted to that medium and which games would be televised only if the league could charge for the program. For example, the Super Bowl and the World Series are obviously contests that free television profitably can show. In contrast, franchises might be unwilling routinely to broadcast home games that were not sell-outs, unless they received substantial additional revenues through pay cable. If a regulator allows cable to show a game based on the incorrect prediction that advertisers will not sponsor the contests on free television, consumers will have to pay significant sums of money to watch a game they otherwise could have watched for free. Conversely, if a regulator prohibits cable from showing a game on the incorrect assumption that advertisers will sponsor the contest on free television, fans will be unable to watch the game in their homes.

In 1975, the FCC adopted a complex regulation preventing cable from siphoning sports programming from broadcast television.[304] This regulation provided that if more than one-quarter of the league's games traditionally had been televised, the number of cablecasts could not exceed one-half of the number of games that traditionally had *not* been televised.[305] The Court of Appeals struck down the regulation as arbitrary.[306] This decision was correct—the regulation was both overbroad and underinclusive. Under the regulation, a significant number of games would remain untelevised, even if fans willingly would pay to view those games on cable. Moreover, the regulation did nothing to prevent the league from selecting the most exciting contests of the season to show on cable—games that free television previously had broadcast and would have contin-

303. Home Box Office, Inc. v. FCC, 567 F.2d 9, 49 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977) (vacating Subscription TV Program Rules, First Report and Order, 52 F.C.C. 2d 1 (1975)).

304. *See id.* at 13 (summarizing 1975 regulations).

305. *See id.* at 20 n.10 (quoting relevant portion of FCC regulation).

306. *Id.* at 40.

HeinOnline -- 73 Minn. L. Rev. 713 1988-1989

ued to broadcast, absent the cable option. Nothing suggests that efforts to regulate would be any more effective today.

E. INEFFICIENT MANAGEMENT

The leagues' tolerance for certain inefficient owners' poor management examplifies another harm monopoly sports leagues cause consumers.[307] To prevent that harm, a regulatory body daily would have to oversee myriad decisions made by team executives, who lack the threat of competition from a rival league that would motivate them to make wise and innovative business decisions.[308] No guarantee exists, of course, that well-meaning government bureaucrats will make wiser or more innovative decisions than professional sports executives, even if the latter group runs monopolies and seeks the "quiet life." More importantly, neither a monopoly league nor a government bureaucracy faces the test of the marketplace to determine whether decisions are in the fans' best interests. Rival leagues are therefore superior to either monopolists or government regulators in achieving maximum managerial efficiency.

Moreover, regulating and correcting mismanagement is costly and time-consuming.[309] Regulation is therefore unwise if the marketplace is a feasible alternative means of ensuring efficiency in management.

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307. *See supra* Part I(E).

308. To cite just one example, consider revenue sharing. *See supra* note 158 and accompanying text (arguing revenue sharing could promote competitive balance). Seattle Mariners owner George Argyros, who would benefit significantly from the sharing of revenues, advocated federal legislation mandating such a result. *See Danforth 85 Hearings*, *supra* note 22, at 137-39 (testimony of George Argyros). All leagues, however, share some revenues. Baseball, for example, shares its network television package revenues on an equal basis, and visiting teams receive a percentage of road game live gate revenue. *Id.* at 59 (statement of General Counsel Edwin Durso). An optimal revenue sharing scheme provides franchises in smaller markets with sufficient resources to compete meaningfully with their larger city rivals, and at the same time preserves sufficient opportunity for individual profit to retain the incentive that each team should have to maintain its quality and to market its product effectively in its home area. It will be very difficult for a regulatory agency to find this balance adequately.

309. Regulatory agencies recently have begun to conduct "prudency reviews" of public utilities. *See* Rose, *'Prudency Reviews' Are Changing the Way Utilities Set Rates*, Wall St. J., Oct. 2, 1986, at 1, 17. Reviewing the San Onofre nuclear power plant, for example, has taken more than four years, will cost more than $30 million, and will produce 10,000 exhibits and 20,000 pages of transcripts. *Id.*

HeinOnline -- 73 Minn. L. Rev. 714 1988-1989

III. ARE BASEBALL AND FOOTBALL NATURAL MONOPOLIES?

This Article has argued that several factors favor separating Major League Baseball and the NFL, respectively, into several leagues that compete economically,[310] because as monopoly leagues they impose significant costs upon taxpayers and fans,[311] because a free marketplace featuring competing leagues would correct these economic deficiencies,[312] and because a competitive marketplace is preferable to regulation as a means of bringing about an efficiently operated industry.[313] Nevertheless, such a break-up would be ill-advised if each sport were a "natural monopoly" in which one firm could provide the product more efficiently than two or more competing firms.[314] Neither football nor baseball is a natural monopoly. In contrast to markets that economists identify as natural monopolies, significant economies of scale do not arise in sports leagues. Thus, one league cannot serve the entire market at a lower cost than multiple leagues. Although the most powerful argument supporting the natural monopoly theory is the historical record of single leagues in each sport,[315] factors other than the natural monopoly hypothesis best explain this tradition. Prior experiences of inter-league rivalry do not, upon analysis, support the

310. Although Major League Baseball consists of the National and American Leagues, the leagues do not compete economically with each other. They act as one cartel with regard to each of the problems that monopoly sports leagues cause. National League owners need approval from their American League counterparts, and vice versa, for franchise relocation, expansion, and sale. Major League Agreement, art. V, § 2(b)(3), *reprinted in* BASEBALL BLUEBOOK 507 (1987). The leagues jointly adopt rules concerning player allocation. *Compare* Major League Rules 2-18, *reprinted in* BASEBALL BLUEBOOK 514-68 (1987) (articulating rules governing player contracts) *with* Major League Agreement art. IV, *reprinted in* BASEBALL BLUEBOOK 505 (1987) (providing that "[a]ny rules or regulations . . . shall be binding upon the Major Leagues and their constituent clubs . . . ."). Any action relating to radio or television requires the approval of a majority of the clubs in each league. Major League Agreement art. V, § 2(b)(iv), *reprinted in* BASEBALL BLUEBOOK 506 (1987).

311. *See* Part I.

312. *See id.*

313. *See supra* notes 257-309 and accompanying text.

314. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945) (finding "[a] market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand."); *Thurmond 85 Hearings*, *supra* note 28, at 398 (testimony of Charles F. Rule) (defining natural monopoly as "a market in which the minimal optimal scale of production is so large that there is room in the market for only one firm").

315. *See infra* notes 327-63 and accompanying text.

HeinOnline -- 73 Minn. L. Rev. 715 1988-1989

claim that "ruinous competition" inevitably will drive rival leagues into either merger or bankruptcy.[316] Given the proper legal environment, sports leagues could engage in economic rivalry in a stable, competitive market.

A. SPORTS DO NOT FIT THE ECONOMIC DEFINITION OF NATURAL MONOPOLY

Economists have observed that competition is self-destructive and undesirable when "one firm of efficient size can produce all or more than the market can take . . . and can continually expand its capacity at less cost than that of a new firm entering the business."[317] The critical characteristic of a natural monopoly is that "it is only as more output is concentrated in a single supplier that unit cost will decline."[318] For example, one company can supply electricity to an entire city at less cost than two companies providing the service. Once the first firm sets up its plant and wires the city, it is much cheaper for it to add additional homes to its network than for a second firm to set up a completely separate plant and network.[319]

Two theoretical arguments support the thesis that sports leagues fit within this economic definition of natural monopoly, but the facts undermine both. One argument suggests that the minimum size of a sports league is too large to support two leagues. If, for example, a league needs at least eight franchises in order to function,[320] a sport might be a natural monopoly if fewer than sixteen viable franchise locations existed. Because Major League Baseball now includes twenty-six teams and the NFL has twenty-eight franchises, this argument does not apply.

The other possible argument suggests that expanding existing leagues costs less than forming and operating new leagues. No economic evidence supports this hypothesis. In

316. *See infra* notes 375-408 and accompanying text.

317. C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 191 (1959); *see also* W. SHARKEY, THE THEORY OF NATURAL MONOPOLY 54 (1982) (natural monopoly exists "if and only if a single firm can produce the desired output at lower cost than any combination of two or more firms"); Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969) (suggesting that "[i]f the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it.").

318. 2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 119 (1971).

319. *See id.* at 120-23 (discussing inefficiency of duplicating high fixed costs).

320. *See supra* note 81.

HeinOnline -- 73 Minn. L. Rev. 716 1988-1989

contrast to industries characterized by large fixed costs for plant and equipment, one economist estimated the annual fixed cost for a sports franchise at less than $100,000.[321] No evidence suggests that stadium rental, player salaries, and administrative costs would be any higher for a second league than for a monopoly league.[322]

Assessing whether a natural monopoly exists requires distinguishing *costs*—that is, the value to society of a resource being used by a league—and the actual *dollar expenses* paid out. Monopoly leagues pay less for players than leagues operating in a competitive market.[323] Therefore, it may be "easier" for a monopoly league to expand than for a rival league to form.[324]

Savings resulting from monopoly exploitation, however, do not benefit society. No one today would suggest, for example, that the automobile industry is a natural monopoly, even though the world's automakers undoubtedly could reduce expenses by merging into one monopoly corporation and using their economic power to suppress wages and obtain favorable prices for steel and other inputs.[325] Unlike the electric utility paradigm, a monopoly sports league does not better serve the public.[326]

B. THE HISTORICAL RECORD

The argument persists, nevertheless, that sports are a natural monopoly, for the understandable reason that competition among rival leagues never has existed for any length of time. Instead, a brief review of the economic history of Major League

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321. Noll/Adams, *supra* note 239, at 384-85.

322. The only cost savings would be the incidental administrative savings from elimination of duplicate commissioner offices.

323. *See supra* notes 196-97 and accompanying text.

324. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1195 (D.C. Cir. 1978) (MacKinnon, J., concurring in part, dissenting in part) (concluding that NFL "resembles a 'natural monopoly' because it is easier for the NFL to expand than for another league to form.").

325. E. MANSFIELD, *supra* note 54, at 294-95.

326. Michael Canes argues that there should be only one league per sport, because "[i]f several leagues compete in a sport, each league will ignore the effects of additional quality on returns to teams in other leagues, which will lead again to socially excessive team quality." Canes, *supra* note 97, at 95. Canes correctly observes that each league will seek to improve its own quality at the expense of rival leagues in hopes of higher profits. Canes errs, however, in concluding that this improvement in quality will be "socially" excessive. If consumers are paying for higher quality baseball, team owners' wealth may decrease with competition, but it is difficult to see how this harms society—most of us, after all, are consumers.

HeinOnline -- 73 Minn. L. Rev. 717 1988-1989

Baseball and the NFL discloses alternative explanations for the absence of competitive leagues in each case.

1. Baseball

Although the National League began play in 1876,[327] the entity now known as Major League Baseball was created in 1903 as the result of an agreement ending competition between the National and American Leagues.[328] In 1913, a new Federal League was formed. After the National and American Leagues rebuffed its efforts to join the Leagues' noncompetition agreement, the Federal League engaged in vigorous inter-league rivalry.[329] The incumbent leagues responded by threatening to blacklist any players jumping to the Federal League.[330] The Federal League attempted to compete by acquiring players and constructing new baseball stadiums for each of its franchises, but could not survive a period when all baseball leagues lost money as a result of general economic depression and World War I.[331] Although Federal League owners claimed that their losses were in part attributable to antitrust violations that the two incumbent leagues perpetrated, a "peace agreement" providing that the National and American League owners would make cash payments of $600,000 to their Federal counterparts and that two Federal owners could purchase existing franchises mollified most of the owners.[332] The agreement did not, however, satisfy the Baltimore Federal owners, who filed an antitrust suit against Major League Baseball and won an $80,000 verdict.[333] The Supreme Court ultimately affirmed the District of Columbia Circuit Court of Appeals' rejection of this suit, which concluded that baseball was not commerce subject to

327. THE BASEBALL ENCYCLOPEDIA, *supra* note 137, at 15.

328. *Id.*

329. *Id.*

330. L. SOBEL, *supra* note 24, at 2 (citing SUBCOMM. ON THE STUDY OF MONOPOLY POWER OF THE HOUSE COMM. ON THE JUDICIARY, ORGANIZED BASEBALL, H.R. REP. NO. 2002, 82d Cong., 2d Sess. 16-50 (1952)). Blacklisting is a cause of action under the Sherman Act susceptible to a suit for treble damages. Radovich v. NFL, 352 U.S. 445, 448, 453-54 (1957).

331. L. SOBEL, *supra* note 24, at 2-3.

332. *Id.* at 4. In addition, all blacklisted players were reinstated and Federal League teams could sell their player contracts to American and National League teams. *Id.*

333. National League of Professional Baseball Clubs v. Federal Baseball Club, 269 F. 681, 682 (D.C. Cir. 1920) (reversing trial curt judgment trebling damages to $240,000 with costs and attorneys' fees), *aff'd*, 259 U.S. 200 (1922).

HeinOnline -- 73 Minn. L. Rev. 718 1988-1989

regulation by the Sherman Act.[334]

Over the next four decades, others occasionally attempted to compete, either on the major league or the minor legue level. A series of boycotts, player blacklists, price wars, legal harassment, and deliberate scheduling of conflicting games crushed these entrants.[335] Not surprisingly, almost four decades elapsed before the next serious new league attempted to enter baseball.[336] Taking on an entrenched monopolist is always a daunting task; succeeding when the monopolist is not subject to the restrictions of the Sherman Act poses insuperable obstacles.[337]

Thus, when baseball executive Branch Rickey sought to form a new Continental League in 1960, he initially sought to join the National and American Leagues as a partner, rather than a competitor.[338] When the terms for admission proved too steep,[339] Continental League officials threatened to begin economic competition.[340] This effort foundered, however, when the incumbent leagues announced their intention to expand to four new locales in 1962, including three sites the Continental League had targeted.[341] Major League Baseball subsequently has added six additional teams, further decreasing the markets available for a new entrant.

Major League Baseball's method of developing players compounds the difficulties of forming a rival league. Since

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334. Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

335. Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 604 & n.150 (1953) (citing H.R. REP. NO. 2002, 82d Cong., 2d Sess. 82 (1952)). A *monopsony* exists when a single buyer controls the entire demand for a service or commodity. *Id.* at 576 n.3.

336. THE BASEBALL ENCYCLOPEDIA, *supra* note 137, at 18.

337. During the 1940s, organized baseball brought rival leagues in Canada and Mexico within its control as "minor leagues." Leagues composed of black players survived until the lifting of the color ban in 1945. Comment, *supra* note 335, at 605-07.

338. *See* Young, *Young Ideas*, The Sporting News, Jan. 6, 1960, at 1, col. 1, 22, col. 3 (comments of Continental League founder Branch Rickey).

339. Major League Baseball required the Continental League to compensate minor league franchise owners in cities such as Minneapolis, St. Paul, and Atlanta, because the entrance of a major league team would displace their teams. King, *Talent Supply Success Key for Circuits*, The Sporting News, Jan. 6, 1960, at 1, col. 5, 22, col. 3.

340. *See, e.g.*, Foley, *B.R. Threatens Drastic Steps to Get CL Players*, The Sporting News, Apr. 27, 1960, at 14, col. 3 (William Shea, legal counsel to Continental League, threatened to raid Major League Baseball rosters to force court review of the reserve clause, and Continental League founder Branch Rickey said Continental League would raid as last resort).

341. Prell, *Delay Action Until C.L. is Counted Out*, The Sporting News, July 20, 1960, at 1, col. 4.

HeinOnline -- 73 Minn. L. Rev. 719 1988-1989

shortly after World War II, Major League Baseball has been vertically integrated, with major league teams signing unproven free agents and developing them in farm systems.[342] While rival football leagues can be staffed fairly quickly by competing with the incumbent for top college players,[343] a rival baseball league either must lure stars away from existing teams,[344] or build its own farm system from scratch. Unless Major League Baseball cooperates at the minor league level—which, given its antitrust exemption, it has little incentive to do—it is virtually impossible for a rival league to attract comparable talent.[345]

This history of the economic structure of baseball does not suggest that baseball is a natural monopoly.[346] Major League Baseball acquired monopoly power by engaging in mergers and anticompetitive acts that clearly would constitute illegal monopolization in violation of section two of the Sherman Act.[347]

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342. Branch Rickey organized the farm system in 1926. By 1951, major league clubs controlled directly or indirectly 51% of minor league clubs. NATIONAL ASSOCIATION OF PROFESSIONAL BASEBALL LEAGUES, THE STORY OF MINOR LEAGUE BASEBALL 77 (1952).

343. King, *supra* note 339, at 1, col. 5.

344. *Id.* Until the *Messersmith* arbitration in 1975, *supra* notes 136-37, Major League Baseball took the position that player contracts were indefinitely renewable. *Messersmith*, 66 Lab. Arb. (BNA) at 112-13. Luring away established players therefore has resulted in extensive contract litigation. Of course, courts may not have enforced the perpetual reserve clause. *See, e.g.*, American League Baseball Club v. Chase, 86 Misc. 441, 455-56, 149 N.Y.S. 6, 14 (N.Y. Sup. Ct. 1914) (declaring standard contract reserve invalid for lack of mutuality). Doubts about succeeding, however, could deter many entrants.

345. *See* King, *supra* note 339, at 1, col. 5.

346. *See supra* notes 320-26 and accompanying text.

347. In United States v. American Tobacco Co., 221 U.S. 106 (1911), the Supreme Court held that the merger of five companies controlling 95% of the national cigarette market, accompanied by the purchase and closing of the businesses of other rivals, constituted illegal monopolization. *Id.* at 181-83. Major League Baseball's acquisition of monopoly power through the equivalent of a merger between the National and American Leagues and the maintenance of its monopoly by its "peace agreement" with most Federal League owners, *supra* notes 330-32, appears to constitute similar conduct. In Radovich v. NFL, 352 U.S. 445 (1957), the Supreme Court held that blacklisting football players who played for rival leagues constituted a cause of action under the Sherman Act. *Id.* at 448, 453-54. Major League Baseball used blacklisting to contest the entry of the Federal and Mexican Leagues. Gardella v. Chandler, 172 F.2d 402, 403 (2d Cir. 1949); National League of Professional Baseball Clubs v. Federal Baseball Club, 269 F. 681, 687 (D.C. Cir. 1920), *aff'd*, 200 U.S. 201, 209 (1922); Comment, *supra* note 335, at 604-07. In Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972), the court enjoined the NHL from using the reserve clause in its standard player's contract because it constituted unlawful monopolization by excluding rival leagues from signing veteran players. *Id.* at 517-18. Until

HeinOnline -- 73 Minn. L. Rev. 720 1988-1989

Major League Baseball maintained its monopoly by creating new franchises to deprive new leagues of the base necessary to begin competition.[348] This conduct also probably would constitute illegal monopolization absent the exemption.[349] It is nearly impossible for a rival league currently to engage in competition with Major League Baseball. If Major League Baseball's current teams were organized into several competing entities, however, nothing suggests that such entities could not and would not engage in viable competition.

2. Football

Unlike Major League Baseball, the NFL has faced several significant challenges to its monopoly position over the last few decades. Because the NFL does not enjoy baseball's antitrust exemption,[350] the league has limits on the exercise of its economic power to maintain its monopoly. Moreover, football has several characteristics that make entry of a new league somewhat easier than in baseball, including fewer games and major college programs to develop talent. Nevertheless, the NFL has maintained its monopoly throughout this period. The circumstances surrounding the demise of economic competition in football do not, however, suggest that establishing rival football leagues is unworkable.

The All-American Football Conference was formed in 1946, but did not enjoy success as a rival league.[351] The league ignored the now-conventional wisdom that competitive balance among franchises is desirable,[352] and the Cleveland Browns became the overwhelmingly dominant team in the league.[353] Nevertheless, several of its teams eventually entered the NFL in 1949.[354]

Inter-league rivalry next existed in professional football beginning in 1960 when the AFL challenged the supremacy of

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1975, Major League Baseball employed a similar reserve clause. *See Messersmith*, 66 Lab. Arb. (BNA) 118.

348. *See supra* text following note 341.

349. *Cf.* AFL v. NFL, 323 F.2d 124, 130-31 (4th Cir. 1963) (affirming district court judgment that defendant league did not monopolize professional football by adding two expansion teams because 20 of 31 potentially desirable sites were open to plaintiff).

350. Radovich v. NFL, 352 U.S. 445, 453-54 (1957).

351. A. RONALD, ENCYCLOPEDIA OF FOOTBALL 12-6 to 7 (3d ed. 1963) [herinafter FOOTBALL ENCYCLOPEDIA].

352. *See supra* text accompanying notes 124-29.

353. FOOTBALL ENCYCLOPEDIA, *supra* note 351, at 12-6.

354. *Id.* at 12-7, 12-11.

HeinOnline -- 73 Minn. L. Rev. 721 1988-1989

the NFL.[355] At that time, the incumbent NFL had twelve franchises.[356] A court subsequently found that thirty-one cities could support major league professional football at that time.[357] Thus, ample room existed for additional competitors to enter and compete in large metropolitan areas capable of sustaining a rival league. This rivalry ended, however, with the merger of the two leagues in 1966.[358]

Since this congressionally sanctioned merger, a new football entrant must now face a giant incumbent, entrenched in all the major media markets and most of the largest markets in the country. This entrenchment may be a critical factor in explaining the inability of other leagues, such as the World Football League (WFL) and the United States Football League (USFL), to compete. Obtaining a network contract is essential for a league to compete successfully in the major league market.[359] A league's ability to locate franchises in at least some of the four or five largest metropolitan areas may be critical to securing a national network contract.[360] Moreover, disasterous managerial decisions by owners of the WFL and USFL may have contributed significantly to their lack of success.[361]

That recent attempts at entry into professional football failed does not establish football as a natural monopoly[362] any more than unsuccessful attempts to enter the aluminum industry prior to the dissolution of Alcoa demonstrated the natural monopoly status of that industry.[363] The experience of a new league facing an entrenched incumbent is not a reliable indication of the probable result should the NFL be divided into two or more competing entities, each with established franchises.

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355. *Id.* at 12-8.

356. *Id.*

357. *AFL v. NFL*, 205 F. Supp. at 76-77.

358. *See* Pub. L. No. 89-800, 80 Stat. 1515 (1966) (current version codified at 15 U.S.C. §§ 1291-1293 (1982)) (authorizing merger).

359. USFL v. NFL, 842 F.2d 1335, 1353 (2d Cir. 1988).

360. J. WEISTART, *supra* note 44, at 728-29.

361. *See USFL*, 842 F.2d at 1344 (observing that World Football League (WFL) underfinanced and located franchises in mostly smaller markets); *id.* at 1351-52 (noting extensive evidence that strategy of moving from spring to fall, escalating salary bids, and relocating franchises to markets without NFL teams in hopes of achieving merger with NFL, caused USFL downfall).

362. *See supra* notes 320-26 and accompanying text.

363. *See generally* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

HeinOnline -- 73 Minn. L. Rev. 722 1988-1989

C. THE NFL'S ARGUMENTS AGAINST COMPETING FOOTBALL LEAGUES

The NFL's merger with the AFL created a monopoly football league, and almost certainly would have violated the antitrust laws. The leagues, however, obtained a statutory exemption from Congress.[364] The merger's supporters have justified the merger by asserting that football is a natural monopoly,[365] and provide two specific reasons why having one monopoly football league instead of two rival leagues serves the public interest. The merger's proponents argue that only a single economic entity could provide a championship game and could assure the competitive balance necessary for exciting contests.[366]

The Super Bowl's television ratings certainly support the notion that fans enjoy a championship game.[367] Rival leagues, however, could agree jointly to produce a Super Bowl or a World Series.[368] Similarly, competing leagues could establish

364. Pub. L. No. 89-800, 80 Stat. 1515 (1966) (current version codified at 15 U.S.C. §§ 1291-1293 (1982)).

365. *See NFL 66 Hearings, supra* note 51, at 119-20 (memorandum of NFL to House Judiciary Committee); *see also Danforth 85 Hearings, supra* note 22, at 74-75 (testimony of Pete Rozelle).

366. *Danforth 85 Hearings, supra* note 22, at 74 (testimony of Pete Rozelle) (explaining that league's competition with rival league seriously impairs effectiveness of rules designed to equalize team strengths within league, resulting in weaker clubs' inability to sign players in competition with rival league and ever-increasing competitive imbalance); *see also* 2 *Sisk Hearings, supra* note 34, at 164 (testimony of Gerald Scully) (asserting that "[m]aintaining the highest possible absolute quality of play and establishing a champion among the contenders are sufficient justifications for the continuance of sports leagues as monopolies."); *Hoop Hearings, supra* note 168, at 342 (testimony of Roger Noll) (supporting merger in part because it will allow championship playoff); Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1, 6 (1964) (declaring that only single league can produce world champion).

367. According to the Nielsen ratings, the 10 most popular televised sports events in United States history are all Super Bowls; eight of the 10 most popular television programs in history have been Super Bowls. NATIONAL FOOTBALL LEAGUE, THE NFL AND YOU 8 (1987).

368. Pete Rozelle argued that leagues could not be expected to "in effect, hit each other over the head for all but one day of the year. You cannot have raiding of players and compete as agressively as we have been doing and then get together and play a football game." *NFL 66 Hearings, supra* note 51, at 60-61. Nonetheless, Pete Rozelle managed with some awkwardness, but not too much difficulty, to preside over a Super Bowl featuring the Oakland Raiders, whose owner was suing the rest of the league for millions of dollars. *See Raiders*, 725 F.2d at 1381. Money, along with politics and war, make strange bedfellows. Contrary to Rozelle's assertion, rival leagues, recognizing the tremendous revenue possibilities for a Super Bowl or World Series, can expect to take advantage of these opportunities in spite of personal feelings that vig-

HeinOnline -- 73 Minn. L. Rev. 723 1988-1989

inter-league play if it were popular and demanded by the fans.[369]

According to the competitive balance rationale for the merger, balance requires restrictions on player movement, such as the Rozelle Rule or a draft.[370] Again, there is no evidence that rival leagues cannot meet the legitimate goal of competitive balance. Team rivalry for player contracts actually increases competitive balance because competition allocates players more efficiently among the teams.[371] Rival leagues would be free to structure their own draft rules to ensure that the various teams in the league shared rookie stars.[372] Because maintaining fan interest necessitates competitive balance, each rival league probably would agree to share revenue among its own members to allow all franchises to compete for top rookie players. Moreover, if a common free agent draft among various competing leagues were truly necessary to assure competitive balance, the players' union probably would agree to such a draft, which would then fall within the labor exemption to the antitrust laws.[373] The arguments in support of the merger erro-

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orous economic rivalry causes. *See also Hoop Hearings*, *supra* note 168, at 229 (testimony of Lawrence Fleischer) (stating that merger is unnecessary to have championships, all-star games, or even inter-league contests).

369. *See Hoop Hearings*, *supra* note 168, at 229 (testimony of Lawrence Fleischer). *But see id.* at 1130 (testimony of Thomas Kuchel) (asserting, without explanation, that merger is prerequisite to interleague play).

370. *See NFL 66 Hearings*, *supra* note 51, at 117-19 (arguing, in NFL memorandum submitted to committee, that merger will permit player restraints so that "[c]onditions can be created where all clubs, including those in less favorably situated cities, such as Denver or Pittsburgh, can have an equal run at the league championship in competition with such cities as New York, Los Angeles, and Chicago").

371. *See supra* Part I(C).

372. *Cf. Danforth 85 Hearings*, *supra* note 22, at 74-75 (testimony of Pete Rozelle) (stating that Denver Broncos could not sign either first or second round draft pick in first seven years and Pittsburgh Steelers drafted lower-rated players whom they could sign). If the Broncos' and Steelers' inability to sign players resulted because of economic contraints and seriously endangered competitive balance, special subsidies could have given them the economic ability to compete with the rival league.

Melvin Kratter of the NBA's Golden State Warriors believed that the only reason for a merger with the American Basketball Association was to enhance competitive balance through a common draft and a modified reserve clause. Fearful that the NBA would agree to water down these restraints as the price for congressional support, *Hoop Hearings*, *supra* note 168, at 856-57, he advocated no merger and increased sharing of live gate revenues as a preferred method of promoting competitive balance. *Id.*

373. Under the labor exemption, restraints imposed on the market for players are not subject to antitrust scrutiny if the players' union agrees to them in bona fide arm's-length bargaining. McCourt v. California Sports, Inc.,

HeinOnline -- 73 Minn. L. Rev. 724 1988-1989

neously assume that only a single league successfully could implement the player restrictions necessary for competitive balance. More importantly, these arguments do not establish football as a natural monopoly.[374]

D. THE THEORETICAL ARGUMENT OF RUINOUS COMPETITION

A final argument in support of the natural monopoly theory is that competing leagues invariably will engage in ruinous competition until one or both are bankrupt. Thomas Kuchel, a former senator retained as counsel to the NBA and the American Basketball Association in their unsuccessful quest for legislation permitting a merger of the two leagues, articulated this concern most directly:

> The conditions presently confronting professional basketball result from the annual rites of self-destruction between the two leagues. Teams are quite literally forced, by the need to maintain major league status, to bid against each other annually for those college players entering professional ranks with reputations as potential superstars. The yearly bidding war with its fantastic contracts for a limited number of untested rookies—contracts which bear no relationship whatever to basketball economics—will inexorably end in ruin. Yet neither league can unilaterally retreat from that war, for to do so would be equally ruinous to it.[375]

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600 F.2d 1193, 1198 (6th Cir. 1979); Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976). The National Basketball Players' Association proposed the concept of a common draft between rival leagues, which would then compete among themselves for veteran players, but the owners of the NBA and the rival American Basketball Association (ABA), who unsuccessfully sought congressional approval for a merger, rejected the proposal. *See Hoop Hearings*, *supra* note 168, at 295 (testimony of Lawrence Fleischer).

374. As additional support for the merger, the NFL asserted that competition forced leagues to end their policy of not signing student athletes still in college, thus interfering with the integrity of college athletics. *NFL 66 Hearings*, *supra* note 51, at 115. Courts have held, however, that agreements not to sign college athletes constitute illegal restraints of trade. Haywood v. NBA, 401 U.S. 1204, 1206 (1971); Boris v. USFL, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984).

375. *Hoop Hearings*, *supra* note 168, at 93; *see also id.* at 665 (testimony of NBA Commissioner Walter Kennedy) (stating that "[i]t is the necessity to provide the fans with strongly competitive teams that has driven many clubs in both leagues to saddle themselves with contracts for untested rookies far exceeding their ability to pay.").

Later in his testimony, however, Commissioner Kennedy made clear that the real rationale for the merger was not a natural monopoly theory, but his desire to permit traditional player restraints such as a draft and a modified reserve clause necessary to promote competitive balance. *Id.* at 666; *see also id.* at 668 (testimony of ABA Commissioner Jack Dolph) (same). Similarly, NFL Commissioner Rozelle testified that some clubs had "withdrawn from the player market" and others, "under the pressure of having to remain competi-

HeinOnline -- 73 Minn. L. Rev. 725 1988-1989

Senator Kuchel did not explain why the NBA was "literally forced" to pay salaries to untested rookies that bore "no relationship whatsoever to basketball economics." One would normally expect that if ABA owners foolishly offered excessively high salaries to rookies, NBA owners would sit back happily and watch their rivals lose money.

The specter of ruinous competition often has been invoked to justify monopolies.[376] The concern usually is raised with respect to industries with large fixed costs, such as railroads or airlines.[377] The argument is that firms in these industries will inevitably lower the price charged for their services until the price equals only the cost of providing a particular item to a particular customer, thus preventing the firms from covering their overhead.[378] Bankruptcy is the eventual result.[379] Sports leagues, however, are not subject to large fixed costs.[380] Their primary costs are player salaries.[381] The Illinois Central Gulf Railroad must pay off the bonds used to finance its track from Chicago to New Orleans, regardless of the amount of freight carried over the track. By contrast, owners usually can release a player if his continued service is not economically justified.[382]

Moreover, economic theory and some empirical evidence suggest that league owners generally will not pay more in player salaries than they reasonably can expect players to produce in ticket sales and broadcast revenues.[383] The natural mo-

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tive within their own leagues and with a determination to be among those clubs which survive, are bidding for players at prices which have no relation to football economics." *NFL 66 Hearings*, *supra* note 51, at 35. Yet the NFL later made clear that the real argument supporting the merger was not a natural monopoly argument, but rather the discredited argument that monopoly over players somehow helps competitive balance. *Id.* at 116-19 (memorandum to House Judiciary Committee).

376. *See* THE POLITICS OF REGULATION 81 (J. Wilson ed. 1980) (explaining the "destructive competition" argument advanced by those wishing to implement price regulations).

377. *Id.* at 44, 81.

378. *Id.*

379. *Id.*

380. *See supra* note 321 and accompanying text (observing that annual fixed cost for sports franchise are less than $100,000).

381. *See supra* note 87 and accompanying text (discussing salaries).

382. *See supra* note 213.

383. *See* H. DEMMERT, *supra* note 85, at 25 (noting that most observers consider clubs to function as profit maximizers); L. KOPPETT, A THINKING MAN'S GUIDE TO BASEBALL 217 (1967) (observing that "when a clear-cut choice arises between more victories and more profit, the path toward more profit is chosen"); Jones, *The Economics of the National Hockey League*, 2 CAN. J. ECON. 1, 2 (1969) (suggesting that model of profit maximization explains behavior of

HeinOnline -- 73 Minn. L. Rev. 726 1988-1989

nopoly theorists fail to explained why sports owners, unlike other business executives, would contract with a player knowing that the club cannot possibly profit from that contract.[384]

Those who claim that bidding wars resulting in bankruptcy are inevitable support their argument with facts showing that teams in the midst of inter-league competition are losing money.[385] Alternative explanations exist, however, for the evidence used to show that teams are losing money. One explanation is that the figures which advocates of the ruinous competition theory tout are inaccurate—that one or both leagues actually maintain profitable operations despite the bidding war for player contracts. In other words, the reason that teams spend money on player contracts even though they are losing money is that they are not really losing money at all.

NHL franchises); Noll/Adams, *supra* note 239, at 388 (noting that during 30-year period from 1920 to 1950, St. Louis Browns and Brooklyn Dodgers continued to sell players for cash, despite their mediocre team records, thus preferring profit to victories).

Some commentators suggest that nonfinancial considerations may motivate some owners, and those owners will continue to pay players at "high, unsustainable" levels to avoid public criticism for being cheap or timid. *See, e.g.*, J. MARKHAM, *supra* note 77, at 38-39; *see also NFL 66 Hearings*, *supra* note 51, at 51 (testimony of Pete Rozelle) (observing that money is not motivating factor for all owners). The evidence cited above suggests that profits generally motivate owners. Spendthrift owners cause two easily remedied problems. In the rare event that these owners happen to own teams exclusively in the more powerful league, the new league may go out of business because of its inability to sustain an unprofitable salary structure. Such a league probably would have a valid monopolization claim. The more plausible situation would find both leagues saddled with a few deep pocket owners who view franchises as toys. In this case, their willingness to spend will throw off competitive balance in both leagues. If so, each league independently could employ internal league rules to rein in their black sheep.

384. Economist Robert Nathan, who testified in support of the basketball merger, argued that "it would be unsound economics to determine everyone's salary on the basis of the gross increment in revenues that might be traced to his efforts." *Hoop Hearings*, *supra* note 168, at 645. Nathan suggested that "under such a policy the allocation and recovery of overhead and fixed costs becomes impossible." *Id.* Nathan would be correct if basketball, like railroads, were an industry characterized by larged fixed costs and declining marginal costs of additional output, but there is no evidence that this is so. *See supra* text accompanying note 321. Moreover, as a practical matter of basketball economics, Nathan's suggestion appears incorrect. Any major professional franchise will attract a sizeable number of patrons merely by opening up the stadium and playing a talented opposing team. Marketing and promotion by the front office will attract additional fans. Thus, the owners can compensate skilled players for their incremental contibutions that add more victories or otherwise make the team more attractive, and recover a normal profit.

385. *See, e.g.*, *Hoop Hearings*, *supra* note 168, at 157-88 (testimony of economist Robert Nathan).

HeinOnline -- 73 Minn. L. Rev. 727 1988-1989

The second possibility is that an incumbent league might be engaging in predatory behavior to rebuff a new entrant.[386] In other words, teams may spend more on player contracts than they possibly can hope to realize in revenue with the expectation that they will recoup the losses later through monopoly profits, once they have eliminated the rival league.

The ruinous competition argument posits that teams pay players excessive salaries bearing "no relation" to the economics of the sport. But Roger Noll, appointed as special counsel to advise the Senate subcommittee reviewing the basketball merger, testified that his "calculations of the revenue value of superstars suggests that the top players in professional basketball really are worth the salaries they earn. . . ."[387] Moreover, franchises can take advantage of accounting devices and tax laws so they appear unprofitable even though they remain attractive as investments for their owners. The tax laws permit owners to suffer paper losses, such as the depreciation of player contracts, that do not affect the team's actual profitability.[388] In addition, owners can use expenses other than player costs, such as administrative or front office expenses, to take out profits in the form of salaries paid to themselves or their relatives. The prices of franchises resold at a time when a league is bemoaning financial losses is probably more indicative of a league's true financial health. During the period of the "ruinous" professional basketball war to which Senator Kuchel alluded, for example, NBA franchises continued to increase in value.[389]

The predatory argument requires more elaboration. A new entrant willingly will lose a lot of money in the early years to establish itself as an entity of major league quality. Given that the cost of acquiring an existing or even an expansion franchise in an entrenched monopoly league is considerable, it is sensible to join a rival league for a modest entry fee, suffer some initial

386. *See generally* E. MANSFIELD, *supra* note 54, at 286-87 (explaining tactic of predatory pricing to drive rival firm out of business).

387. *See Hoop Hearings*, *supra* note 168, at 403.

388. Noll concluded that tax laws allowed a franchise to reflect a paper loss of $1 million and a cash flow loss of $600,000 and still be profitable for the owner. *Id.* at 341; *see also id.* at 228 (testimony of Lawrence Fleischer).

389. *Id.* at 228 (testimony of Lawrence Fleischer) (estimating franchise values have increased from $1.25 million to $3.8 million); *id.* at 234 (observing that San Diego Rockets paid fee of $1.75 million to join NBA and receive roster of expansion players; four years later, owner claimed financial difficulties and sold team for relocation in Houston for a $4 million profit on his original investment).

HeinOnline -- 73 Minn. L. Rev. 728 1988-1989

losses while the league develops credibility, and then merge with the incumbent league, thereby acquiring benefits of participating in a monopoly league.[390] Thus, a new entrant who foresees eventual merger and inclusion in the monopoly sports league, rather than competition on equal terms, will spend more—perhaps to levels that Senator Kuchel considers to have no relation to economics—than an entrant who foresees only continued vigorous competition.[391]

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390. *Cf.* 1 *Sisk Hearings*, *supra* note 34, at 263 (testimony of World Hockey Players' Association head Ronald Roberts) (noting that WHA teams lost $1 million in first year, but paid between $25,000 and $250,000 to join, in contrast to $6 million price recent NHL expansion franchises paid); *Hoop Hearings*, *supra* note 168, at 292 (testimony of Lawrence Fleischer) (observing that ABA owners set up new league because it was cheaper to enter NBA through rival league than to buy in through fee for expansion franchise).

The potential capital gain realized if a franchise in a new league merged into a single monopoly league explains why 11 franchises remained in operation in the ABA despite a "record of dismal financial performance." *Id.* at 191-92 (testimony of economist Robert Nathan) (finding continued operation "remarkable"). Indeed, Roger Noll concluded that the ABA deliberately fostered increased bidding for players prior to consummation of the merger agreement, to bring the NBA to the merger table. *Id.* at 369; *see also id.* at 858-59 (testimony of Golden State Warriors executive Melvin Kratter) (noting that not all ABA decisions were "pure business judgments" but some ABA officials believed that "they were going to be able to force their way into free NBA franchises").

391. *See Hoop Hearings*, *supra* note 168, at 370 (testimony of Roger Noll) ("if competition were permanent, we would predict that the salaries that rookies would sign for would be lower in the long run than they are now because at least some of the salaries now being paid are not just payments for the value of players. They are in addition, payments to force costs up and thereby force a merger."); *id.* at 859 (testimony of Golden State Warriors executive Melvin Kratter) (explaining that "businessmen eventually, in both leagues, will begin to exercise some business restraints instead of indulging in this hysterical competition, and I believe that that will lend itself to a self-leveling of the market, which has, in fact, already occurred" (citing San Diego decision not to draft Pete Maravich)).

Similar business behavior occurs in the newspaper industry. For example, Detroit's two newspapers entered into an all-out war of heavy spending and massive discounting either to drive their rivals out of business or to persuade Attorney General Edwin L. Meese III to permit them to operate jointly. *See* Barnett, *Detroit's High-Stakes Failure Game*, COLUM. JOURNALISM REV., Jan./Feb., 1988, at 40, 41. If the newspapers' efforts to obtain governmental approval of a joint operating agreement fails, Professor Barnett predicts that both parties would change their policies to end their losses. *Id.* at 42. Two lower courts have affirmed Attorney General Meese's finding that the Detroit Free Press—because it had incurred, and will continue to incur, losses that would have led to its demise if a large corporate parent did not own it—was a "failing newspaper" for purposes of The Newspaper Preservation Act's partial exemption to newspapers that enter into joint operating agreements. Michigan citizens for an Independent Press v. Thornburgh, 695 F. Supp. 1223 (D.D.C. 1988), *aff'd*, 868 F.2d 1285 (D.C. Cir.), *cert. granted*, 57 U.S.L.W. 3722

HeinOnline -- 73 Minn. L. Rev. 729 1988-1989

How will the incumbent league respond? In most industries, existing firms faced with new rivals react by reducing prices, but they are not expected to lower the price below the marginal cost of production.[392] A team without hopes of future monopoly profits may raise salaries, but it has no reason to raise them above the revenue it expects the players to produce.

In contrast, an incumbent league's owners might choose a strategy that anticipates future monopoly profits. Expectation of monopoly profits may explain why the league would pay salaries that bear no immediate relationship to the economics of the sport, to paraphrase Senator Kuchel.[393] If the incumbent league is more able than the new rival league to withstand losses, it may pay "unsustainable" salaries in hopes of driving the new league into bankruptcy.[394]

For example,[395] the NFL merely outlasted its WFL and USFL rivals.[396] In both of these cases, the new leagues went out of business and owners in the incumbent NFL were then free to return to monopoly behavior.[397] If a new league were starting to crumble, the incumbent league might facilitate its

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(1989). *But see id.*, 868 F.2d at 1297 (Ginsburg, J., dissenting) (lamenting failure of Attorney General to explain cogently why parties would not, absent promise of "pot of gold" of legally sanctioned joint agreement, adopt profitable marketing strategies).

392. *See* E. MANSFIELD, *supra* note 54, at 134-36 (explaining effect of new firm's entrance into market on existing firm's price).

393. *Hoop Hearings*, *supra* note 168, at 93.

394. Testimony in congressional hearings offered insight on this point:

> Since the NBA teams operate in larger cities and have a more established following, they can afford to pay higher salaries than their fledgling competitors. By offering to pay enormous salaries, the NBA could force the ABA to assume a payroll that precluded a chance for profit, or could relegate the league to minor league status. Some players might be offered even more than their expected contribution to team revenues—just as in the days when predatory price cutting caused some goods to be sold at prices below cost—because high salaries would lead to higher future profits if they contributed to the financial demise of the competition.

Id. at 409 (testimony of Roger Noll and Benjamin Okner); *see also id.* at 292 (testimony of Lawrence Fleischer) (stating that NBA "felt an absolute need to maintain its monopoly by destroying this new fledgling league").

395. In citing these examples, this Article does not mean to suggest that the NFL necessarily was behaving predatorily. It is possible that it merely was sharing some of its monopoly profits with its players.

396. *Cf. supra* notes 359-61 and accompanying text (discussing USFL and WFL).

397. NFL salaries escalated sharply after the entrance of the USFL. Annual salary increases were much more modest after the rival league's demise. FEDERATION OF PROFESSIONAL ATHLETES, AFL-CIO, LAWDIBLE, vol. 8, no. 5, (Nov. 1987).

HeinOnline -- 73 Minn. L. Rev. 730 1988-1989

decline by offering to accept several franchises into its fold.[398] When a competing league, such as the AFL, appears well-positioned to continue vigorous competition, a truce usually is declared,[399] the new entrants are allowed to join the incumbent with little or no entrance fee,[400] and the incumbent benefits by restoring its monopoly.[401]

Although some dispute the likelihood of predation in a typical industry,[402] predation is much more plausible in sports. Unlike new competitors in most industries, an entrant in a sports market cannot succeed via price competition, that is, by offering what may be an inferior product at a lower price.[403] Most fans are likely to insist on major league talent.[404] Most important, however, a significant portion of revenue comes from broadcasting on free television.[405] A new league cannot possibly persuade fans to watch inferior games, when for the same price (zero) they can watch the incumbent's superior product.[406]

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398. *See* 1 *Sisk Hearings*, *supra* note 34, at 394 (testimony of ABAPA General Counsel Prentiss Yancey) (stating that ABA was on its way up and had best year in nine-year existence, but was killed by application of New York Nets and Denver Nuggets for NBA membership). One of the allegations of illegal monopolization in *USFL v. NFL* was that the NFL made overtures to a few successful USFL owners, such as Donald Trump, concerning possible admission of their teams into the NFL. 842 F.2d at 1342-43. Although the jury verdict does not specify the precise conduct that the jury found illegal, the jury did find that the NFL had unlawfully maintained its monopoly power. *Id.* at 1353.

The capital gain to an entrant league's franchises that merge with the established league often will be enough to compensate those owners whose teams were not fortunate enough to obtain permission to merge. *See* 1 *Sisk Hearings*, *supra* note 34, at 632 (testimony of NBA Commissioner Lawrence O'Brien) (four ABA teams merging with NBA made "accommodations" with at least two other ABA franchises).

399. *See supra* notes 355-58 and accompanying text.

400. *See supra* notes 390-91 and accompanying text.

401. *See supra* note 397 and accompanying text.

402. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-91 (1986) (asserting that predatory pricing is "rarely tried, . . . even more rarely successful"). *But see* Ordover & Wall, *Proving Predation after* Monfort *and* Matsushita*: What the "New Learning" Has to Offer*, ANTITRUST, Summer 1987, at 5 (arguing that many scholars perceive predatory pricing as threat).

403. *See* 1 *Sisk Hearings*, *supra* note 34, at 486 (testimony of WHA Cleveland owner Jay P. Moore) (stating that he could not compete against NHL on price; tried cutting ticket prices but attendance didn't increase).

404. *Id.*

405. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1199 (D.C. Cir. 1979) (McKinnon, J., concurring in part, dissenting in part) (noting television revenue constituted approximately 30% of NFL teams' total revenue).

406. *See* 2 *Sisk Hearings*, *supra* note 34, at 474 (testimony of WFL Birming-

HeinOnline -- 73 Minn. L. Rev. 731 1988-1989

Concern about this problem led one thoughtful student commentator to suggest that fans "may be unwilling to give long-term support to two independent leagues in a sport, each claiming to be 'major.' If support gravitates to one league as 'superior,' that league will be able to outbid the other for players and will establish a decisive dominance.[407] Professor John Weistart has endorsed this theory. He concluded that fans eventually will decide that one league or the other is superior, broadcasters will follow consumers' preference, and the inferior league will decline rapidly.[408]

This scenario, although entirely speculative, is plausible in the context of competition between an entrenched league and a rival, or between two new leagues in a sport undeveloped in the United States, such as soccer or lacrosse. It is less plausible that the divestiture of existing monopoly leagues into competing leagues will result in one dominant league. For example, a few exciting National League seasons might result in a more lucrative television contract for that league, perhaps giving National League franchises some advantage in bidding against American League teams. Unlike new leagues, however, American League franchises have a well-developed base of fan support. An established league should have little difficulty obtaining the capital necessary to continue to compete with its cash-rich rival for quality players. Although a decline in quality might cause fans across the country to watch fewer televised American League games, loyal fans would be unlikely to desert their local heroes to watch allegedly superior contests between National League teams unless the American League's decline in quality were substantial.

Predatory practices are thus unlikely to occur in sports in which well-established rival leagues compete. Imagine a world inhabited by three baseball entities: the National, American,

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ham owner A. E. Burgess) (fans will not watch unless league plays best teams). Although fewer fans watched AFL games and their broadcast rights sold for a smaller amount than the NFL's, the AFL nevertheless, was able to attract a sizeable audience; *see also id.* at 294 (testimony of Deputy Assistant Attorney General Joe Sims) ("The NBC contract for the AFL did not produce anywhere near the kind of money that the CBS contract produced for the NFL, but the AFL was able to survive and was able to prosper.") If the current monopoly leagues were divided into several entities of roughly comparable talent, each league should be able to maintain fan interest, although a league perceived to be substantially inferior probably risks losing many of its fans.

407. HARVARD Note, *supra* note 121, at 432.

408. J. WEISTART, *supra* note 44, at 728.

HeinOnline -- 73 Minn. L. Rev. 732 1988-1989

and Continental Leagues. If a new United States Baseball League (USBL) sought to enter the market, it might lose money during its early years as it signed expensive player contracts and before it had developed a fan following. Absent collusion, the three incumbent leagues would not respond by raising their salaries to unprofitable levels. National League owners would have no incentive to lose money in order to keep out the USBL, because even if they succeeded, they still would be competing with the American and Continental Leagues. Only the prospect of future monopoly profits gives league owners an incentive for predatory conduct that is unprofitable in the short run. If monopoly leagues were clearly illegal, owners would not engage in predation. Competition would be the norm in baseball and football.

IV. MONOPOLY LEAGUES, RIVAL LEAGUES, AND THE ANTITRUST LAWS

Representatives from both Major League Baseball and the NFL have complained about the effect of the antitrust laws on their leagues. In a memorandum submitted to the House Judiciary Committee, Major League Baseball's legal counsel wrote that the rule of reason analysis which courts used in antitrust cases would not "provide meaningful protection for the basic practices of Baseball in the event the sport lost its existing antitrust immunity."[409] NFL Commissioner Pete Rozelle has commented that NFL owners are "damned in antitrust if they do, and damned in antitrust if they don't."[410]

The criticisms have merit. Courts have not done a particularly good job of analyzing allegations that activities of monopoly sports leagues unreasonably restrain trade. When courts discover monopolistic practices, they prefer to break up the monopoly so that the market can provide its own self-correcting form of regulation. Divestiture is likely to maximize welfare for consumers more accurately than would a judge's well-meaning regulatory edicts. When fashioning antitrust remedies, courts thus prefer to establish rules that foster competition rather than to attempt to regulate monopolies. In contrast to the problems that exist in judging the legality of conduct by monopoly sports leagues, courts sensibly can apply existing antitrust doctrines to regulate competition among competing

409. *Rodino 82 Hearings*, *supra* note 29, at 445 (Memorandum of Arnold & Porter).
410. *Id.* at 185.

HeinOnline -- 73 Minn. L. Rev. 733 1988-1989

leagues.[411]

When the defendant is one of several rival leagues, courts should sustain most of the practices that have been challenged as antitrust violations over the past thirty years. The antitrust laws would serve primarily to ensure that agreements *between* the leagues did not impair meaningful inter-league rivalry or prevent new leagues from entering the marketplace. Thus, the current state of antitrust law justifies a divestiture of Major League Baseball and the NFL into several competing leagues in two discrete respects: divestiture will free leagues and courts from the difficult and possibly intractable regulation of agreements among owners in a monopoly league, while existing law provides a workable structure for oversight of competition among rival leagues.

A review of reported cases involving antitrust suits directed against the major professional leagues in baseball, football, basketball, and hockey reveals that most cases concern agreements among the owners of a single league. These cases raise difficult antitrust issues when the league is a monopolist. The court either must allow the monopoly league to do as it wishes or intervene and determine whether the challenged restraint is reasonable under the circumstances.[412] Because monopoly sports leagues, if courts do not restrain them, will cause significant harm to taxpayers and fans, intervention is desirable.[413] Judicial intervention, however, often puts the court in the role of sports regulator, for which the judge, or for that matter any governmental official, is ill-suited.[414]

When rival leagues vigorously compete in the same market, however, judges need not so carefully scrutinize agreements among owners in any one league. In such cases, judges

411. *See infra* notes 448-60 and accompanying text.

412. Major League Baseball officials have expressed a fear that courts might condemn agreements among members of a league as per se illegal under the antitrust laws without considering the facts and justifications for such agreements. *See* SISK REPORT, *supra* note 25, at 52-53. The Supreme Court subsequently has made clear that these fears are unfounded. In *NCAA v. Board of Regents*, 468 U.S. at 100-01, the Court held that courts would evaluate league rules by the rule of reason—which inquires into the particular market context and the defendant's justifications—because in sports "horizontal restraints on competition, or agreements among competitors, are essential if the product is to be available at all;" *see also id.* at 101 (quoting R. BORK, THE ANTITRUST PARADOX 278 (1978) ("When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.")).

413. *See generally supra* Part I.

414. *See supra* Part II.

HeinOnline -- 73 Minn. L. Rev. 734 1988-1989

can defer more confidently to independently determined policies of the defendant league. If the league's policies are inefficient or otherwise contrary to consumers' interests, the league will suffer in the marketplace as rivals woo the defendant's customers.[415]

The largest number of reported antitrust cases against major sports leagues[416] involve players or other employees who claim that the leagues unreasonably restricted the market for their services.[417] Even when the defendant is a monopoly sports league, the courts have analyzed the challenged agreements under the rule of reason.[418] The challenged agreements, however, often have been held illegal.[419] Most restrictive

415. *Cf.* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51, 52 & n.19 (1977) (adopting more relaxed standard of antitrust treatment for certain agreements because "when interbrand competition exists . . . it provides a significiant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product"); *see also* 2 *Sisk Hearings*, *supra* note 34, at 286 (testimony of Joe Sims) ("Competition between rival leagues in the same sport is very natural, and it does not involve some of the difficult questions which must be faced when analyzing intra-league restraints" of monopoly sports leagues.).

416. This analysis studies basketball and hockey as well as football and baseball, in order to explore fully the range of possible litigation that may be brought against monopoly leagues now and might be brought in the future against competing leagues. *But see supra* note 14.

417. Football cases: Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); Powell v. NFL, 678 F. Supp. 777 (D. Minn. 1988); Zimmerman v. NFL, 632 F. Supp. 398 (D.D.C. 1986); Boris v. USFL, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984); Hayes v. NFL, 469 F. Supp. 247 (C.D. Cal. 1979); Alexander v. NFL, 1977-2 Trade Cas. (CCH) ¶ 61,730 (D. Minn. 1977); Bowman v. NFL, 402 F. Supp. 754 (D. Minn. 1975); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974); Beach v. NFL, 331 F. Supp. 249 (S.D.N.Y. 1971).

Baseball cases: Flood v. Kuhn, 407 U.S. 258 (1972); Salerno v. American League, 429 F.2d 1003 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); Tepler v. Frick, 204 F.2d 506 (2d Cir. 1953); Kowalski v. Chandler, 202 F.2d 413 (6th Cir.), *aff'd sub nom.* Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Martin v. National League, 174 F.2d 917 (2d Cir. 1949).

Basketball cases: Haywood v. NBA, 401 U.S. 1204 (1971); Wood v. NBA, 809 F.2d 954 (2d Cir. 1987); Bridgeman v. NBA, 675 F. Supp. 960 (D.N.J. 1987); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975); Saunders v. NBA, 348 F. Supp. 649 (N.D. Ill. 1972); Hawkins v. NBA, 288 F. Supp. 614 (W.D. Pa. 1968); Molinas v. NBA, 190 F. Supp. 241 (S.D.N.Y. 1961).

Hockey cases: McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979); Neeld v. NHL, 594 F.2d 1297 (9th Cir. 1979); Boston Professional Hockey Ass'n v. Cheevers, 472 F.2d 127 (1st Cir. 1972); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977).

418. *See* NCAA v. Board of Regents, 468 U.S. 85, 100 (1984); *Smith*, 593 F.2d at 1181; *Mackey*, 543 F.2d at 619-20.

419. *See, e.g.*, *Haywood*, 401 U.S. 1204 (striking down league rule against

HeinOnline -- 73 Minn. L. Rev. 735 1988-1989

agreements not only give a player *no* opportunity to receive competing bids for his services, but courts typically have found them to be much more restrictive than necessary to accomplish whatever justifiable goals the league purports to have in adopting them.[420]

Courts can be more tolerant of restraints on players in a world of competing leagues. Such leagues are less likely to adopt rules that are not truly justified by some legitimate competitive goal, such as promotion of competitive balance or more exciting games.[421] If teams from different leagues are bidding for their services, players will bargain for salaries approximating their full market value. No single league will depress salaries artificially through player restraints. Similarly, so long as players can receive truly competitive bids from different leagues, a player will be unable to demonstrate that one particular league's rules have harmed him. If, for example, the USFL and the AFL each had one or more teams actively bidding for the services of All-Pro tight end John Mackey in the 1970s, he could hardly have claimed significant injury because the National Football League allowed only the Baltimore Colts to bid on him. Thus, if vigorous inter-league competition actually existed for players, an intra-league restraint that one league independently adopted would not usually constitute an unreasonable restraint of trade.[422]

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drafting college underclassmen); *Mackey*, 543 F.2d at 623 (striking down restraints on competition for players' services); *Kapp*, 390 F. Supp. 73 (holding NFL draft illegal); *Robertson*, 389 F. Supp. 867 (striking down NBA draft and rules limiting competition for players' services); *Boris*, 1984-1 Trade Cas. (CCH) ¶ 66,012 (striking down league rule against drafting college underclassmen).

420. *See supra* text accompanying notes 154-58.

421. *See supra* Part I(C).

422. Indeed, the bidding war between the NFL and rival leagues such as the AFL and the USFL was extremely vigorous, although in most cases there was only one franchise per league entering the bidding. *See, e.g.*, Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir. 1966) (concerning AFL team's attempt to enjoin college player from contracting with NFL team).

The discussion in the text applies to most of the player restraint cases cited at note 417, *supra*. A few cases fall into other categories. Some involve decisions permitting monopoly leagues to boycott players found to be involved in gambling or other activities that affect the integrity of the game, or whose physical conditions involve severe risk of injury. *See, e.g.*, Neeld v. NHL, 594 F.2d 1297 (9th Cir. 1979) (holding player with only one eye not permitted to play); Molinas v. NBA, 190 F. Supp. 241 (S.D.N.Y. 1961) (upholding indefinite suspension for gambling). If monopoly leagues properly can bar such players, *a fortiori* rival leagues can do so. Other cases forbid leagues from adopting rules barring college players from turning pro before the expiration of their

HeinOnline -- 73 Minn. L. Rev. 736 1988-1989

A second major source of antitrust litigation involves suits challenging franchise relocation, expansion, or other internal league decisions.[423] When plaintiffs have brought such suits against monopoly sports leagues, they often have persuaded courts that without judicial intervention fans will be denied the opportunity to watch desired contests, and that the defendant's refusal to expand or permit a relocation is motivated by monopolistic self-interest.

Most of these suits never would have been brought in a world of competing leagues. The bitterly contested litigation between the NFL and Raiders' owner Al Davis concerning Davis's decision to relocate his team from Oakland to Los Angeles

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college eligibility. *See, e.g.*, Haywood v. NBA, 401 U.S. 1204 (1971); Boris v. USFL, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984). These rules would be easier to sustain legally if done unilaterally by a single league. So long as rival leagues do not agree jointly to boycott college athletes, however, competitive pressures probably will induce all leagues to go after athletes who wish to turn pro. The best explanation for why rival leagues would decide not to pursue talented players is fear of concerted retribution from colleges or their coaches. *See, e.g.*, *id.* at ¶ 68,462. If so, college coaches should be sued along with the leagues for conspiring to prevent players from turning pro.

423. *See, e.g.*, NBA v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir. 1987) (finding NBA effort to determine initially proposed relocation of Clippers from San Diego to Los Angeles not capable); *Raiders*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) (overruling league denial of permission for Raiders to move from Oakland to Los Angeles); Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527 (7th Cir. 1978) (concerning Commissioner veto of cash sale of three star A's players); Washington v. American League, 460 F.2d 654 (9th Cir. 1972) (concerning league approval for relocation of Seattle Pilots to Milwaukee and refusal to grant expansion franchise for Seattle); Buffalo v. Atlanta Hawks Basketball, Inc., Civ. No. 76-0261 (W.D.N.Y. June 15 1976) (approving of planned relocation of Buffalo franchise to Florida), *cited in* J. WEISTART, *supra* note 44, at 716-19; Wisconsin v. Milwaukee Braves, Inc., 1966 Trade Cas. (CCH) ¶ 71,738 (Cir. Ct. Milw. Co.) (overruling league approval for relocation of Braves to Atlanta and refusal to grant expansion franchise for Milwaukee), *rev'd on other grounds*, 31 Wis. 2d 699, 144 N.W.2d 1, *cert. denied*, 385 U.S. 990 (1966).

Except for *Finley*, these cases all concern franchise location or expansion. *Finley* involved an antitrust challenge by the owner of the Oakland A's to Commissioner Bowie Kuhn's exercise of power granted to him in the Major League Baseball Constitution to take steps necessary "in the best interests of the national game of Baseball." *Finley*, 569 F.2d at 533 n.11. Kuhn exercised this power to void a sale of three star players for cash. *Id.* at 531. The Seventh Circuit dismissed the Sherman Act counts because of baseball's antitrust exemption. *Id.* at 541-42. Were baseball subject to the antitrust laws but broken into several leagues, Finley's suit probably would not have prevailed. With various leagues competing, courts would give great leeway to individual league determinations of whether players should be sold for cash. If barring cash sales hurts the efficient allocation of players and results in less exciting and competitive races, other leagues can be expected to permit cash sales and draw fans—at least on television—to view their contests.

HeinOnline -- 73 Minn. L. Rev. 737 1988-1989

over the league's objection,[424] serves as a prime example. If competing leagues existed, the controversy probably never would have arisen.[425] If the AFL had a team in Anaheim, the Los Angeles Rams probably would not have moved there from Los Angeles; thus the Los Angeles Coliseum Commission probably would not have been interested in offering concessions to lure the Raiders to Los Angeles. Assume, however, that Anaheim had no AFL team, and the Rams had moved. Although the NFL still might have prohibited any of *its* teams from moving to Los Angeles, the rival AFL would have been happy to let Al Davis move his Raiders to Los Angeles.[426]

As a legal matter, the prospect of rival league expansion or relocation would make it virtually impossible for a city[427] or a maverick owner to prove that the defendant league harmed competition. If, as the Ninth Circuit found in *Raiders*, the Los Angeles market is large enough to support two teams,[428] or, as the Milwaukee County Circuit Court found in *Braves*, baseball

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424. *See Raiders*, 726 F.2d 1381 (9th Cir. 1984) (involving suit challenging NFL's rule requiring approval of Raiders' relocation).

425. Ironically, Al Davis had previously served as Commissioner of the AFL and was planning to add an AFL expansion team in Anaheim at the time of the NFL merger. D. HARRIS, *supra* note 30, at 308.

426. For example, the *Raiders* court was concerned that the proposed relocation was denied because the league wished to protect the Los Angeles Rams from competition. *Raiders*, 726 F.2d at 1395, 1397. The court hearing the *Milwaukee Braves* case found that expansion to Milwaukee was denied to perpetuate Major League Baseball's monopoly. *Milwaukee Braves*, 1966 Trade Cas. at ¶ 82,404. Owners in a monopoly sports league have an incentive to bar efficient relocations in order to preserve their own exclusive territories, even if the league as a whole and fans would prefer that a large metropolitan area host two or more franchises, *see supra* text accompanying notes 61-67, and such owners also have an incentive artificially to restrain the number of franchises, *see supra* text accompanying notes 56-60.

427. *Raiders* also held that the NFL's refusal to authorize the relocation to Los Angeles unlawfully lessened competition among stadiums to secure NFL tenants. *Raiders*, 726 F.2d at 1395. For a withering critique of this holding, see Roberts, *supra* note 246, at 285-90. This aspect of *Raiders* seems incorrect. Once the league determines that there will be only 28 franchises—a decision not challenged in *Raiders*—which stadiums get the leases is of no competitive significance. *Cf.* A.H. Cox & Co. v. Star Mach. Co., 653 F.2d 1302, 1307 (9th Cir. 1981) (substituting one exclusive dealer for another is not antitrust violation). Indeed, from the point of view of a consumer-oriented antitrust policy, league decisions consistently prohibiting relocations would be beneficial, rather than harmful. If cities knew that teams could not relocate, the teams would not be able to obtain massive tax subsidies. Unfortunately, the NFL has not consistently applied such a no-relocation rule. *Raiders*, 726 F.2d at 1397.

428. 726 F.2d at 1395.

HeinOnline -- 73 Minn. L. Rev. 738 1988-1989

can expand and Milwaukee can support an expansion team,[429] one can expect rival leagues to fill the void. Thus, unless the number of teams that a particular metropolitan area can support exceeds the number of competing leagues that exist, which is for the forseeable future an unlikely prospect, except for relocations to the New York area, courts should sustain against antitrust challenge individual decisions by one of several competing leagues concerning franchise relocation.[430] Courts should not, of course, tolerate collusion among rival leagues on these issues.

A third source of significant antitrust litigation concerns the sale of rights to broadcast the monopoly sports league contests. Even though package agreements may promote competi-

429. Wisconsin v. Milwaukee Braves, Inc., 1966 Trade Cas. (CCH) ¶ 71,738, at 82,411 (Cir. Ct. Milw. Co.).

430. For example, the NCAA attempted to justify its restrictions on college football telecasts by arguing that such restrictions were necessary to allow members to compete with other forms of entertainment. The Supreme Court rejected this argument, based on the trial court's finding that there were no adequate substitutes for college football. *NCAA*, 468 U.S. at 115. The court noted, however, that "if the NCAA faced 'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete." *Id.* at 115 n.55; *see also* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296 (1985) (holding cooperative wholesalers could exclude plaintiff where alternatives were available).

Some suggest that the Supreme Court's decision in United States v. Topco Assocs., 405 U.S. 596 (1972), unduly restricts league regulation of franchise relocation, and that the Court therefore should overrule it. *See, e.g.*, Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157, 189-93 (1984). Whether or not the Court should overrule *Topco*, the case does not bar antitrust as a workable regulator of competing leagues. *Topco* involved an agreement among competing retailers to use exclusive territories in selling house brand groceries. *Topco*, 402 U.S. at 602-04. On remand, the district court implemented a less restrictive territorial scheme to protect the defendant's legitimate goals. *Topco*, 1973 Trade Cas. (CCH) ¶ 74,485 (N.D. Ill.), *aff'd per curiam*, 414 U.S. 801 (1973). Thus, at most, *Topco* would render suspect a league rule giving members automatic vetoes over relocations into their home territory. A league rule that determined whether to permit relocations on a case-by-case basis thus would be distinguishable.

Moreover, *Raiders* strongly implies that the NFL probably could have rejected the Raiders move if Los Angeles could not support two football teams. *See Raiders*, 726 F.2d at 1397. Yet with competing leagues, a plaintiff challenging a franchise relocation denial would have the difficult task of arguing that a market is large enough for multiple teams, but for some reason rival leagues who have chosen not to place franchises there do not share this judgment. The only circumstance in which franchise relocation decisions might be challenged is that in which a metropolitan area is so large that it can support more teams than there are rival leagues.

HeinOnline -- 73 Minn. L. Rev. 739 1988-1989

tive balance and ensure that franchises in smaller locales have access to television markets, the courts have been particularly critical of agreements prohibiting the telecasting of certain games in specific locations.[431] In response, Congress passed an antitrust exemption to facilitate package sales.[432] This exemption covers only the sale of rights to "sponsored telecasting," however, which arguably does not apply to package sales to cable networks.[433] When no exemption applies, courts must determine whether a challenged broadcast rights agreement restricts viewership from what "would otherwise be" the case.[434] Because monopoly leagues have an incentive to enter into anticonsumer agreements to enhance monopoly profits,[435] courts must carefully scrutinize nonexempt package sales to protect consumers.

With competing leagues, however, each league's separate package sale would be more likely to survive antitrust scrutiny, regardless of the statutory exemption,[436] because viewers could choose among televised games of the various leagues. Recent litigation concerning college football telecasting supports this conclusion. In *National Collegiate Athletic Association v. Board*

431. *See, e.g.*, United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953).

432. Sports Broadcasting Act, Pub. L. No. 87-331, 75 Stat. 732 (1961) (codified as amended at 15 U.S.C. §§ 1291-1295) (1982)). Because the NFL package television contracts might violate the antitrust laws if the exemption did not apply, there has been some litigation concerning the specific terms of the 1961 Act by those hoping to show that the NFL exceeded the terms of the exemption. *See, e.g.*, Colorado High School Activities Ass'n v. NFL, 711 F.2d 943 (10th Cir. 1983) (addressing precise scope of provision of 15 U.S.C. § 1293 denying antitrust exemption to NFL if it telecasts during high school games when proper notice is given); WTWV, Inc. v. NFL, 678 F.2d 142 (11th Cir. 1982) (addressing whether station outside 75-mile territory in which blackouts are permitted could broadcast its signal to viewers within Miami territory); Blaich v. NFL, 212 F. Supp. 319 (S.D.N.Y. 1962) (addressing whether Sports Broadcasting Act applies to NFL decision to blackout championship game in New York).

Congress included baseball within the Sports Broadcasting Act's protection, notwithstanding baseball's general exemption from antitrust scrutiny. *See* 15 U.S.C. § 1291 (1982). Before the statute's enactment, two reported attacks on the sale of baseball broadcast rights were unsuccessful. *See* Portsmouth Baseball Corp. v. Frick, 21 F.R.D. 318 (S.D.N.Y. 1958) (involving suit by minor league team for injuries due to broadcast of major league games into local territory); Liberty Broadcasting System v. National League Baseball Club of Boston, Inc., 1952 Trade Cas. (CCH) ¶ 67,278 (N.D. Ill.) (upholding baseball's restriction of transmission of official scorer's accounts of games).

433. *See Metzenbaum Hearings, supra* note 222, at 53-54 (written statement of Stephen F. Ross) (citing legislative history).

434. *See NCAA*, 468 U.S. at 107.

435. *See supra* Part I(D).

436. Of course, the exemption will continue in place after a divestiture order.

HeinOnline -- 73 Minn. L. Rev. 740 1988-1989

of Regents of the University of Oklahoma,[437] the Supreme Court struck down an agreement among all the members of the NCAA that limited college football telecasts to two or three games each Saturday and which restricted the number of times any team could appear on television.[438] After this decision, separate groups of colleges that compete with each other for viewers entered into restrictive agreements with various networks.[439] Courts have treated these agreements more favorably.[440]

The final major source of antitrust litigation is rival leagues which allege that the entrenched incumbent leagues unlawfully monopolized the market.[441] Although predatory conduct would, of course, continue to be illegal following a

437. 468 U.S. 85 (1984).

438. *Id.* at 120.

439. *See e.g.*, Association of Indep. Television Stations, Inc. v. CFA, 637 F. Supp. 1289, 1291 (W.D. Okla. 1986) (stating that two different groups of colleges, CFA and Big Eight Conference, signed television agreements with ABC sports).

440. *See, e.g.*, *id.* at 1298-1302 (noting significant difference between challenge to NCAA exclusive contract and challenge to contract with CFA, which competes with other college and professional teams for Saturday afternoon telecasts); *cf. NCAA*, 468 U.S. at 115 n.55 (stating that collective action is permissible if defendant faces competition for substitute products). *But see* Regents of the Univ. of Cal. v. American Broadcasting Corp., 747 F.2d 511, 516-19 (9th Cir. 1984) (holding illegal agreement among members of CFA, which represents most major college football teams, not to allow games with nonmembers televised except pursuant to its contract with ABC).

441. USFL v. NFL, 842 F.2d 1335 (2d Cir. 1988); *In re* Professional Hockey Antitrust Litigation, 531 F.2d 1188 (3d Cir. 1976); AFL v. NFL, 323 F.2d 124 (4th Cir. 1963); American Basketball Ass'n Players' Ass'n v. NBA, 72 F.R.D. 594 (S.D.N.Y. 1976); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

A variety of other suits against monopoly sports leagues would not succeeded against a league without monopoly power. In North Am. Soccer League v. NFL, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), the court struck down an NFL rule barring its owners from also owning soccer franchises. *Id.* at 1261. The court found that the number of individuals with the wealth and expertise to operate sports franchises was quite limited and the rule made it unreasonably difficult for a potentially competitive sport to get started. *Id.* at 1259-61. If there were several competing football leagues, however, each one's unilateral decision to forbid cross-ownership simply would not have had this effect. Given the desire by certain owners to be involved in more than one sport, *see* D. HARRIS, *supra* note 30, at 99, the threat of a Miami Dolphins owner Joe Robbie, for example, to take his talents to a rival football league probably would deter an independent AFL from preventing Robbie's ties to a franchise in another sport.

Radovich v. NFL, 352 U.S. 445 (1957), involved a boycott of players who previously had breached NFL contracts to play in the rival All-American Football Conference. If Radovich could have peddled his talents to the AFL or the

HeinOnline -- 73 Minn. L. Rev. 741 1988-1989

breakup of Major League Baseball or the NFL, plaintiffs who bring monopolization or attempted monopolization suits must show that the defendants enjoyed monopoly power or a dangerous likelihood of success in acquiring such power.[442] Most conduct of monopoly leagues that courts view with suspicion, such as enforcement of a uniform player contract binding players to their existing clubs for at least three years,[443] expansion into

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USFL, however, his case would be weaker. If he had these alternatives, however, the NFL never would have bothered to blacklist him in the first place.

Portland Baseball Club, Inc. v. Kuhn, 491 F.2d 1101 (9th Cir. 1974), involved a dispute concerning Major League Baseball compensation for the minor Pacific Coast League (PCL) because of the expansion of the major leagues into San Diego and Seattle—two areas previously served by the PCL. Although the court relied on Flood v. Kuhn, 407 U.S. 258, 283-84 (1972), to dismiss the antitrust claims, *Portland Baseball Club*, 491 F.2d at 1103, it is difficult to imagine the merit of a similar antitrust suit brought against one of several competing major leagues which, because of the superiority of its product, threatens to displace minor league franchises in the context of expansion.

Finally, several suits against monopoly leagues challenged decisions not to permit particular owners to join the league. Courts uniformly have rejected those suits as not stating antitrust challenges. *See, e.g.*, Seattle Totems Hockey Club, Inc. v. NHL, 783 F.2d 1347 (9th Cir.) (challenging NHL's decision not to award franchise to any club in Seattle), *cert. denied*, 467 U.S. 932 (1986); Mid-South Grizzlies v. NFL, 720 F.2d 772 (3d Cir. 1983) (alleging antitrust violations for NFL's refusal to establish franchise in Memphis), *cert. denied*, 467 U.S. 1215 (1984); Levin v. NBA, 385 F. Supp. 149 (S.D.N.Y. 1974) (challenging NBA Board decision denying new owners of Boston Celtics permission to join association). The plaintiffs' cases would be even weaker if the defendant leagues were not monopolists.

442. *See, e.g.*, United States v. Empire Gas Corp., 537 F.2d 296, 305 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (holding that 50% market share does not establish dangerous probability of success); General Communications Eng'g, Inc. v. Motorola Communications & Elecs., Inc., 421 F. Supp. 274, 291-93 (N.D. Cal. 1976) (stating that 64% market share is insufficient to establish dangerous probablilty of success when competitive nature of market precludes attainment of monopoly power); *see generally* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 142 n.205 (2d ed. 1984) (citing cases). Even the more lenient rule in the Ninth Circuit, *see, e.g.*, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1029-30 (9th Cir. 1981) (permitting an inference of dangerous probability of success from clear evidence of defendant's intent to monopolize), *cert. denied*, 459 U.S. 825 (1982), would be virtually impossible to satisfy by new leagues suing *one* of several established major leagues.

443. In *Philadelphia Hockey*, the court held that the monopoly NHL use of long-term contracts unlawfully restricted the ability of a new league to obtain the services of talented players. 351 F. Supp. at 511. Otherwise, the court concluded, the NHL would have absolute control of the entire market for major league players. *Id.* In a world in which rival leagues existed and competed against one another, no league would have such control, and each league therefore would be free to compete with others by offering long-term contracts.

HeinOnline -- 73 Minn. L. Rev. 742 1988-1989

previously untapped markets,[444] or increasing the number of players permitted on each team's active roster in order to attract key players from rival leagues[445] will be viewed by courts simply as vigorous competition in a competitive market when there are several leagues that are roughly balanced, at least initially.[446] The types of conduct that concern most of the major antitrust litigation brought against monopoly sports leagues either would be unlikely to occur in a competitive market or would be sustained against antitrust attack because the conduct had no anticompetitive effect.[447]

Although most of the difficult and messy litigation against monopolists would disappear in a world of competing leagues, the courts would face a new challenge: regulating cooperation *between* the competing leagues. If recent developments in antitrust law are applied properly to inter-league agreements, however, courts will permit those arrangements that serve the interests of fans, while preventing agreements that reduce competition and can lead to the harms that monopoly sports leagues now cause.[448]

The Supreme Court has held that the antitrust laws permit

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444. *See* AFL v. NFL, 323 F.2d 124 (4th Cir. 1963).

445. *See USFL*, 842 F.2d at 1343.

446. This leniency would not apply, of course, to agreements among several leagues jointly to monopolize a market. Such agreements, rather than manifesting vigorous competition, would be conspiracies to monopolize in violation of § 2 of the Sherman Act, 15 U.S.C. § 2 (1982).

447. A change from a monopoly to a competitive structure in sports leagues would leave one category of antitrust litigation unaffected. The addition of competitive leagues is not likely to change most cities' inability to support more than one baseball or football franchise. Thus, most franchises will continue to have a local monopoly although, if abused *too* much, the team might face entry from a new franchise in a rival league. Suits alleging unlawful unilateral practices by a local monopolist therefore would continue to occupy the courts. *See, e.g.*, Midwest Communications, Inc. v. Minnesota Twins, Inc., 779 F.2d 444 (8th Cir. 1985) (challenging rival television station's package sale of cable rights to local baseball and hockey games), *cert. denied*, 476 U.S. 1163 (1986); Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir. 1974) (alleging that requirement that season ticket holders also purchase tickets for exhibition games is illegal tied-sale), *cert. denied*, 419 U.S. 1022 (1974).

448. Mergers between competing leagues would be subject to the Clayton Act, 15 U.S.C. § 18 (1982). It is doubtful that any such mergers would receive approval unless one of the leagues faced imminent bankruptcy and there were no other buyers. *See* Citizen Publishing Co. v. United States, 394 U.S. 131, 136-39 (1969) (setting forth standards for "failing company defense"). United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), held that mergers which give the combined firm a post-merger market share of 30% are presumptively unlawful. *Id.* at 364. Unless there were five leagues in a sport, almost any merger would be likely to trigger this presumptive illegality.

HeinOnline -- 73 Minn. L. Rev. 743 1988-1989

rival firms to act jointly where cooperation is essential to produce a new or distinct product.[449] Thus, competing leagues lawfully could agree jointly to produce such events as the World Series, the Super Bowl, and the All-Star Games. Courts also would consider lawful any agreement necessary to produce such events as "ancillary" to bringing about these games.[450] The leagues therefore could grant exclusive telecasting rights, set ticket prices, and determine eligibility for these events.

Under the same theory, the antitrust laws also would permit inter-league play, which would give fans the opportunity to watch contests and teams they otherwise would be unable to see. The leagues could agree on the terms essential to bring about such contests, including agreements governing the division of revenues and the sale of broadcast rights. Agreements that went beyond those terms, however, such as agreements dictating what each league did with its share of the revenue, would remain unlawful.

Issues arising from inter-league cooperation in baseball are more complex because of the minor leagues. A simple agreement between two competing leagues to have their farm teams play each other would raise no significant antitrust problems. Rules that went beyond those necessary to sponsor the minor league contests, however, would be more suspect. For example, joint decisions by separate major leagues that prescribed when teams could recall players to a higher league or option them to a lower one, prescribed when teams could draft players from another team's minor league roster, or prescribed the terms and length of minor league player contracts would raise serious competitive problems.[451] Although courts would have to deter-

449. NCAA, v. Board of Regents, 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

450. *See Broadcast Music*, 441 U.S. at 24 (stating that per se violations of the Sherman Act will not arise automatically from the issuance of a blanket license); United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898) (holding that no contractual restraint of trade is enforceable unless it is merely ancillary to some lawful contract), *aff'd*, 175 U.S. 211 (1899).

Prior to recent antitrust decisions such as *NCAA* and *Broadcast Music*, many were skeptical of the ability of competing leagues jointly to offer unique championship events. *See, e.g.*, *Rodino 82 Hearings*, *supra* note 29, at 447, 451 (testimony of Jesse Markham) (stating that although agreements among league members concerning home and away split of gate receipts, broadcast arrangements, division of broadcasting revenues, playoffs, and championships are absolutely necessary for functioning of league and constitute, in economic terms an "inverted joint product," antitrust laws prohibit such agreements). These decisions suggest that Markham's prediction is incorrect.

451. *See, e.g.*, Professional Baseball Schools & Clubs, Inc. v. Kuhn, 693 F.2d

HeinOnline -- 73 Minn. L. Rev. 744 1988-1989

mine each case on its own facts, courts are not likely to sustain such arrangements because they pose a significant risk to free competition in the player market. Moreover, leagues probably would have trouble showing that such agreements were necessary to the efficient functioning of the player development system. A rule of antitrust liability that permits *necessary* restraints would be unlikely to harm either major league fans who want to see quality talent developed in the minors, or minor league fans who want to watch entertaining baseball games.

Agreements between competing leagues that excluded one or more other leagues from joint activities raise questions of special concern. Suppose, for example, that following divestiture, the football market included the NFL, the AFL, and a revitalized USFL. If the NFL and AFL agreed to put on the Super Bowl to the exclusion of the USFL, the USFL might have a valid antitrust claim.

The USFL would have to prove that the NFL and AFL had market power and that excluding the USFL from the Super Bowl would deprive it of its ability to compete with the other two leagues "on the merits."[452] Although the antitrust laws usually encourage firms to engage in separate joint ventures, in the case of deciding who is the champion, fans desire a single product. In similar cases in which only one product realistically can exist, the courts require that the product be made available to all rivals on reasonable terms.[453]

1085 (11th Cir. 1982) (challenging monopolistic system of player assignment and rule barring minor league members of National Association of Professional Baseball Clubs from playing nonmembers).

452. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296 (1985) (stating that act of expulsion does not necessarily imply anticompetitive animus).

453. *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 21 (1945) (prohibiting Associated Press from refusing to furnish its news items to competitors of its members); United States v. Terminal R.R. Ass'n, 224 U.S. 383, 411-12 (1912) (directing railroad company to permit non-proprietary companies equal use of their terminal facilities). Courts have held that antitrust laws also prohibit unreasonable contract restrictions on essential facilities owned by a third party that effectively deprive rivals of an opportunity to compete. *See, e.g.*, Hecht v. Pro Football, Inc., 444 F.2d 931, 947 (D.C. Cir. 1971) (holding that lease provision giving Washington Redskins exclusive right to play football in RFK Stadium violated antitrust laws), *cert. denied*, 404 U.S. 1047 (1972). *But see* USFL v. NFL, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986) (holding that when, as is usually the case, third party is public stadium authority, restrictive contract is protected from antitrust scrutiny by *Noerr-Pennington* doctrine exempting anticompetitive influence on governmental action). *See generally* Ratner, *Should There Be an Essential Facility Doctrine?*, 21 U.C. DAVIS L. REV. 327, 348-68 (1988).

HeinOnline -- 73 Minn. L. Rev. 745 1988-1989

This analysis raises the specter of a federal judge determining whether the AFL and NFL acted reasonably in excluding the USFL from the Super Bowl. Fortunately, regulatory tasks of this sort are much more circumscribed than judicial efforts to supervise all the myriad decisions monopoly leagues make.[454] One legitimate reason to exclude the USFL would be that the quality of play in the new league is significantly inferior to that in existing leagues.[455] Fortunately, this objection is subject to imprecise but somewhat reliable empirical verification. Before participating in championships, and upon an initial showing that its teams are qualitatively comparable to NFL and AFL squads, USFL teams could play NFL or AFL teams in exhibition contests.[456]

Assuming new leagues participated in the Super Bowl or the World Series, disputes also could arise concerning the extent of their participation. Courts would need to resolve these issues based on the facts of each particular case. Because the defendant leagues would claim that their agreements were necessary to carry out the pro-consumer goals of championship games or other forms of inter-league play, courts would analyze such agreements under a rule of reason.[457] The plaintiff therefore would have to prove that the agreements harmed competition.[458] Moreover, courts probably would sustain exclusions motivated by legitimate business purposes.[459] In any event, the narrow scope of judicial review for these agreements is a far superior alternative to the current alternatives either of allowing

454. *See supra* Part II.

455. Another possible argument that the NFL and AFL could make to exclude the USFL from the Super Bowl is that the USFL was attempting to "free ride" on the extensive promotional investment the two other leagues had made in the Super Bowl. Without the ability to exclude others, the argument goes, the NFL and AFL would have been unwilling to invest initially in developing the Super Bowl. Whatever the merits of this argument in other contexts, the financial benefits to the league of a championship game or series in football and baseball are so great, (telling of huge revenues from World Series) that there is little risk of lessened investment because of a potential free-rider. *See, e.g., In Sports, the Big Time is Getting Even Bigger,* U.S. NEWS & WORLD REPORT, Oct. 16, 1978, at 61.

456. Certainly, each league would have a great deal at stake and players might receive hefty bonuses to inspire top play.

457. *See* NCAA v. Board of Regents, 468 U.S. 85, 100 (1964) (stating that rule of reason applies when agreements are necessary in order for defendants to offer their product).

458. *See* VII P. AREEDA, ANTITRUST LAW 397 (1986) (explaining that plaintiff bears preliminary burden of proving that defendants have restrained trade significantly).

459. *See* USFL v. NFL, 842 F.2d 1335, 1360 (2d Cir. 1988).

HeinOnline -- 73 Minn. L. Rev. 746 1988-1989

monopoly leagues to injure taxpayers and consumers or of requiring judges or other regulators to oversee virtually all aspects of the business operations of a sports league.[460]

Antitrust laws effectively could preclude agreements between leagues that do not involve joint activities. Rival leagues have no pro-competitive reasons jointly to agree on decisions concerning the issues discussed in this Article: the number and location of franchises; player restraints;[461] broadcast policies; and other internal operating decisions.[462] Each league's decisions about these issues therefore would have to be entirely unilateral. Sports leagues no longer would harm taxpayers and fans by forcing taxpayers to pay huge subsidies[463] and by depriving deserving fans of major league teams because of the artificial scarcity of franchises,[464] by restraining the market for players so that the result is noncompetitive races and an inefficient allocation of players,[465] by shifting games to cable and pay television so that fans must pay for games they now view free of charge,[466] and by implementing the inane decisions of ineffi-

460. To the extent that some have concerns that judges may be unfit to carry out even this limited regulatory role, Congress could delegate such a task to an administrative agency.

461. If a restraint operates primarily in the labor market, concerns a topic that is a mandatory subject of bargaining under federal labor law, and has been agreed to with a players' union pursuant to bona fide arms-length negotiations, the restraint is exempt from antitrust scrutiny under the so-called "non-statutory labor exemption." *See* McCourt v. California Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979) (holding that non-statutory labor exemption applied when these three criteria were met); Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976) (finding free agent compensation rule of professional football to fall outside protection of non-statutory exemption because no bargaining has occurred), *cert. dismissed*, 434 U.S. 801 (1977). Thus, if rival leagues and a players' union were to agree to engage in multi-employer bargaining, uniform player restraints could be agreed to. It is unlikely that a players' association would want to engage in such bargaining, however, for its strength is far improved if it negotiates with management one at a time, similar to the effective tactic unions such as the United Auto Workers used in negotiating with the major automobile companies. If players were persuaded, however, that a particular restraint was desirable, they might agree to a limited multi-employer agreement. The basketball players' union, for example, offered to agree to a common draft of college players if unlimited free agency were granted after two years of play. *Hoop Hearings*, *supra* note 168, at 295 (testimony of Lawrence Fleisher). Union members might prefer to see resources allocated to proven veterans rather than bid away in speculating on potential stars of the future.

462. *See supra* Part I.

463. *See supra* Part I(A).

464. *See supra* Part I(B).

465. *See supra* Part I(C).

466. *See supra* Part I(D).

HeinOnline -- 73 Minn. L. Rev. 747 1988-1989

cient managers who are unrestrained by the forces of competition.[467]

V. IMPLEMENTING A DIVESTITURE: LEGISLATION PREFERRED, BUT NOT ESSENTIAL

To this point, this Article has argued that a divestiture of Major League Baseball and the NFL into competing economic entities would best serve the public interest. This Part argues that legislation is the *preferable* way to implement these divestitures. "Preferable" is emphasized because the political power enjoyed by league owners may prevent passage of such legislation,[468] and because the case for a judicially-ordered divestiture has some merit.[469] Nevertheless, three reasons explain why im-

467. *See supra* Part I(E).

468. The burden of divestiture will fall very heavily on the relatively few owners of monopoly baseball and football franchises. In contrast, the principal beneficiaries of divestiture legislation will be taxpayers and fans. The tangible benefit to each individual citizen, however, is slight. A large body of academic work demonstrates how the legislative process is not conducive to proposals that impose costs upon a few and benefits on many; the owners have a strong incentive to lobby against legislation, while fans and taxpayers feel less intensely and are difficult to organize into a cohesive political force. *See* M. OLSON, THE LOGIC OF COLLECTIVE ACTION 27-36, 60-64, 132-35 (1965) (explaining how group dynamics provide incentives or disincentives for groups to organize); W. ESKRIDGE & P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 51-56 (1987) (labeling such situations "distributed benefits/concentrated costs" and explaining that well-organized interests will oppose such proposals); *see also* Flood v. Kuhn, 407 U.S. 258, 292 (1972) (Marshall, J., dissenting) (noting that whatever political "muscle" baseball players "might have been able to muster by combining forces with other athletes has been greatly impaired by the manner in which this Court has isolated them").

469. Whether Congress should reexamine *Flood v. Kuhn* because its holding that Congress's failure to overrule *Federal Baseball* constituted legislative endorsement of the baseball exemption, *see Flood v. Kuhn*, 407 U.S. at 283, is demonstrably an aberration as a matter of statutory construction, *see* Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1404-09 (1988); or because the court majority implicitly relied on the widely held view in 1972 that free agency would destroy Major League Baseball, *cf. Flood v. Kuhn*, 407 U.S. at 269 n.9 (quoting concurring opinion in court below by Judge Moore, 443 F.2d 264, 272 (2d Cir. 1970), that "[i]f baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record."), a view that subsequent events have proven incorrect, *see supra* text accompanying notes 161-76; or because the majority feared that antitrust precedents would render many rules deemed essential to baseball's success illegal *per se, see, e.g.*, United States v. Topco Assocs., 405 U.S. 596, 612-13 (1972) (Blackmun, J., concurring) (concurring reluctantly, based on settled antitrust doctrine, with court judgment that agreement among small independent grocers was illegal per se despite obvious procompetitive virtues); is beyond the scope of this Article.

HeinOnline -- 73 Minn. L. Rev. 748 1988-1989

plementing the breakup of the monopoly sports leagues by legislative action would best serve the public interest. First, legislation can provide clearer and more certain rules of competition that would govern competing baseball and football leagues. Second, a statutory scheme can better establish the precise means of implementing the divestiture, and protect owners from liability for previously legal conduct. Finally, significant legal obstacles exist to a judicial divestiture order.

A. CLEAR SPORTS ANTITRUST DOCTRINE

Correct application of current antitrust doctrine will permit stable competition among competing leagues and will give greater leeway to each league in enacting internal rules than the courts now afford to the monopoly NFL.[470] It is not certain, however, that every judge's ruling in an antitrust sports case will be consistent with this Article's analysis of "correct" antitrust doctrine.[471] The threat of treble damages may deter desirable and probably lawful competitive conduct by rival leagues.[472] Legislation can avoid these problems by specifying, for example, that the establishment of the World Series, the Super Bowl, minor baseball leagues, and other desired joint efforts is lawful.[473] To ensure that agreements among competing leagues do not result in the harms monopoly sports leagues impose, the legislation should prohibit any inter-league agreement concerning the number and location of franchises, rules for allocating players among teams, and, except for games involving teams from rival leagues, the sale of broadcast rights.

B. CLEARLY ESTABLISHED REMEDY

A proper divestiture order will require a careful restructuring of baseball and football. To minimize interference with

470. *See supra* Part IV.

471. *Cf.* USFL v. NFL, 842 F.2d 1335, 1372 (2d Cir. 1988) (stating that "the antitrust law governing horizontal arrangements among competitors . . . has been fluid").

472. *Cf.* National Coop. Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (codified at 15 U.S.C. §§ 4301-4305) (Supp. 1986)) (clarifying applicable antitrust law and limiting amount this Act exemplifies role of legislation in antitrust law). The legislative history of the Act shows how unclear antitrust laws can depress ventures that benefit competition; testimony to Congress indicated that firms avoided joint research and development ventures out of fear of possible antitrust liability. *See* S. REP. NO. 427, 98th Cong., 2d Sess. 3 (1984) (bill intended to rectify "perception problem" that participation in joint research and development ventures posed significant antitrust risks).

473. *See supra* text accompanying note 450.

HeinOnline -- 73 Minn. L. Rev. 749 1988-1989

established patterns, divestiture should maintain existing divisions within Major League Baseball and the National Football League, if possible. Some significant changes may be necessary, however, in order to achieve the goal of stable competition between rival leagues. For example, the NFL's AFC teams play within smaller markets than those of the NFC.[474] As a result, the NFL's contract with CBS to broadcast road games of NFC teams is more lucrative than the NBC contract for broadcast of AFC road games.[475] This imbalance may impair the ability of an independent AFC to compete with its rival. A workable divestiture therefore might require some reorganization in the current divisional alignment.

Divestiture also must address the issue of the number of rival leagues necessary to permit fans to enjoy the benefits of competition. The history of inter-league rivalry suggests that two rival leagues may be sufficient to ensure competition.[476] Moreover, the increased ability of the players' unions to bargain for extensive free agency reduces the risk that duopoly sports leagues would collude on rules concerning player restraints. Divestiture into only two leagues also has the advantage of permitting baseball's two traditional leagues to maintain their identities.

On balance, however, a more extensive divestiture into three or four leagues is preferable. Agreements for inter-league play among teams now in the same league can maintain baseball's traditions. Moreover, the history of previous rivalry between two leagues may not be a reliable indicator of the potential for oligopolistic behavior[477] following a divestiture. Pre-

474. In 1986, metropolitan areas hosting NFC franchises had an average population of 4,232,928, while areas with AFC franchises averaged 3,081,535. Population figures for the rival league teams in the New York and Los Angeles metropolitan areas were obtained by allocating half the population of those areas to each team. The Green Bay franchise population figures include the Milwaukee metropolitan area. *See* UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 28-30 (108th ed. 1988).

475. In 1987, CBS paid $150 million and NBC paid $120 million for NFL broadcast rights. *See NFL rights deal closed; ESPN included*, BROADCASTING, Mar. 16, 1987, at 39.

476. *See generally* Houston Oilers v. Neely, 361 F.2d 36 (10th Cir. 1966) (discussing heated competition between NFL and AFL); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (discussing rivalry between NHL and WHL); *Hoop Hearings, supra* note 168 (discussing rivalry between NBA and ABA).

477. "Oligopoly is a market structure characterized by a small number of firms and a great deal of interdependence, actual and perceived, among them." E. MANSFIELD *supra* note 54, at 333.

HeinOnline -- 73 Minn. L. Rev. 750 1988-1989

viously, such rivalry was between an entrenched incumbent league attempting to maintain its monopoly status and a new rival seeking to obtain equality quickly and to force a merger. The incentives to tacit collusion or oligopolistic behavior may increase when owners realize that the rival league will be around for the long term.

Moreover, at least three leagues are necessary to gain the benefits of competition concerning expansion and franchise relocation that involve the removal or addition of a team in any area currently having two franchises. For example, the American League is less likely to be deterred by the existence of one rival, the National League, from allowing the Chicago White Sox to obtain tax subsidies by credibly threatening to move to St. Petersburg;[478] the probability that the National League would put two of its own teams in Chicago is slight. Conversely, if three leagues existed, the league without a team in Chicago obviously would be poised to enter that market if the White Sox departed. To avoid losing the nation's third largest metropolitan area, American League owners would be unlikely to permit the White Sox to move south and Illinois taxpayers would be less likely to make concessions to the White Sox knowing that they could attract a new team from the third league.

Another benefit of legislation is that Congress would have the opportunity to set the precise terms of a divestiture or could delegate that authority to an expert agency. Although federal courts have extensive experience with complex reorganizations of monopolized industries,[479] a legislative or administrative approach might assuage fears of fans concerning leaving divestiture to a federal judge. Fans may be concerned that the federal judge who happens to draw a divestiture suit on his docket may not have any background or interest in either antitrust or sports and may be insensitive to fans' concerns and traditional loyalties.

Any court-ordered divestiture of Major League Baseball would have to be based on a judgment that baseball's owners

478. *See* Chicago Tribune, Nov. 6, 1988, pt. 3, at 1, col. 7.

479. *See, e.g.*, United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 222-28 (D.D.C. 1982) (detailing divestiture of integrated national telephone network and vesting authority in court to enforce provision on own initiative), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983); United States v. Paramount Pictures, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,553 (S.D.N.Y. 1980) (noting more than 500 hearings on implementation of order overseeing motion picture industry across three decades).

HeinOnline -- 73 Minn. L. Rev. 751 1988-1989

committed a violation of the antitrust laws. Such a judgment would expose Major League Baseball to treble damage liability for past conduct, although these owners reasonably may have believed they were immune from antitrust liability based on the judicially-created antitrust exemption for baseball.[480] Justice Marshall, in his dissent to *Flood v. Kuhn*,[481] suggested that the Court could overrule the exemption prospectively, thus granting injunctive relief while shielding Major League Baseball from private antitrust suits for past conduct.[482] Although the Court has alluded to the possibility of taking that approach in other antitrust cases,[483] no such decision ever actually has been issued. Legislation, of course, could remove the antitrust exemption and limit private remedies for violations occurring after the effective date of the statute.

C. Legal Obstacles to a Judicial Remedy

The most practical reason for pursuing a legislative remedy is that a court-ordered divestiture is so uncertain. Such an order would have to rely on a judgment that Major League Baseball and the NFL committed unlawful monopolization in violation of section two of the Sherman Act. A full analysis of these leagues' compliance with section two is beyond the scope of this Article. For current purposes, it suffices to note that a plaintiff seeking a judicial divestiture order faces many significant obstacles that do not arise with a legislative remedy.

1. Baseball

A judicial divestiture of Major League Baseball would confront only one major obstacle, but it is a daunting one. Major League Baseball established its monopoly through merger and

480. *See* Flood v. Kuhn, 407 U.S. 258, 282-85 (1972) (5-3 opinion) (upholding exemption from federal antitrust laws); Toolson v. New York Yankees, 346 U.S. 356, 356-57 (1953) (per curiam) (upholding exemption for baseball and noting any change should be by legislation); Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 207-09 (1922) (holding business of providing baseball games for profit does not involve interstate commerce and therefore does not fall within antitrust laws).

481. 407 U.S. 258, 289 (1972).

482. *Id.* at 293 (Marshall, J., dissenting).

483. *See, e.g.*, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 496 (1968) (acknowledging possible theory that newly-declared doctrine can be applied prospectively when party has rules on established doctrine); Simpson v. Union Oil Co., 377 U.S. 13, 25 (1964) (reserving question of whether only prospective application would be warranted).

HeinOnline -- 73 Minn. L. Rev. 752 1988-1989

maintained it through predatory practices.[484] Were it not for baseball's judicially-created antitrust exemption, courts undoubtedly would find Major League Baseball guilty of unlawful monopolization. The Supreme Court, however, has held on three occasions that baseball is not subject to the antitrust laws.[485] To order divestiture, the court would have to overrule these three cases. Although persuasive reasons exist for the Court to overrule baseball's exemption,[486] the likelihood that the court ever will do so is very uncertain. Congress should not wait for the judiciary to act.

2. Football

Although the NFL is currently subject to the antitrust laws,[487] one of the principal causes of its monopoly status is the federal statute permitting the NFL-AFL merger.[488] Thus, the NFL cannot be challenged for unlawfully acquiring monopoly power. An organization that obtains power lawfully, however, still violates section two of the Sherman Act if it unlawfully maintains such power.[489]

Although the NFL is vulnerable to an antitrust claim based on section two of the Sherman Act, it is by no means certain that a plaintiff could win the claim. A successful plaintiff would have to overcome, for example, prior judicial determinations that the NFL's predatory conduct directed against the USFL did not cause the latter's demise,[490] that the NFL's contracts with all three major television networks were not unlawfully exclusionary,[491] or that exclusive lease arrangements between individual NFL teams and governmentally operated stadiums were not subject to antitrust scrutiny.[492]

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484. *See supra* notes 328-49 and accompanying text.

485. *See supra* note 480.

486. *See supra* note 469 and accompanying text.

487. Radovich v. NFL, 352 U.S. 445, 452 (1957).

488. Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1515 (1966) (codified as amended at 15 U.S.C. § 1291 (1982)).

489. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979) (stating rule that "[e]ven if the orgin of the monopoly power was innocent, . . . maintaining or extending market control by that power" violates § 2), *cert. denied*, 444 U.S. 1093 (1980). *But see* USFL v. NFL, 842 F.2d 1335, 1380 (restructuring of football inappropriate because 1966 Merger Act shows congressional support for single football league).

490. *See USFL*, 842 F.2d at 1357.

491. *See id.* at 1356.

492. Prior to trial in the USFL case, the district court held that evidence concerning such leases would be excluded at trial because the *Noerr-Pennington* doctrine, which immunizes from antitrust scrutiny private efforts to

HeinOnline -- 73 Minn. L. Rev. 753 1988-1989

If gambling on judicial decisions were legal, the oddsmakers would make those betting on a divestiture of professional baseball or football through antitrust litigation decided underdogs. Because properly drafted legislation would insure that desirable aspects of the games of baseball and football would survive divestiture, would clearly establish the proper method for implementing the break up, and would not require reconsideration of precedents, such legislation is the preferred course for implementing divestiture.

CONCLUSION

Baseball and football continue to be exciting sports that capture the interest and arouse the passions of millions of Americans. These sports are enjoyed by so many fans and are such a part of American life that society often overlooks the costs of allowing Major League Baseball and the NFL to operate as monopolists.

Monopoly sports league owners take advantage of their economic power to secure massive subsidies from local taxpayers, while depriving fans in many cities of expansion teams they could economically support and emotionally cherish. Owners conspire to hold down player salaries through schemes that inefficiently allocate players among teams, limiting the opportunity of individual franchises to obtain the players they may need to develop winning or championship teams. Both Major League Baseball and the NFL owe their current success and popularity to the broadcasting of their games, including the World Series and Super Bowl, on free television. Yet monopoly leagues are well-positioned to force fans to pay millions of dollars to view these contests on cable television. Moreover, each year inefficient executives who are under no market restraints to manage their teams well cause fans in one or more cities

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obtain anticompetitive governmental action, protected this conduct. United States Football League v. National Football League, 634 F. Supp. 1155, 1179-80 (S.D.N.Y. 1986). For the evolution of the *Noerr-Pennington* doctrine, see Hecht v. ProFootball, Inc., 444 F.2d 931, 940-42, 47 (D.C. Cir.) (distinguishing *Noerr* and *Pennington* and holding that lease between Armory Board and professional football was subject to scrutiny under antitrust laws), *cert. denied*, 404 U.S. 1047 (1971); *see also* United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents' Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (holding that railroad's solicitation of government action was not violative of antitrust laws even though it may have had anticompetitive purpose).

HeinOnline -- 73 Minn. L. Rev. 754 1988-1989

across the country to suffer by denying them the best possible product.

Although these harms are real, they are not inevitable. The existence of rival leagues would solve most of these economic problems. The city's option to seek a franchise from a rival league on more favorable terms would limit a team's ability to extort tax subsidies. Competing leagues would seek out expansion cities in order to increase ticket and network revenues. No league would have an incentive to establish inefficient means of player allocation that depress salaries, because inter-league competition would raise salaries to a competitive level. Instead, each league would design its internal rules to produce the most exciting pennant and championship races. Leagues contemplating significant shifts to cable television would hesitate to do so if their audiences could continue to watch rival league games for free. Finally, leagues could not afford to tolerate extreme mismanagement of individual franchises, because that would invite direct head-on competition from a competing league.

Baseball and football are not natural monopolies; two or more rival leagues can compete in each sport. There is no apparent economic reason why stable competition cannot exist. That single leagues historically have monopolized these sports does not suggest they are natural monopolies. Rather, termination of inter-league rivalry through mergers and predatory practices and the expansion of Major League Baseball and the National Football League to a size that now virtually precludes new entrants explain their persistent monopoly status.

Were baseball and football characterized by competing leagues, the antitrust laws could effectively regulate competition in the industry. Indeed, many of the troublesome issues now raised in antitrust sports litigation would disappear if the industry no longer featured a monopolistic structure. To carefully supervise the transition to a competitive environment and to avoid difficult judicial obstacles, Congress should act to bring to the American sports fan the benefits of the free enterprise system that we expect from other business endeavors.

HeinOnline -- 73 Minn. L. Rev. 755 1988-1989

APPENDIX A: BASEBALL EXPANSION

This appendix first explores whether the five smallest markets in baseball today—Cincinnati, Kansas City, Milwaukee, San Diego, and Seattle—can support major league franchises. The data suggest that at least four of the five are viable markets. The appendix next compares these five markets to the five largest markets currently without baseball franchises: Denver, Miami, Phoenix, Tampa-St. Petersburg, and Washington, D.C. The evidence suggests that both groups have similar demographic characteristics. The analysis concludes that expansion to these five markets is feasible and appropriate.

For the reasons stated in the text, the analysis first required determining if the franchises in the five current markets studied can be predicted to attract at least 1.5 million fans should their teams enjoy a won-loss percentage of .500. A simple regression was used for each team. The dependent variable was attendance, and the independent variable was the team's winning percentage during each season. The study covered the seasons from 1973 to 1987.

Simple regression analysis[493] predicts that Milwaukee, San Diego, and Cincinnati will draw more than 1.5 million fans if their teams play .500 ball. The analysis, set forth below in Table A-1, shows that each of these estimates is statistically significant.[494] Although the regression is not statistically significant for Kansas City, the data suggest that Royals' fans are very loyal, regardless of their team's on-field performance. In any event, the Royals clearly can draw more than 1.5 million fans. Indeed, the Royals have drawn between 1.6 million and 2.3 mil-

493. Where there exists reason to believe that one variable (for example, attendance) is a function of another variable (winning percentage), simple regression analysis is a statistical technique that can be used to estimate the degree of the relationship between two variables; in other words, the degree to which an increase in winning percentage affects attendance. If the data suggest a general trend of higher attendance for teams with better winning percentages, the technique estimates the average effect of the latter on the former. *See generally* R. PARSONS, STATISTICAL ANALYSIS: A DECISION-MAKING APPROACH 685-86 (1974).

494. An estimate is generally deemed to be significant if statistical techniques indicate that there is less than a 5% chance that the results are due to random occurrences, rather than due to the effect of one variable (winning percentage) on another (attendance). *See* R. SENTER, ANALYSIS OF DATA: INTRODUCTORY STATISTICS FOR THE BEHAVIORAL SCIENCES 152-54 (1969). One statistical technique to measure significance is a "t value" (shown in parenthesis under the coefficient in Table A-1). Normally, a "t value" in excess of 1.96 indicates that the particular result is statistically significant. *See* R. PARSONS, *supra* note 493, at 423-24.

HeinOnline -- 73 Minn. L. Rev. 756 1988-1989

lion fans from 1976 through 1987, including drawing 1.9 million fans in 1983 while playing .488 ball and drawing 2.3 million fans in 1986 while playing .469 ball. The data do not suggest that Seattle would support a team if it played .500 ball. Indeed, the analysis for Seattle is statistically significant and predicts that a .500 Mariner team would draw just over 1.1 million fans. This analysis, however, may be misleading because Seattle *never* has played .500 ball. Its 1987 record (.487) was the best in the history of the franchise. Therefore, it is difficult to predict how the team would do if it were not a perennial loser.

Table A-1[495]

	Constant	Coefficient	R^2	Att. at .500	Degrees of Freedom
Milwaukee	−838084	4795.6 (3.937)	.564	1,509,721	12
San Diego	−1003930	5438.7 (4.582)	.636	1,715,428	12
Cincinnati	−593400	4783.2 (4.385)	.616	1,798,201	12
Kansas City	1616961	569.3 (0.207)	.004	1,901,616	12
Seattle	109808	2017.0 (3.004)	.563	1,118,298	7

The author next sought to compare these five cities with the five largest markets without baseball franchises to determine if the latter markets possessed characteristics sufficiently similar to the former group for one to infer that expansion would be viable. Roger Noll has suggested a number of variables that determine baseball attendance.[496] In determining expansion sites, a number of these variables are not relevant because they depend on management decisions by the franchise. These variables include ticket price, stadium age, number of star players, closeness of the pennant race, recent

495. The coefficient resulting from the regression analysis is an estimate of the *degree* to which winning percentage affects attendance—the higher the coefficient, the greater the effect. To estimate the team's attendance with a winning record of .500, for example, the coefficient is multiplied by 500 and added to the constant figure. The R_2 value estimates *how much* winning percentage, as opposed to other possible variables, explains increases in attendance. R. SENTER, *supra* note 494, at 427. Statisticians often view R_2 values less than .20 as showing an almost negligible relationship between the two variables. Values between .40 and .70 are considered to demonstrate that there is a substantial relationship between the two variables. *Id.* at 433.

496. *See* Noll, *supra* note 85, at 120-21.

HeinOnline -- 73 Minn. L. Rev. 757 1988-1989

pennant wins, and number of games behind the leader. The demographic characteristics that Noll analyzed were population, per capita income, number of other major league sports teams, and black population. Note that per capita income, sports competition, and black population were all *negatively* correlated to attendance. Table A-2 sets forth these characteristics for the five existing markets and the five potential markets analyzed.

Table A-2

	Population	P/cap. inc	#teams	Black pop.
K.C.	1,518,000	$11,153	2	191,268
Cin.	1,690,000	$10,247	2	189,280
Mil.	1,522,000	$ 9,765	2	162,960
S.D.	2,201,000	$11,766	2	123,256
Sea.	2,285,000	$12,919	3	95,970
WashDC	3,563,000	$13,530	3	954,884
Miami	2,912,000	$ 8,904	1	433,888
Tpa-StP	1,914,000	$ 9,628	1	176,088
Phx.	1,900,000	$11,363	1	60,800
Den.	1,847,000	$12,490	2	88,656

As the table indicates, these "have-not" cities have significantly larger populations (which is the major variable in Noll's analysis) than three of the five current markets. The very large population in Washington, D.C. should offset the high income, existence of other sports franchises, and black population, which are negatively correlated variables.

This analysis suggests that Washington, D.C., Miami, Tampa-St. Petersburg, Phoenix, and Denver possess characteristics that support the prediction that a Major League Baseball franchise playing with a .500 record in each of those cities would attract at least 1.5 million fans. Of course, special circumstances may exist that would cause a similar number of fans to attend games in some cities that are smaller than those analyzed above.

HeinOnline -- 73 Minn. L. Rev. 758 1988-1989

APPENDIX B: IS ROZELLE RIGHT ABOUT FREE AGENTS?

This statistical analysis seeks to test the proposition that absent player restraints free agents will flock to the top teams, in the largest cities, with the warmest temperatures. League officials have used this proposition to justify restrictions on the free market for player contracts.

To test the proposition that free agents will migrate to the top teams, the author first performed a multiple regression analysis[497] for each team for each of the 1976-1985 seasons—the years following the *Messersmith* decision and prior to the arbitrator's finding that owners had stopped bidding collusively on players. The dependent variable was the net gain or loss of free agents by each team from the prior year. The independent variables were (1) the population for the Standard Metropolitan Statistical Area in which each team played, (2) the team's place in the standings in the previous year, and (3) the average high temperature in each city during the month of April.

If Commissioner Rozelle were correct, a strong positive correlation should exist between the number of free agents signed by a particular team in a year and that team's place in the standings. Specifically, the coefficient for prior year standings should be positive and fairly large, and the results should be statistically significant. The results (with T values in parentheses) were:

Table A-3

Constant	−2.06949 (1.710643)
Prior Year Standings	.038280 (.756857)
Temperature	.030633 (2.082299)
R^2	.029128
Degrees of Freedom	254

Contrary to Rozelle's prediction, the data show a very small coefficient for prior year standings (indicating that this variable has little effect on the number of free agents signed), and are not statistically significant.

497. Where we have reason to believe that one "dependent" variable is a function of several other "independent" variables, multiple regression analysis is a statistical technique that can be used to estimate the degree to which each independent variable has an effect on the dependent variable. *See* R. PARSONS, *supra* note 493, at 728.

HeinOnline -- 73 Minn. L. Rev. 759 1988-1989

The author next sought to determine whether population or temperature affected the number of free agents signed. To more accurately discover trends in this area, the author analyzed each team's net gain or loss of free agents over the entire ten-year period. A multiple regression analysis was performed. The dependent variable was the net number of free agents signed by each team during the 1976-1985 period. The two independent variables were population and temperature. If Commissioner Rozelle's claims were correct, the coefficients for population and temperature should be positive and large, and the results should be statistically significant. The results were:

Table A-4

Constant	−12.048605
Population (in millions)	0.8567453685 (1.4925011609)
Temperature (in degrees)	0.168379 (1.078237)
R^2	0.13607032
Degrees of Freedom	23

As more fully discussed in the text, this shows only a weak positive correlation between a team's success in the free agent market and the size of its city and its temperature; the results, moreover, are not statistically significant.

This analysis does not differentiate among the quality of free agents in examining the gain or loss of teams. This analysis does not disprove an argument, for example, that all the high-salary free agents do flock to contending, warm-weather franchises in large cities. If there were such a movement, however, these teams would be expected to dominate Major League Baseball. The post-*Messersmith* record, however, demonstrates that competitive balance has improved, not suffered.[498] Moreover, the ability of veteran players of modest talent to relocate can have a significant beneficial effect on competitive balance by allowing such players to move from teams where they may be surplusage to teams that place a greater value on their talent.

498. *See supra* text accompanying notes 136-50.

HeinOnline -- 73 Minn. L. Rev. 760 1988-1989

APPENDIX C: BASEBALL GAMES ON FREE AND CABLE TELEVISION

The following table reflects the number of games that each team shows on free (over-the-air) and on cable television. Cable television includes both subscription and pay-per-view offerings.

Table 5

AMERICAN LEAGUE			NATIONAL LEAGUE		
TEAM	FREE	CABLE	TEAM	FREE	CABLE
California	60	35	Atlanta	131	—
Chicago	67	79	Cincinnati	47	—
Kansas City	50	—	Houston	76	75
Minnesota	68	25*	Los Angeles	50	35
Oakland	49	—	San Diego	51	41
Seattle	76	—	San Francisco	40	36
Texas	65	60	Chicago	150	—
Baltimore	42	90	Montreal	—	—
Boston	75	83	New York	75	75
Cleveland	60	—	Philadelphia	85	39
Detroit	52	80	Pittsburgh	46	55
Milwaukee	60	—	St. Louis	56	50
New York	53	100			
Toronto	39	40 or more			

Information was derived from *Baseball bags almost $370 million in rights*, BROADCASTING, Mar. 7, 1988, at 54-63. Note that Atlanta and Chicago local stations also serve as nationwide cable superstations. Further, the figures given are for regular season games only.

*With option to pick up eight more.

+These are estimates because exact figures were not settled when the *Broadcast* article went to press.

HeinOnline -- 73 Minn. L. Rev. 761 1988-1989

HeinOnline -- 73 Minn. L. Rev. 762 1988-1989