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Abstract

Professor Nathaniel Grow has produced a creative, thoroughly researched piece arguing that antitrust has failed in the context of professional sports and calling for the creation of a national-level federal regulatory agency to address anticompetitive conduct by the major leagues. I respond to his diagnosis of antitrust's failings and to his prescription.

In his provocative new article, Professor Nathaniel Grow calls for the creation of a federal regulatory body to oversee America's major sports leagues.[1] His diagnosis: antitrust law has failed to curb the exercise of monopoly power by the major sports leagues, resulting in harm to the public, and the only feasible solution is a federal regulatory entity.[2]

Grow's conclusions are grounded on four propositions. First, antitrust law has failed to regulate sports leagues.[3] Baseball is the most notable example, in that the courts have abdicated any role as antitrust authorities for nearly a century,[4] even as all

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1. Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE. L. REV. 573, 573 (2015).

2. *Id.*

3. *Id.* at 576.

4. *See generally* Flood v. Kuhn, 407 U.S. 258 (1972) (finding that the plaintiff baseball player could not bring an antitrust claim challenging the sport's reserve); Toolson v. New York Yankees, 346 U.S. 356 (1953) (refusing to overrule dismissals of anti-trust lawsuits on the ground that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws); Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922) (finding baseball competitions not commerce, and thus purely a state affair and

doctrinal foundation for the sport's "antitrust exemption" has been obliterated.[5] Yet even in the context of three other major sports—football, basketball, and hockey—Grow finds that antitrust law has failed.

Second, as a result of their evasion of antitrust law's mandate for market competition, the major leagues operate in ways that harm the public. Here, Grow concentrates on the extraction of stadium subsidies[6] from leagues that threaten to move teams to other markets if their demands for lavish new facilities are not met and the leagues' failure to expand to new cities.[7] He also argues that collective broadcasting practices lead to higher cable television bills and other results harmful to consumers.[8]

Third, Grow argues that two prior proposals for addressing these problems, divestiture (break-up of the dominant league into two or more separate leagues)[9] and a Euro-Soccer style promotion and relegation regime,[10] are inadequate. Divestiture, he argues, is simply not going to happen; Congress lacks the political will, and antitrust courts shun such draconian remedies in the modern era. Moreover, he doubts the likelihood that a model of two competing leagues would be sustainable because the leagues would likely outbid one another for star players, to the point of economic failure.[11] Alternatively, to produce a single "world" or "national" champion, two leagues would likely collaborate to the point that they practically function as a single monopolist, for all intents and purposes.[12] Grow argues that promotion and relegation are similarly unlikely to ever occur, could generate public backlash, and ultimately would not reduce the monopoly

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not subject to federal antitrust law).

5. *See* Jon M. Sands, *The Baseball Trust: A History of Baseball's Antitrust Exemption*, 61 FED. LAW. 121, 122 (2014) (reviewing STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION (2013)).

6. Grow, *supra* note 1, at 607–08.

7. *Id.* at 610–11.

8. *Id.* at 577.

9. *Id.* at 629–30.

10. *Id.*

11. *Id.* at 631.

12. *Id.* at 633–34.

power of a league, even as its "premiership" composition changed from year to year.[13]

Fourth, Grow asserts that a new government agency—or division within an existing agency—offers a workable solution. At a minimum, that agency would have authority over: (1) expansion and contraction, and (2) broadcast activities.[14]

I find Grow's argument creative and well-supported, though I am not entirely persuaded. Grow views the basis for courts' unwillingness to apply antitrust law to sports leagues as a product of the unique level of coordination required by sports leagues.[15] I have three concerns.

First, this view could be premature. Because sports league antitrust cases are relatively rare[16]—they require, in most cases, a work stoppage,[17] a rival league,[18] or a recalcitrant owner,[19] and

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13. *See* Grow, *supra* note 1, at 638 ("[C]onsidering the popularity of the existing leagues, as well as the well-entrenched tradition of closed sports leagues in the United States, the imposition of such a radical structural change . . . would likely generate significant public backlash among many of the nation's sports fans.").

14. *Id.* at 642.

15. *See id.* at 585–86 (arguing that it has "proven difficult to apply coherently to the industry due to its unique economic characteristics").

16. Sands, *supra* note 5, at 122.

17. A strike, or lockout, creates the potential for players to bring a lawsuit that avoids the non-statutory labor exemption from antitrust, at least at some point, such as when players decertify as a union. *See* Christopher Smith, *A Necessary Game Changer: Resolving the Legal Quagmire Surrounding Expiration of the Nonstatutory Labor Exemption in Sports*, 14 U. PA. J. BUS. L. 1191, 1192 (2012) (describing the legal rules surrounding when the exemption ends after the expiration of a CBA as a "confusing mess").

18. *See* Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 814–15 (1987) (discussing concerns that can lead to antitrust claims arising from the existence of a rival league). The start-up costs of creating a rival even vaguely constituting a threat to a preeminent league are quite high. *See* Mitchell Nathanson, *What's in a Name, or Better Yet, What's it Worth? Cities, Sports Teams and the Right of Publicity*, 58 CASE W. RES. L. REV. 167, 182 (2007) ("[S]tart-up costs for new leagues have skyrocketed to the point where today there is little threat of new teams from rival leagues potentially entering existing markets."). *But see* Rosenbaum, *infra* note 20, at 798 n.280 (explaining why there are not actually observable entry barriers for rival leagues).

19. The classic example is Oakland Raiders owner Al Davis. *See* Matthew J. Mitten & Bruce W. Barton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 104

only in even rarer cases are they decided on the merits[20]—sports league antitrust jurisprudence has undoubtedly evolved at a glacial pace. Yet, it might be possible that in some future dispute, courts could start getting things right. If one had written on the courts' treatment of the NCAA a decade ago, surely one could have concluded, as Grow does in the professional context, that the NCAA had evaded antitrust scrutiny in the courts.[21] But today, we have *Keller*[22] and *O'Bannon*[23] radically shifting the college sports antitrust framework. These cases could be a preview of a professional sports dispute of the future—one that may be unlikely given the leagues' ability to buy out any challengers, internal or otherwise, but one that could nonetheless demand different thinking on antitrust's potential to regulate sports.

Second, the landscape Grow surveys to conclude that sports have effectively become natural monopolies[24] consists largely of cases in which sports leagues faced minimal competition. Rival leagues failed on their own, often due to poor business models, so there was little the courts could do using antitrust decisions to free the forces of competition in professional sports.[25]

(1997) ("Most league attempts to block franchise relocations were directed at owners, such as Charlie Finley, Bill Veeck, and Al Davis, who were perceived as mavericks. Apparently, 'personal animosity' and other factors motivated these actions, rather than an honest desire to protect a host city's interests.").

20. Michael A. Carrier & Christopher L. Sagers, *O'Bannon v. National Collegiate Athletic Association: Why the Ninth Circuit Should Not Block the Floodgates of Change in College Athletics*, 71 WASH. & LEE L. REV. ONLINE 299, 300 (2015) (explaining how O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014), stands as a rare antitrust case because the rule-of-reason challenge actually reached the merits).

21. In fact, some wrote exactly that. For instance, one author argued that "judicial deference to the NCAA" was "insurmountable to parties raising antitrust claims." Gordon E. Gouveia, *Making a Mountain out of a Mogul: Jeremy Bloom v. NCAA and Unjustified Denial of Compensation Under NCAA Amateurism Rules*, 6 VAND. J. ENT. L. & PRAC. 22, 27 (2003). Another wrote that courts "have been unwilling to entertain antitrust disputes involving the NCAA, in effect granting a private organization carte blanche authority over substantial commerce." Lisa M. Bianchi & Bryan S. Gadol, Casenote, *When Playing the Game of College Sports, You Should Not Be Playing "Monopoly"*, 1 CHAP. L. REV. 151, 169 (1998).

22. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013).

23. *Id.*

24. Grow, *supra* note 1, at 639.

25. Famously, although the USFL "won" its antitrust challenge against the

But what if a real competitor emerged? Grow doubts this possibility,[26] but two prospects come to mind. The first, and more likely option, is a foreign or global league seeking to penetrate U.S. markets,[27] perhaps in hockey or basketball. Such a league might possess the financial resources necessary to litigate antitrust claims in ways the XFL[28] never could. Second, a prolonged work stoppage might lead star players to break from their leagues and start new ventures using a cooperative business form: a player-owned league—a model pioneered, with some success, by the case of Professional Bull Riding (PBR).[29] Either a well-funded foreign league or the "Brady-Manning Football League" could have the resources to both compete effectively and use the levers of antitrust against the current dominant leagues. In other words, Grow's analysis may well be in reaction to a lack of plaintiffs with standing and injury to date, rather than actual failures by antitrust courts.

Third, Grow's case for antitrust's failings is based on decades of sports law cases from the pre-digital era. With the advent of streaming and other new ways of accessing sports broadcasts, the possibility of intra-league competition becomes more of a reality. Traditionally, teams competed on the field but not for fans; allegiances were divided by geography and perpetuated by limited access to televised performances of other teams. Today, a consumer can choose many different modes of fandom, and these new channels open possibilities for antitrust violations—and successful vindication of such claims in the courts—that have not

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NFL, it was awarded only one dollar in damages, suggesting that the jury "conclude[ed] that the USFL's product was not appealing largely for reasons of the USFL's own doing." United States Football League v. Nat'l Football League, 842 F.2d 1335, 1342 (2d Cir. 1988).

26. Grow, *supra* note 1, at 639.

27. *See* Marc Edelman, *Does the NBA Still Have "Market Power"? Exploring the Antitrust Implications of an Increasingly Global Market for Men's Basketball Player Labor*, 41 RUTGERS L. J. 549, 576–80 (2010) (discussing the rise of global basketball).

28. Maxwell J. Mehlman et al., *Doping in Sports and the Use of State Power*, 50 ST. LOUIS U. L.J. 15, 49 (2005) ("Distastefulness certainly can kill a sport; witness what happened to XFL football.").

29. PBR was founded in 1992 by twenty bull riders who "broke away from the traditional rodeo scene." *History*, PROF. BULL RIDERS, http://www.pbr.com/en/education/history.aspx (last visited Aug. 5, 2015) (on file with the Washington and Lee Law Review).

been open for most of the formative years of sports antitrust jurisprudence.

I am also not entirely persuaded that sports leagues use their monopoly power in ways that are as harmful to the public as Grow posits. Ordinarily, the harm to the public arising from monopolies consists of supra-competitive pricing. In their direct dealings with the public, the sports leagues often appear to price at sub-competitive levels.[30] "Scalping" would not be profitable if tickets to ordinary sporting events were priced at the level predicted by consumer demand. Recognizing that any extraction of rent from the public is indirect, Grow concentrates on three harms flowing from the leagues' status as unregulated monopolies: (1) inadequate expansion ("artificial scarcity");[31] (2) extraction of public subsidies in connection with stadium construction and renovation;[32] and (3) broadcasting practices.[33]

Among the problems here is determining the "optimal" level of expansion. As Grow recognizes, at some point, expanding a league risks diluting talent levels in ways fans might not want.[34] The extraction of stadium subsidies is indeed distressing, but it might be more of a political failing than a legal one. Perhaps local governments, or all forms of government, simply cannot be trusted to make rational, long-term decisions when it comes to sports. This, however, should give one pause about Grow's proposed solution: governmental regulation. If countless counties and cities are unable to stand up to sports leagues, why should we expect a new regulatory agency to be anything other than a quick and easy captive?[35]

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30. *See* Scott D. Simon, Note, *If You Can't Beat 'Em, Join 'Em: Implications for New York's Scalping Law in Light of Recent Developments in the Ticket Business*, 72 FORDHAM L. REV. 1171, 1176 (2004) ("Traditionally, the entertainment and sports industries have set their ticket prices far below market value.").

31. Grow, *supra* note 1, at 606.

32. *Id.* at 607.

33. *Id.* at 614–18.

34. *Id.* at 612–13.

35. New agencies face an "ever-present [risk] from vested interests of regulatory capture in the framing of their legislation (Carve-outs or exceptions for economically and politically influential sectors) or in the efficacy of their enforcement efforts." Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 LOY. U. CHI.

Arguing that sports monopolies produce higher cable bills,[36] Grow is no doubt correct in his proposition that sports contracts consume a huge share of cable providers' outlays.[37] But that does not mean that the prices charged to cable providers—and passed on to consumers—are necessarily *supra* competitive.[38] Cable providers, after all, operate in many markets as monopolies, or close to it. In the battle of a sports league monopoly and a cable monopoly, why should the sports league always win?

Grow recognizes that he is not the first to call for governmental intervention, but he is the first to advance the case in a thoughtful and detailed way in the last thirty-five years. When contemplating his proposed agency, one wonders what models he has in mind—the ICC or the FTC? How would the agency avoid the kind of regulatory capture that besets the federal bureaucracy? Would constitutional limitations on federal power make the agency less effective than Grow imagines it would be? And of course, like the alternatives of divestiture and promotion/relegation, is there any realistic prospect that this proposal is more than a thought experiment? In future work, perhaps Grow will consider drafting the implementing legislation that would create such an agency and giving a hypothetical example of a proposed rule the agency might draft.

I enjoyed reading Professor Grow's article; it provides fodder for the active reimaging of American sports law, even if his suggestion is about as likely to be adopted as the Chicago Cubs are to win the World Series.[39]

L.J. 455, 470 (2010).

36. Grow, *supra* note 1, at 616.

37. *Id.*

38. *See* Holly Phillips, *I Want My MTV, but Not Your VH1: A La Carte Cable, Bundling, and the Potential Great Cable Compromise*, 28 J. NAT'L ASS'N ADMIN L. JUD. 321, 323–24 (2008) (arguing that "there is more competition than ever before" between cable networks).

39. *See* Michael S. Melbinger, CCH EXECUTIVE COMPENSATION, *Delaware Courts Approve Another Lawsuit Over Director Stock Awards*, 11 EXECUTIVE COMPENSATION UPDATE, 2015 WL 3750353 (June 17, 2015) ("It is reasonably conceivable that the Chicago Cubs will win the World Series this year (after a 106-year drought). Not likely, but *reasonably conceivable*.").