Washington and Lee Law Review

Volume 72 | Issue 2 Article 4

Spring 3-1-2015

Regulating Professional Sports Leagues

Nathaniel Grow
University of Georgia

Regulating Professional Sports Leagues

Nathaniel Grow*

Abstract

Four monopoly sports leagues currently dominate the U.S. professional sports industry. Although federal antitrust law—the primary source of regulation governing the industry—would normally be expected to provide a significant check on anticompetitive, monopolistic behavior, it has failed to effectively govern the leagues due to both their well-entrenched monopoly status and the unique level of coordination necessary among their respective teams. Consequently, the four leagues today each, in many respects, enjoy unregulated monopoly status in what is estimated to be a $67 billion industry.

As one might expect, these leagues use their largely unchecked monopoly power to injure the public in various ways. By restricting expansion, leagues create an artificial shortage of franchises enabling their existing teams to extract billions of dollars in stadium subsidies from U.S. taxpayers. Similarly, by preventing their franchises from individually licensing their broadcast rights nationally or over the Internet, the leagues are able to demand significantly higher fees from television networks and consumers than would be obtainable in a competitive marketplace while at the same time subjecting viewers to arcane and outdated blackout provisions.

Unfortunately, existing proposals in the academic literature to remedy this undesirable state of affairs are both impractical and unlikely to be effective. This Article instead proposes a surprisingly

---

* Assistant Professor of Legal Studies, Terry College of Business, University of Georgia. I would like to thank Marc Edelman, Gordon Hylton, Matt Mitten, Matt Parlow, Geoff Rapp, Tim Samples, Michael Waxman, and my fellow participants at the Marquette University Law School Sports Law Works-in-Progress Conference for supplying helpful comments on earlier versions of this Article.

often overlooked solution: the creation of a federal sports regulatory body. Because the U.S. professional sports leagues today effectively operate as natural monopolies—with nearly 150 years of history establishing that competing leagues cannot sustainably coexist in a sport for any significant length of time—direct government regulation of the industry is warranted. Indeed, a specialized regulatory body would be particularly well suited to ensure that the leagues' activities are aligned with the public interest, while at the same time accommodating the industry's unusual economic characteristics.

Table of Contents

I. Introduction

Four monopoly sports leagues currently dominate the U.S. professional-team-sports industry.[1] Because each of these leagues enjoys unchallenged control over its respective sport at the highest level of professional competition, each possesses significant market power in what is estimated to be a $67 billion industry.[2] While

---

1. The four monopoly leagues are the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL). This Article focuses only on the legal regulation of these four leagues and does not address the sufficiency of the existing legal regulation of other professional sports leagues or those professional sports (e.g., golf, tennis, auto racing, etc.) utilizing a "circuit" structure in which "a single central body independently coordinates many aspects of the sport." *See* Nathaniel Grow, American Needle *and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L.J. 449, 498 (2011) [hereinafter Grow, American Needle]. This Article also does not address the regulation of the National Collegiate Athletic Association (NCAA).

2. *See* Stefan Szymanski, *What sports capitalism can teach us about real world fair play*, CNN (Jan. 24, 2014, 10:58 AM), http://edition.cnn.com/2014/01/24/business/davos-sports-capitalism-real-world/ (last visited Mar. 25, 2015) (reporting that the estimated "market value of the four major leagues (NFL, MLB, NBA, NHL) [is] $67 billion") (on file with the Washington and Lee Law Review).

Some commentators have contested the extent of the leagues' monopoly market power, contending instead that the leagues simply constitute a few of the many competitors operating in a larger "entertainment" marketplace. *See, e.g.*, Franklin M. Fisher et al., *The Economics of Sports Leagues—The Chicago Bulls Case*, 10 MARQ. SPORTS L.J. 1, 13 (1999) (asserting that "sports leagues compete with other entertainment products"); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 34 n.156 (1983) ("[T]his article posits that the relevant product market for NFL football is the 'entertainment' market . . . .'"); Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 1013 n.253 (1988) [hereinafter Roberts, *Evolving Confusion*] (contending that leagues do not have "substantial or monopoly market power in a relevant product market").

While this may be true to some extent, both courts and many economists have determined that leagues operate in more narrowly defined relevant markets and, thus, possess monopoly power over their respective sport. *See, e.g.*, Fishman v. Estate of Wirtz, 807 F.2d 520, 531–32 (7th Cir. 1986) (characterizing NBA basketball as a separate market); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1393 (9th Cir. 1984) (finding that there are federal antitrust law—the primary legal authority regulating professional sports leagues in the United States[3]—would normally be expected to provide a significant check on anticompetitive, monopolistic behavior, it has failed to govern the industry effectively due to the leagues' well-entrenched monopoly status and the high degree of coordination necessary among their respective teams.[4] Consequently, in many respects, each of the four major U.S. professional sports leagues today effectively enjoys unregulated monopoly status.[5]

As one might expect, the leagues use this unchecked power to extract monopoly profits—or, in economics parlance, monopoly rents[6]—from the public with little legal consequence. For example, by restricting their rate of expansion, the leagues have created an artificial shortage of teams, forcing cities to compete against one another to attract and retain professional sports franchises.[7]

"limited substitutes from a consumer standpoint" for NFL football); Mid-South Grizzlies v. Nat'l Football League, 550 F. Supp. 558, 571 (E.D. Pa. 1982) ("There is no doubt that the NFL currently has a monopoly in the United States in major league football."); JAMES QUIRK & RODNEY FORT, HARD BALL: THE ABUSE OF POWER IN PRO TEAM SPORTS 8 (1999) (discussing "the monopoly power of pro team sports leagues"); Stephen F. Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625, 628 [hereinafter Ross & Szymanski, *Open Competition*] ("All major sports are controlled by monopoly leagues."). Consequently, this Article proceeds on the assumption that each of the four major U.S. professional sports leagues possesses monopoly power.

3. *See infra* notes 29–33 and accompanying text (discussing antitrust law in relation to professional sport regulation).

4. *See infra* Part II (discussing the limitations of antitrust regulation of professional sports leagues); *see also* David Haddock, Tonja Jacobi & Matthew Sag, *League Structure & Stadium Rent-Seeking—the Role of Antitrust Revisited*, 65 FLA. L. REV. 1, 45 (2013) (stating that "antitrust law fails to curb" anticompetitive league conduct).

5. *See infra* Part II (explaining the failure of antitrust law to regulate sports leagues).

6. An economic rent is defined as "a payment for services over and above the incentive required for its production." Haddock et al., *supra* note 4, at 14; *see also* GERALD W. SCULLY, THE MARKET STRUCTURE OF SPORTS 23 (1995) (explaining that "[l]eague rules that define . . . conditions of entry . . . are not necessary for the provision of games but exist in the interest of rent-seeking").

7. *See infra* Part III.A (discussing the anticonsumer practices of sports leagues in regards to stadium construction); *see also* Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues:* American

Despite the questionable economic benefits these franchises impart on their host communities,[8] teams have nevertheless been able to extract enormous subsidies from local governments—typically in the form of new stadiums constructed at public expense—estimated to cost taxpayers as much as $1 billion per year for just the NFL alone.[9] Meanwhile, the leagues have also extended their monopoly power to the television broadcast market, eliminating potential competition among their respective teams by collectively negotiating all national television broadcast agreements on a league-wide basis.[10] As a result, the leagues are able to charge networks higher prices for the right to televise their games, costs that are eventually passed on to all television viewers—both sports fans and non-fans alike—in the form of higher cable television bills.[11] Even then, fans may find themselves unable to watch their favorite teams play on television or over the Internet due to the imposition of various arcane and anticompetitive blackout rules imposed by the leagues.[12]

This Article asserts that government regulation, ideally in the form of a federal sports regulatory body, represents the only practical means for curbing the anticompetitive behavior of the monopoly sports leagues.[13] Because the U.S. professional sports

---

Needle *and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 885 [hereinafter Feldman, *Puzzling Persistence*] ("The scarcity of teams may also give team owners significant leverage when negotiating stadium deals with local governments."); Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 650 (1989) [hereinafter Ross, *Monopoly Sports*] ("Team owners use their significant advantage in bargaining power to extract subsidies from local treasuries.").

8. *See infra* note 164 and accompanying text (noting that the perceived reputational benefits may not outweigh the economic costs of a stadium).

9. *See* Gregg Easterbrook, *How the NFL Fleeces Taxpayers*, THE ATLANTIC (Sept. 18, 2003, 8:24 PM), http://www.theatlantic.com/magazine/archive/2013/10/how-the-nfl-fleeces-taxpayers/309448/ (last visited Mar. 25, 2015) (estimating that "[a]nnualized, NFL stadium subsidies and tax favors add up to perhaps $1 billion") (on file with the Washington and Lee Law Review).

10. *See infra* Part III.B.1 (discussing broadcasting licensing practices).

11. *See infra* notes 217–219 and accompanying text (exploring the anticompetitive effects of leagues' broadcasting licensing practices).

12. *See infra* Part III.B.2 (discussing blackout restrictions).

13. *See infra* Part V (arguing that government regulation is needed).

industry has, throughout its nearly 150-year history, consistently gravitated towards monopoly control of each sport by a single "major" league,[14] alternative proposals employing free-market mechanisms to curtail the leagues' monopoly power are impractical and unlikely to succeed.[15] Indeed, sports leagues today effectively operate as natural monopolies, warranting government regulation of the industry.[16]

Moreover, direct federal regulation of the industry is particularly justified not only insofar as Congress has itself granted the leagues some of their monopoly power through the enactment of various antitrust exemptions[17] but also in light of the fact that the public has repeatedly helped subsidize the industry by providing billions of dollars in stadium funding.[18] Indeed, in many respects, the U.S. professional sports industry has become a public trust, with sports franchises often deeply woven into the social fabric of their host communities.[19] While team owners are

---

14. *See infra* notes 291–304 and accompanying text (discussing the monopolistic nature of sports leagues); *see also* John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1070 ("The tendencies toward monopolization are unmistakable in the various professional sports.").

15. *See infra* Part IV (discussing alternative proposals to curb professional sports leagues' monopoly power).

16. *See infra* notes 291–304 and accompanying text (discussing the development of natural monopolies among professional sports leagues). The characterization of sports leagues as natural monopolies has been adopted by various economists. *See, e.g.*, Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1, 4 (1964) (concluding that "each professional sport is a natural monopoly"); James Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 LAW & CONTEMP. PROBS. 42, 64 (1973) ("Because the incentives for monopoly control are so strong, it is not possible to rely on the market to regulate activities in the professional sports industries—competitive leagues simply will not and have not survived.").

17. *See infra* notes 332–334 and accompanying text (discussing how congressional regulation contributed to the development of league monopolies).

18. *See* Easterbrook, *supra* note 9 (detailing numerous examples of the NFL receiving major subsidies from cities and from taxpayers that "add up to perhaps $1 billion" per year).

19. *See* Arthur T. Johnson & James H. Frey, *Introduction* to GOVERNMENT AND SPORT 2 (Arthur T. Johnson & James H. Frey eds., 1985) (declaring that "sport has acquired the status of a *public trust*").

quick to highlight this relationship when seeking new stadiums,[20] the time has come for the public to take the necessary steps to ensure that the sports industry no longer abuses that bond.[21]

This Article therefore advances the case for the direct federal regulation of the professional sports industry. The Article proceeds in four parts. Part II asserts the normative claim that federal antitrust law is often unable to effectively regulate professional sports leagues due to their unique economic characteristics. Part III documents the ways that sports leagues abuse their unchecked monopoly power to the public's detriment. Part IV discusses alternative scholarly proposals to curtail the sports leagues' anticompetitive practices, concluding that neither divestiture nor the imposition of a promotion and relegation system offers a feasible solution to the problems posed by the monopoly leagues.[22] Finally, Part V proposes an intuitive, but surprisingly often overlooked, solution to the harm caused by the U.S. professional sports industry: the creation of a federal sports regulatory body to govern the monopoly sports leagues.[23] This analysis thus offers an original yet pragmatic contribution to the existing legal literature, proposing a means through which to ensure that professional sports leagues do not harm the public interest in the future while at the same time imposing minimal disruption to an industry closely followed and enjoyed by millions of Americans.[24]

---

20. *See* Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1065 (1996) (stating that team owners frequently claim public trust status when "seeking public financing for new stadiums").

21. *See infra* Part V (advocating for legislative measures to curb abuses by sports leagues).

22. *See infra* Part IV (discussing various proposals to combat professional sports monopolies).

23. *See infra* Part V (arguing for the creation of a federal agency to regulate professional sports leagues' anticompetitive behavior).

24. *See infra* Part V (explaining that government regulation need not be heavy-handed or burdensome).

II. Antitrust Law Cannot Effectively Regulate Professional Sports Leagues

Federal antitrust law is the primary legal authority regulating the operation of professional sports leagues in the United States.[25] While the NFL,[26] NBA,[27] and NHL[28] have each been subject to the Sherman Antitrust Act (Sherman Act)[29] for the better part of sixty years, professional baseball has notoriously been exempt from federal antitrust law since 1922, when the U.S. Supreme Court ruled that its operations did not constitute interstate commerce.[30] Nevertheless, in most respects MLB structures its operations consistent with that of the other professional leagues. Indeed, MLB has often voluntarily abided by the Sherman Act to avoid drawing the ire of Congress and risk the revocation of its exemption,[31] occasionally even going so far as to refrain from asserting its exemption at all in some lawsuits—such as those relating to its trademark licensing activities—and choosing instead to defend

---

25. *See infra* notes 29–33 and accompanying text (discussing regulation of professional sports under antitrust law).

26. *See* Radovich v. Nat'l Football League, 352 U.S. 445, 448 (1957) (concluding that the NFL's "activities as alleged are within the coverage of the antitrust laws").

27. *See* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205 (1971) (stating that the NBA "does not enjoy exemption from the antitrust laws").

28. *See, e.g.*, Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 496 (E.D. Pa. 1972) (concluding that "the National Hockey League is subject to the operations of the antitrust laws").

29. 15 U.S.C. §§ 1–7 (2012).

30. *See* Fed. Baseball Club of Balt. v. Nat'l League, 259 U.S. 200, 208 (1922) (determining that MLB's business "is giving exhibitions of base ball, which are purely state affairs"). The Supreme Court has subsequently affirmed baseball's unusual antitrust status on two occasions. *See* Flood v. Kuhn, 407 U.S. 258, 285 (1972) ("[W]hat the court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972 . . . ."); Toolson v. N.Y. Yankees, 346 U.S. 356, 357 (1953) ("Without reexamination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball* . . . .").

31. *See* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 260 (2012) [hereinafter Grow, *In Defense of*] ("Recognizing that it must maintain political goodwill with Congress to keep its exemption, MLB has regularly agreed to modify its practices in response to congressional pressure.").

itself on the merits of the antitrust challenge.[32] Consequently, because MLB has acted in many respects as if it were subject to the Sherman Act,[33] federal antitrust law governs, directly or indirectly, all four major U.S. professional sports leagues.

Unfortunately, despite society's reliance on the Sherman Act to regulate the professional sports industry, antitrust law has failed to effectively govern the monopoly sports leagues.[34] Indeed, the Sherman Act is poorly suited to regulating these entities due to their unique characteristics and "peculiar economics."[35] Because the individual teams in a league must work closely together to coordinate their competitive athletic events, courts have struggled to apply section 1's anticollusion restrictions in a consistent and coherent manner to curtail the leagues' anticompetitive practices.[36] Meanwhile, because the leagues also enjoy a well-entrenched monopoly status—due to the significant barriers to entry that exist in the industry—the antimonopolization restrictions in section 2 of the Act have likewise failed to curb the leagues' abuse of their monopoly power.[37]

---

32. *See*, *e.g.*, Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 296 (2d Cir. 2008) (demonstrating MLB asserting "that its conduct did not violate the Sherman Act").

33. *Cf.* Grow, *In Defense of*, *supra* note 31, at 215 (concluding that "MLB's operations are nearly identical to the other leagues in most significant respects despite its antitrust immunity").

34. *See* Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 892 (1999) [hereinafter Piraino, *A Proposal*] (declaring that courts have failed to "effectively regulat[e] the leagues' abuses of monopoly power").

35. Neale, *supra* note 16; *see* Steven R. Rivkin, *Sports Leagues and the Federal Antitrust Laws*, *in* GOVERNMENT AND THE SPORTS BUSINESS, 387, 387 (Roger G. Noll ed., 1974) ("Applying the antitrust laws to professional sports, like any attempt to push a square peg through a round hole, is bound to be troublesome.").

36. *See infra* Part II.A.

37. *See infra* Part II.B.

A. Section 1 of the Sherman Act

The activities of the U.S. professional sports leagues have most frequently been scrutinized under section 1 of the Sherman Act,[38] which declares "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . to be illegal."[39] Although a literal interpretation of section 1 would potentially outlaw any agreement limiting trade, courts have historically interpreted the provision to only forbid "unreasonable" restraints, namely those whose anticompetitive effects outweigh their procompetitive benefits.[40] Meanwhile, because any "contract, combination . . . or conspiracy" inherently requires the participation of two or more parties, a single firm acting alone cannot infringe section 1.[41] Instead, the unilateral conduct of a single entity is subject only to the antimonopolization provision in section 2.[42]

The leagues initially contested the applicability of section 1 to their activities by asserting that each league was, in effect, a single economic actor producing a solitary product, such as "NFL football" or "NBA basketball."[43] The U.S. Supreme Court rejected this so-

38. *See, e.g.*, Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 412 (2009) ("The main section of U.S. antitrust law applicable to U.S. sports leagues is Section 1 of the Sherman Act.").

39. 15 U.S.C. § 1 (2012).

40. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (explaining that antitrust law "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest"); *cf.* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 570 (2009) [hereinafter Feldman, *Misuse*] (describing the emerging analysis as finding a practice unreasonable if there is a less restrictive alternative available).

41. *See, e.g.*, Brian Winrow & Kevin Johnson, *The Rule of Law Is the Rule of Reason*, 84 N.D. L. REV. 59, 64 (2008) ("In order for a restraint to violate Section One of the Sherman Act, there must be an agreement between at least two parties.").

42. *See, e.g.*, Grow, American Needle, *supra* note 1, at 449 (discussing same).

43. *See, e.g.*, Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 597 (7th Cir. 1996) ("[T]he NBA submits [that] it function[s] as a single

called "single entity" defense in the 2010 case of *American Needle v. National Football League*,[44] however, holding that section 1 applied to the NFL's joint trademark licensing activities.[45] Because the logic of the *American Needle* decision would appear to extend to most other league activities, practically all league conduct is now subject to challenge under section 1 of the Sherman Act.[46]

The urge for courts to apply section 1 to the professional sports industry is quite understandable as the leagues' existing form of industrial organization is ripe for potential anticompetitive abuse.[47] Indeed, most significant league decisions require the approval of a majority or super-majority of the league's thirty to thirty-two independently owned and operated teams.[48] The individual profit motives of these teams may, in some cases, motivate them to make economically inefficient decisions on behalf of the league, decisions that injure the public interest.[49]

---

entity . . . ."); Sullivan v. Nat'l Football League, 34 F.3d 1091, 1094 (1st Cir. 1994) (addressing the NFL's argument that it "function[s] as a single enterprise"); Madison Square Garden, L.P. v. Nat'l Hockey League, No. 07-CV-8455, 2007 WL 3254421, at *1 (S.D.N.Y. Nov. 2, 2007) (exploring the organizational structure of the NHL).

44. 560 U.S. 183 (2010).

45. *See id*. at 196 ("The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action.").

46. *See* Grow, American Needle, *supra* note 1, at 496 (concluding that "[g]iven the scope of the Supreme Court's ruling [in *American Needle*], it will be difficult for the NFL to assert that it constitutes a single entity in any significant respect in the future").

47. *Cf.* N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1257 (2d Cir. 1982) (asserting that allowing the leagues to avoid the application of section 1 "would permit league members to escape antitrust responsibility").

48. *See* Thomas A. Piraino, Jr., *The Antitrust Rationale for the Expansion of Professional Sports Leagues*, 57 OHIO ST. L.J. 1677, 1677 (1996) [hereinafter Piraino, *Antitrust Rationale*] (stating that the four monopoly sports leagues each employ "super majority voting requirements in the leagues' bylaws").

49. *See, e.g.*, MICHAEL N. DANIELSON, HOME TEAM: PROFESSIONAL SPORTS AND THE AMERICAN METROPOLIS 84 (1997) (noting that "[t]eam interests often conflict with the collective welfare of a league"); Gary R. 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, 258–59 (1984) [hereinafter Roberts, *Sports Leagues*] (finding that "the individual [teams'] economic interests sometimes conflict with the league's interests as a whole"); Ross, *Monopoly*

Take, for example, the case of league expansion. Unless a proposed increase in the number of franchises in a league is expected to enlarge each existing team's share of league revenues, the expansion will typically be rejected even if it would increase league revenues overall.[50] For instance, assume that the thirty-two NFL teams each evenly split $4 billion in annual revenues, generating $125 million per team.[51] Even if a proposed two-team expansion were expected to increase the league's revenues by $100 million per year, to $4.1 billion, the league would nevertheless reject it because it would actually result in each individual team's share of the proceeds declining by $5 million, to around $120 million per year.[52] Consequently, given the decision-making structure employed by the four U.S. professional sports leagues, economically efficient proposals will be rejected even though they would maximize total league revenues and therefore enhance consumer welfare.[53]

There would be little need for courts to regulate the internal decision-making processes of the leagues under section 1 if each of the four major professional sports were subject to a truly competitive market, with multiple competing leagues challenging each other for supremacy.[54] In a competitive marketplace, even if

---

Sports, *supra* note 7, at 698 (declaring that "[o]wners of teams in monopoly sports leagues . . . have substantial room to engage in inefficient behavior").

50. *See* Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 139 (2001) [hereinafter Ross, *Antitrust Options*] (noting that a league "will only expand as long as average revenue" is increased).

51. This example is borrowed from Professor Gabriel Feldman, *Puzzling Persistence*, *supra* note 7, at 885.

52. *Id.*

53. *See* Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213, 226 (2006) [hereinafter Ross & Szymanski, *Antitrust and Inefficient*] ("A club-run league . . . will not expand unless a super-majority of clubs are compensated for any lost revenue, even though the league as a whole might benefit from expansion.").

54. *See* PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 329 (2000) (stating that in a competitive landscape sports leagues would face fewer legal challenges under antitrust law

one league were to engage in an inefficient economic practice, it would nevertheless have little adverse impact on the public because the league would quickly lose market share to one of its more efficiently structured rivals.[55] However, because the four major U.S. sports are not subject to typical market forces but instead are controlled by monopolies operating largely outside the scope of section 2 of the Sherman Act,[56] courts have been forced to apply section 1 to the league's internal governance decisions.[57] Otherwise, the monopoly sports leagues would be left to operate free from any significant regulatory oversight.[58] Thus, internal business decisions that would, in most other industries, be judged only under section 2 are instead analyzed under the much broader section 1 when made by professional sports leagues.[59]

While the instinct to subject sports leagues to scrutiny under section 1 is thus understandable, the provision has nevertheless proven difficult to apply coherently to the industry due to its

---

"because a competitive external market is the best judge on that score").

55. *See* Daniel E. Lazaroff, *Antitrust Analysis and Sports Leagues: Re-Examining the Threshold Questions*, 20 ARIZ. ST. L.J. 953, 986 (1988) (declaring that "interbrand competition" between competing firms typically "offset[s] the anticompetitive effects of any significant intrabrand restraints" in most industries).

56. *See infra* Part II.B (explaining the general inapplicability of section 2 of the Sherman Act to the U.S. monopoly sports leagues).

57. *See supra* note 43 and accompanying text (discussing cases in which courts have applied section 1 to internal decisions by sports leagues despite their assertion of single-entity defenses).

58. *See* Edelman & Doyle, *supra* note 38, at 412 ("The main section of U.S. antitrust law applicable to U.S. sports leagues is Section 1 of the Sherman Act.").

59. *See* Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement*, 60 OHIO ST. L.J. 1773, 1778 (1999) ("Because a single firm can engage in anticompetitive conduct so long as it does not threaten monopolization, activity that (if concerted) would be illegal under Section One, is permitted under Section Two (if it is unilateral)."); Roberts, *Sports Leagues*, *supra* note 49, at 269 ("Sports leagues are the only type of business enterprise whose every internal management decision is subject to Section 1 judicial review."). Section 1 is considered to be a broader provision because it subjects any agreement among multiple firms, and not just those that threaten monopolization of an industry, to scrutiny.

unique economic characteristics.[60] Indeed, economists have long recognized that professional sports leagues operate under an unusual or "peculiar" economic model.[61] Specifically, professional sports teams produce a product—competitive sporting events—that inherently and uniquely cannot be produced by a single firm acting alone.[62] Unlike any other industry, competitive athletic contests depend on the interaction of two different, independently operated teams to create a marketable product.[63] A game staged by a single team acting alone—such as an intra-squad scrimmage—

60. *See, e.g.*, Marc Edelman, *How to Curb Professional Sports' Bargaining Power Vis-à-vis the American City*, 2 VA. SPORTS & ENT. L.J. 280, 284 (2003) [hereinafter Edelman, *How to Curb*] ("The unique structure of the professional sports market . . . renders traditional antitrust scrutiny inadequate."); Piraino, *A Proposal*, *supra* note 34, at 892 ("The federal courts' failure to develop a consistent theory regarding the economic behavior of sports leagues has prevented them from effectively regulating the leagues' abuses of monopoly power.").

61. *See* Neale, *supra* note 16, at 1 (positing that teams in professional sports are in a "peculiar" economic position compared with traditional business entities); Michael A. McCann, American Needle v. NFL*: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 740 (2010) ("As many have observed, the NFL and similarly designed professional sports leagues are unique creatures without clear parallels in the market of goods and services.").

62. *See, e.g.*, PAUL DOWNWARD & ALISTAIR DAWSON, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS 20 (2000) (contending that "in team sports . . . no team can produce saleable output by itself"); Roberts, *Sports Leagues*, *supra* note 49, at 227 (asserting that "a sports team . . . is metaphysically incapable of producing its product" by itself).

63. *See, e.g.*, Grow, American Needle, *supra* note 1, at 466 (explaining that "staging a competitive professional sporting event inherently requires the participation of two different teams").

Some commentators have contested the uniqueness of the sports industry by comparing the leagues to so-called "network joint ventures," or in other words, those "that operat[e] in an area where joint production or distribution is said to be necessary before the product can even exist, at least in the form offered by the joint venture." Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 10; *see* Feldman, *Puzzling Persistence*, *supra* note 7, at 861 n.167 (analogizing sports leagues to network joint ventures). The production of a competitive sporting event is not directly analogous to a network joint venture, however, because unlike the sporting event, the typical network joint venture simply creates a more robust version of a product or service already available on a local basis from a single provider acting alone (such as the long-distance telephone system). *See* Grow, American Needle, *supra* note 1, at 488 (arguing the same).

would lack the "competitive intensity" that "consumers have come to expect and demand."[64] Meanwhile, an entire league of teams is necessary to provide a complete season of competition culminating in the crowning of an overall league champion.[65] To create these products, the teams in a league must not only physically interact on the playing field but also agree to a playing schedule and a common set of rules governing their interaction.[66]

This unique level of interdependence among the teams in a league makes them atypical economic competitors.[67] Whereas in most industries competing firms usually would be eager to drive their rivals out of business to seize a larger share of the market for themselves, franchises in a professional sports league depend on the continued economic viability of their competitors for their own survival.[68] If a single team were to become so successful that it eventually drove its rivals out of business, it would have no one left to play against, assuring its own demise. Therefore, while teams may have a short-term economic incentive to dominate their competition both on and off the playing field, they nevertheless recognize that sustained competitive dominance by any single franchise is not in their own long-term best interest.[69]

---

64. Grow, American Needle, *supra* note 1, at 487; *see* Roberts, *Sports Leagues*, *supra* note 49, at 229 (finding that a series of unconnected exhibition games between barnstorming teams "would yield a substantially different, and far less valuable, entertainment product than that developed today by the modern sports league").

65. *See, e.g.*, Fisher et al., *supra* note 2, at 5 ("Even two teams, or a small number of teams, cannot create the product that is produced by a sports league. That product is a series of games in the context of a league season.").

66. *See, e.g.*, McCann, *supra* note 61, at 730 (noting that "[NFL] teams must . . . collaborate . . . on game rules").

67. *See* Brown v. Prof'l Football, Inc., 518 U.S. 231, 248 (1996) ("[T]he clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival.").

68. *See* DOWNWARD & DAWSON, *supra* note 62, at 20 (noting that while "teams prefer to beat their rivals . . . they cannot aim at a monopoly of sporting success, as they need to play successful teams").

69. *See id.* at 21 (explaining that "[d]omination of a league by a single club would reduce public interest in the sport" with the result that "[i]n the long run even the dominant team suffers").

Indeed, if a league's results become too predictable—on either an individual game basis or with respect to the season-long competition for the league championship—then public interest will inevitably wane, reducing the profitability of the entire enterprise.[70] In this sense, economic success in the professional sports industry is not a zero-sum game; if one team were to seize too large a share of league revenues, the size of the entire pie will shrink.[71] Thus, teams recognize that they must often temper their individual, short-term economic interests to best advance the long-term welfare of the entire league.[72]

Recognizing their unusual economic reality, professional sports leagues have designed an elaborate framework to balance their need to encourage teams to compete vigorously on the playing field, while at the same time ensuring that a sufficient level of competitive balance exists within the sport to create the most marketable and commercially successful product possible.[73] On the one hand, leagues must provide teams with sufficient individual economic incentive to ensure that they will maximize the profits available in their local market, thus increasing the entire league's revenues.[74] On the other hand, leagues must also

70. *See* Yang-Ming Chang & Shane Sanders, *Pool Revenue Sharing, Team Investments and Competitive Balance in Professional Sports: A Theoretical Analysis*, 10 J. SPORTS ECON. 409, 409 (2009) ("[A] sporting competition is more entertaining and of higher quality when the game's outcome is more unpredictable.").

71. *See id.* at 418 (explaining that smaller market teams may not be able to compete due to low revenues that do "not allow them [to] hir[e] talented players hired by larger market teams").

72. This is not to suggest that sports teams' economic interests are always perfectly aligned. As noted above, teams may place their own individual self-interests over that of the league in some cases, such as league expansion. *See supra* notes 50–53 and accompanying text (discussing the incentive of each individual team to vote against league expansion if such expansion would reduce the team's share of league-wide revenues). Nevertheless, professional sports teams are not true competitors in the classic economic sense as their shared profit motive will usually outweigh any competing individual economic interests over the long run.

73. *See* Chang & Sanders, *supra* note 70, at 409 ("[A] sporting competition is more entertaining and of higher quality when the game's outcome is more unpredictable.").

74. *See* WEILER, *supra* note 54, at 310 (noting that "[e]xcessive revenue

impose various restraints on team behavior to maintain competitive balance throughout the league.[75] For example, leagues typically restrict the number of players that teams can employ at any given time, as well as the amount that they spend on player salaries, to ensure that they compete on the playing field on a roughly equivalent basis.[76] Similarly, leagues impose restrictions on who may own their franchises, in part, to guarantee that teams do not fall into the hands of undercapitalized or unqualified owners who could ruin the competitive standing of the franchise.[77]

In light of these unusual economic characteristics, courts have struggled to consistently and coherently apply section 1 to professional sports leagues.[78] Recognizing that teams must coordinate their activities to produce competitive athletic events, courts have traditionally held that league restraints are not subject to automatic, per se condemnation under section 1.[79]

---

sharing may not only deter [teams] from competing in the national market but also reduce the incentive of franchise owners to make their teams more attractive in their home markets—both on and off the field").

75. *See, e.g.*, Stephen F. Ross, *Player Restraints and Competition Law Throughout the World*, 15 MARQ. SPORTS L. REV. 49, 55 (2004) [hereinafter Ross, *Player Restraints*] ("What makes sports leagues unique is the recognition of the legitimate interest that clubs have in competitive balance, an interest that can justify restraints impermissible in other industries.").

76. *See* Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After* Brady v. NFL *and* Anthony v. NBA, 45 U.C. DAVIS L. REV. 1221, 1268 (2012) [hereinafter Feldman, *Antitrust Versus Labor*] ("Teams must also agree . . . on rules regarding roster limits, player salaries, player movement, and other player restraints."). MLB is unique among the four major U.S. sports leagues insofar as it does not employ a salary cap but instead utilizes a luxury tax system. *See* Kimberly A. Colmey, Comment, *Unnecessary Roughness: Why the NFL Should Not Be Flagged for Antitrust Scrutiny in Labor Relations*, 5 J. MARSHALL L.J. 231, 258 (2011) (noting the difference between the two systems).

77. *See* Jorge E. Leal Garrett & Bryan A. Green, *Considerations for Professional Sports Teams Contemplating Going Public*, 31 N. ILL. U. L. REV. 69, 81 (2010) (noting that "professional sports team league policies often impose ownership and control restrictions").

78. *See, e.g.*, Feldman, *Puzzling Persistence*, *supra* note 7, at 843 ("Courts have long struggled to coherently apply the antitrust laws to sports leagues.").

79. *See, e.g.*, Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010) (holding that per se condemnation of sports league restraints is

Instead, they typically apply the so-called "rule of reason" to league activity, weighing the procompetitive benefits of a challenged restraint against its anticompetitive effects.[80] In doing so, courts acknowledge that some otherwise anticompetitive restraints may be necessary to encourage competitive balance among the league's teams and thus ultimately ensure the organization's long-term viability.[81]

Nevertheless, courts applying the rule of reason to professional sports leagues have been forced to make extremely difficult and subjective decisions regarding the competitive effects of a particular challenged practice.[82] Indeed, because most league policies will invariably have some impact on competitive balance—and thus the quality of the league's product as a whole—courts are frequently forced to consider whether a particular restraint's beneficial impact on league-wide competitiveness justifies its anticompetitive effect in a related market. For example, the decision by a league to collectively license its trademarks for merchandising purposes may help further its competitive balance interests by equalizing licensing

---

unjustified because "restraints on competition are essential if the product is to be available at all"); Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 503–04 (E.D. Pa. 1972) (holding that per se scrutiny is not appropriate in professional hockey).

80. *See, e.g.*, McCann, *supra* note 61, at 737 (finding that "[c]ourts have repeatedly adopted rule of reason for scrutinizing restraints imposed by professional sports leagues"); *see also* Edward D. Cavanagh, *Antitrust Law and Economic Theory: Finding a Balance*, 45 LOY. U. CHI. L.J. 123, 131 (2013) ("In short, under the rule of reason, a court must weigh procompetitive benefits against anticompetitive effects and determine, on balance, whether particular conduct restrains trade.").

81. *See* SCULLY, *supra* note 6, at 4 (describing sports leagues as being "unique in the range of anticompetitive practices tolerated" by courts); Ross Siler, Comment, *The Lesson of the 2011 NFL and NBA Lockouts: Why Courts Should Not Immediately Recognize Players' Union Disclaimers of Representation*, 88 WASH. L. REV. 281, 290 (2013) ("Courts recognize that some anti-competitive restraints are acceptable to foster competitive balance in a league.").

82. *See* Haddock et al., *supra* note 4, at 45–46 (declaring that "[a]ntitrust law's failure [to regulate sports leagues] is grounded in the necessity of some forms of cooperation in a sports league, obscuring the boundary between legitimate and illegitimate collusion among franchises").

revenue across the league.[83] At the same time, however, such collective action reduces competition in the market for league trademark licenses, thereby presumably increasing the price that licensees (and ultimately consumers) must pay.[84] Attempting to decide whether the procompetitive benefits of such an activity outweigh its anticompetitive effects brings to mind Justice Scalia's oft-quoted criticism of the rule of reason, declaring it to be the equivalent of "judging whether a particular line is longer than a particular rock is heavy."[85]

Indeed, the rule of reason is particularly ill-suited to appraise the competitive effects of a single restraint that operates as one piece of a much larger framework.[86] Because only a single league practice will typically be at issue in a given lawsuit, courts may not fully appreciate the significance of the challenged restraint within the league's greater operational structure.[87] Viewed in isolation, most individual rules will appear to play a rather inconsequential role within a league's overall balancing of economic and competitive interests, and as a result, courts may underestimate the procompetitive benefits of a particular restraint when evaluating it under the rule of reason.[88] Such an

---

83. Admittedly, leagues could accomplish much the same result by allowing teams to license their trademarks individually and then splitting all revenue equally.

84. *See* Matthew J. Mitten, *From* Dallas Cap *to* American Needle *and Beyond: Antitrust Law's Limited Capacity to Stitch Consumer Harm from Professional Sports Club Trademark Monopolies*, 86 TUL. L. REV. 901, 930 (2012) (explaining that "collective exclusive product licensing . . . eliminates economic competition . . . and likely increases retail prices to the detriment of consumer welfare").

85. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

86. *Cf.* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343 (1982) (recognizing that "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition"); *see also* Weistart, *supra* note 14, at 1067 ("The rule of reason invites a type of inquiry that courts have had difficulty making accurately and efficiently in the sports industry.").

87. *See* Roberts, *Sports Leagues*, *supra* note 49, at 293 (explaining that "as a practical matter, courts and juries are not well equipped to determine what is in a league's interests").

88. This problem is particularly acute in cases when a rule is

approach risks exposing leagues to a "death by a thousand cuts" as courts strike down various rules on a piecemeal basis without fully appreciating how they fit into the larger framework, thus ultimately undermining the league's competitive balance efforts.[89]

This problem is only magnified when courts apply the third step of a typical rule-of-reason analysis and inquire into potential less-restrictive alternatives to the challenged restraint.[90] Under this prong of the rule of reason, even if a court determines that a practice's procompetitive benefits outweigh its anticompetitive effects, it will nevertheless strike down the restraint if its beneficial aspects could have been obtained in a less harmful way.[91] Because any single sports-league restraint may have only a modest impact on competitive balance, courts will frequently be inclined to strike down the challenged practice on the grounds that its particular terms are not essential.

For example, in the 1976 case of *Smith v. Pro-Football, Inc.*,[92] the United States District Court for the District of Columbia held that the NFL's then-seventeen-round draft violated section 1 of the Sherman Act.[93] The draft assigned teams the exclusive

---

"procompetitive when viewed on an *ex ante* basis, but [may be] inefficient . . . when considered from an *ex post* vantage point." Michael A. Flynn & Richard J. Gilbert, *The Analysis of Professional Sports Leagues as Joint Ventures*, 111 ECON. J. F27, F45 (2001).

89. *See* Roberts, *Sports Leagues*, *supra* note 49, at 293 (explaining that "as a practical matter, courts and juries are not well equipped to determine what is in a league's interest").

90. *See* Gary R. Roberts, *The Legality of the Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues*, 3 VA. J. SPORTS & L. 52, 73 (2001) [hereinafter Roberts, *Legality*] (describing the less restrictive alternatives stage of the rule of reason as being "so ill-defined and analytically problematic that it makes analyzing or predicting individual cases very difficult, if not impossible").

91. *See* Feldman, *Misuse*, *supra* note 40, at 563 (describing the analysis as holding that "a restraint that achieves a net pro-competitive impact . . . is illegal if that impact could have been attained by a less restrictive alternative").

92. 420 F. Supp. 738 (D.D.C. 1976).

93. *See id.* at 744 ("[T]he Court can only conclude that plaintiff's contention must prevail, and accordingly holds that the NFL draft in which plaintiff was selected violates the Sherman and Clayton Acts per se . . . ."). Today, the NFL draft is immunized from antitrust law under the so-called nonstatutory labor exemption, insofar as the players' union has agreed to it and incorporated it into

bargaining rights to players in the reverse order of where they finished in the most recent league standings (in other words, the worst team in the league received the first pick in each round while the league champion received the last pick).[94] James "Yazoo" Smith, a former NFL player, challenged this practice under antitrust law, contending that, but for the draft, NFL teams would have been forced to bid against one another for the right to sign him, thereby increasing his eventual salary.[95] Applying a less-restrictive-alternative analysis to the draft, the district court determined that the practice violated the rule of reason insofar as the NFL could have designed a draft with fewer rounds, thereby burdening fewer players while still protecting the league's competitive balance interests.[96]

The problem with such an analysis is that one can almost always devise some hypothetical less-restrictive alternative to the challenged restraint. For example, if so inclined, a court could conclude that reducing the length of a draft from seventeen to twelve rounds, or from eight rounds to five, would be unlikely to have a significant impact on competitive balance, thereby making the existing draft an unlawful restraint of trade.[97] But that does

---

the league's collective bargaining agreement. *Cf.* Clarett v. Nat'l Football League, 369 F.3d 124, 138 (2d Cir. 2004) (holding that the NFL's draft eligibility restrictions are protected under the nonstatutory labor exemption).

94. *See* Ross, *Player Restraints*, *supra* note 75, at 50 ("Common among North American and Australian leagues is a player draft, whereby amateurs or veterans not under contract can only negotiate with the team that selects them; teams usually select in reverse order of finish from the prior season.").

95. *See Smith*, 420 F. Supp. at 740–41 (explaining Smith's contention that the draft was a group boycott that prevented him from acquiring a contract at the actual market value of his services).

96. *See id.* at 747 ("Since there are presently seventeen rounds in the draft, with twenty-eight teams picking in each round, a reduction of fifteen rounds would obviously be significantly less restriction on competition than the present system.").

97. *See* Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337, 381 (1986) (noting "the obvious observation that . . . any type of draft deviating from the free market norm would be fatally flawed, even though it might serve 'to regulate and promote . . . competition,' because it would never be the least restrictive system possible").

not necessarily mean that the restraint was actually overly restrictive as it may have played an important role within the league's larger competitive balance framework, serving to offset teams' greater allotted freedom in another realm of their operations.[98] For example, a league might decide that, by increasing the number of rounds in its draft and thereby making a greater number of entry-level players subject to the process, it can afford to place fewer restraints on veteran players' free agency rights while continuing to ensure that sufficient competitive balance exists among its teams. If a court were to shorten the league's draft under the rule of reason, however, then the league's delicate balancing of its competitive interests would be disrupted.

That is not to say that every league restraint is necessary to maintain competitive balance. Indeed, leagues can—and, as will be seen in Part III, often do—engage in anticompetitive practices that, on balance, injure the public welfare.[99] Moreover, many of these same criticisms can be levied against the rule of reason generally, and not just as it is applied to the professional sports industry.[100] However, the shortcomings of the rule of reason have a more pervasive effect on professional sports leagues than most other industries. Because a sports league will almost always act through the collective decision making of thirty-plus teams,[101] practically every significant decision it renders will be subject to challenge under section 1, thus exposing the league's entire operational framework to the vagaries of the rule of reason.[102]

---

98. *See supra* notes 86–88 and accompanying text (noting the difficulties courts face when analyzing a single restraint that may serve a greater role in a league's operational structure).

99. *See infra* Part III (describing the ways sports leagues abuse their unchecked monopoly power to the public's detriment).

100. *See* Feldman, *Puzzling Persistence*, *supra* note 7, at 898 ("There is little question that the rule of reason is an imperfect method for determining the legality of restraints.").

101. *See supra* note 48 and accompanying text (explaining that most significant league decisions require approval).

102. *See supra* notes 82–85 and accompanying text (contending that the rule of reason requires subjective decision making by courts).

While the extent to which one is troubled by the potential breadth of a sports league's exposure to antitrust law will vary, leagues have undoubtedly been subjected to a haphazard application of section 1.[103] Occasionally, courts have applied section 1 to strike down injurious league conduct.[104] More often, however, judges have applied the provision to league restraints that have, at best, an attenuated and inconsequential impact on consumer welfare (the maximization of which serves as the guiding principle underlying federal antitrust law),[105] while in other cases failing to use the Sherman Act to rein in more egregious conduct inflicting substantial harm on the public.[106]

For example, one source of relatively frequent but nevertheless questionable section 1 litigation has come when a self-interested team owner challenges league-wide policies. In these cases, owners contest the legality of rules that they either voted on themselves or that they implicitly consented to when

103. *See* Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 20 (1986) (noting the existence of "[h]aphazard and inconsistent decisions applying Section 1 of the Sherman Act to league governance rules and practices"); *see also* Feldman, *Antitrust Versus Labor*, *supra* note 76, at 1277 ("[C]omplaints about the incoherence of the Rule of Reason are not wholly without merit; the Rule of Reason has devolved from an imperfect test to an incoherent one.").

104. For example, in one of the earliest reported sports league antitrust cases, the U.S. District Court for the Eastern District of Pennsylvania struck down several anticompetitive television blackout rules adopted by the NFL. *See* United States v. Nat'l Football League, 116 F. Supp. 319, 330 (E.D. Pa. 1953); *see also infra* notes 264–269 and accompanying text (summarizing the reasoning of *United States v. National Football League*). Nevertheless, the application of section 1 to sports leagues has been both over- and under-inclusive with respect to the leagues' allegedly anticompetitive behavior, thus failing to adequately protect the public interest.

105. *See, e.g.*, J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at* Weyerhaeuser, 2007 COLUM. BUS. L. REV. 353, 353 ("Courts and federal law enforcement officials routinely invoke 'consumer welfare' as the guiding principle behind their application of the antitrust laws."). Meanwhile, for examples of sports league antitrust cases with an inconsequential effect on consumer welfare, see *infra* notes 107–109 and accompanying text.

106. *See infra* Part III (arguing that nefarious motivations underlie leagues' resistance to adding more franchises).

acquiring a franchise in the league.[107] These owners effectively seek judicial sanction to have their cake and eat it too, hoping to challenge any restraint that is not in their current self-interest while continuing to abide by those league rules that they find beneficial. Courts have been surprisingly amenable to such claims, using section 1 to strike down various league restrictions.[108] These cases will typically have only a minor impact on the public interest, instead predominantly determining how a group of billionaire owners divide their ever-growing league revenues.[109] As a result, courts are put in the position of adjudicating the types of internal business disputes that are usually resolved within a single firm itself, requiring judges to substitute their own business judgment for that of the league as a whole.[110]

Perhaps more troubling, though, is the fact that at other times courts have been either unwilling or unable to use section 1 to deter the leagues from engaging in anticompetitive conduct far more injurious to the public interest. Indeed, as will be discussed in Part III, both sections 1 and 2 of the Sherman Act have failed to curb sports leagues from using their monopoly power to harm consumer welfare in several significant respects.[111]

---

107. *See* Nicolas Saenz, Note, *Sports Franchise Bankruptcy: A New Way for Team Owners to Escape League Control?*, 10 VA. SPORTS & ENT. L.J. 63, 66 (2010) ("[T]eam owners have agreed to give up some autonomy to be part of an 'efficiency-creating economic organization' known as a sports league."); Weistart, *supra* note 14, at 1043 (stating that when an owner "accepted his franchise, he accepted an array of risks and limitations").

108. *See, e.g.*, Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099–101 (1st Cir. 1994) (banning public ownership of teams violates section 1); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1262 (2d Cir. 1982) (banning ownership of an interest in a competing league violates section 1).

109. *Cf.* Roberts, *Evolving Confusion*, *supra* note 2, at 985 ("[T]he lawfulness of a sports league practice should be judged on whether the practice on balance enhances or retards consumer welfare. It is of no relevance that challenged conduct may adversely affect an individual team . . . .").

110. *See* Ross, *Monopoly Sports*, *supra* note 7, at 734 ("Judicial intervention . . . often puts the court in the role of sports regulator, for which the judge . . . is ill-suited.").

111. *See infra* Part III (describing anticompetitive league under-expansion, broadcasting practices, and blackout polices, which are difficult to combat using the Sherman Act); *see also* Haddock et al., *supra* note 4, at 45 (noting that,

B. Section 2 of the Sherman Act

Despite the judiciary's inconsistent application of section 1 to the sports industry, one might anticipate that the antimonopoly provisions of section 2 of the Sherman Act would be well suited to protect the public from the four major U.S. monopoly sports leagues. However, not all monopolies are automatically illegal under section 2.[112] Instead, only those monopolies that acquire or maintain their dominant position through so-called exclusionary practices (i.e., conduct intended to destroy or prevent a rival from entering the market) violate the law.[113] The theory behind this framework is that so long as new rivals are free to enter the market to challenge a monopolist's dominant position, then marketplace forces will alleviate any potential harm inflicted by the monopoly.[114] Put differently, if a monopoly firm is not satisfying public demand in a competitive market then, absent any barriers to entry, a rival firm will enter the field and chip away at the dominant firm's market share by providing consumers with a superior (or cheaper) product.[115] Otherwise, an unchallenged monopoly can be expected to "reduce its output

---

although "leagues are classic cartels in many senses, they have suffered few adverse antitrust decisions of any sort").

112. *See, e.g.*, Christopher R. Leslie, *Patents of Damocles*, 83 IND. L.J. 133, 135 (2008) ("Section Two of the Sherman Act does not condemn all monopolies, only those achieved or maintained through anticompetitive or predatory conduct.").

113. *See, e.g.*, Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 819 (2011) ("The monopolization offense of Section Two of the Sherman Act requires a dominant firm and an 'exclusionary' practice, which is a practice that destroys a rival or keeps rivals out of the market, permitting the monopolist to raise its price to monopoly levels.").

114. *See* QUIRK & FORT, *supra* note 2, at 130 (noting that "in most other industries, when a monopoly develops and the monopolizing firm begins to make big profits or fails to respond adequately to its customers' demands, competitors enter into the industry").

115. *See id.* ("The firms entering the industry provide lower-priced, more consumer-friendly substitutes for the monopoly firm's products, eating into its market and eroding its profits.").

and/or artificially inflate its prices, to the detriment of consumers."[116]

While this framework has generally proven sufficient for most industries, it has been less effective at curbing the anticompetitive conduct of monopoly sports leagues.[117] Specifically, because each league enjoys well-entrenched monopoly power over its sport, section 2 will only provide a check on the leagues should they engage in some type of exclusionary conduct preventing a rival from entering the field.[118] No such rival has emerged to legitimately challenge the existing leagues in over thirty years, however, due to the nearly insurmountable barriers to entry existing in the industry.[119] Indeed, any new entrant seeking to compete with an existing league would immediately be forced to overcome several significant hurdles.[120]

First, the existing leagues have a tremendous advantage insofar as they have developed loyal, vociferous fan bases in nearly every major city in the United States.[121] On the relatively

---

116. Grow, *In Defense of*, *supra* note 31, at 217; *see* Ross, *Monopoly Sports*, *supra* note 7, at 645 ("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.").

117. *See* Piraino, *A Proposal*, *supra* note 34, at 892 (stating that courts have been unable to "effectively regulat[e] the leagues' abuses of monopoly power").

118. *See supra* notes 112–116 and accompanying text (explaining exclusionary conduct and the rationale behind limiting illegal monopolies to those that are exclusionary).

119. *See, e.g.*, Edelman, *How to Curb*, *supra* note 60, at 291 ("[T]he four premier sports leagues rarely face competition from new leagues because the premier markets have high barriers to entry."); Matthew J. Mitten & Bruce W. Burton, *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, 93–94 (1997) (discussing barriers to entry).

120. *See infra* notes 121–139 and accompanying text (discussing four hurdles: developing a fan base; lack of resources to build new stadiums; difficulty signing talented players; and challenges obtaining a national television contract).

121. *See* STEPHEN F. ROSS, THE BUSINESS OF SPORTS PROFESSIONALS 162 (Paul D. Staudohar & James A. Mangan eds., 1991) (stating that a new league "must now face a giant incumbent, entrenched in all the major media markets . . . in the country").

rare occasions in the past when a rival league has successfully (albeit temporarily) emerged, there have typically been a number of major media markets lacking a professional team in the sport.[122] No such critical mass of unserved or underserved cities exists today.[123] Consequently, any new entrant would inevitably need to compete in cities already occupied by existing franchises in the dominant league.[124] Gaining a foothold in such a community will prove to be extremely difficult, if not impossible, given the long-standing, deeply rooted fan bases supporting most professional sports teams.

Second, any new entrant would also need to find stadiums in which to host its games.[125] Because the teams in the existing leagues have already built lavish facilities costing hundreds of millions of dollars, competing with the established leagues on the stadium front will prove extremely difficult.[126] Considering that

---

122. For example, the American Football League (AFL) successfully challenged the NFL in the 1960s by placing franchises in a number of major but at the time unserved markets, including Boston, Buffalo, Denver, Houston, and Kansas City. *See* Alan Fecteau, *NFL Network Blackouts: Old Law Meets New Technology with the Advent of the Satellite Dish*, 5 MARQ. SPORTS L.J. 221, 228 n.34 (1995) (discussing the formation of the AFL).

123. *See* DANIELSON, *supra* note 49, at 289 (declaring that "professional sports have claimed most markets that are large enough to support major league sports"); QUIRK & FORT, *supra* note 2, at 136 (observing that leagues have teams in enough metropolitan areas to deter the entry of rival leagues).

124. Admittedly, technological changes may eventually decrease the importance of a sports league placing its teams in major media markets. Indeed, as television (and Internet) broadcasting revenues continue to gain importance in the sports industry, the time may eventually come when a league can be profitable based almost entirely on its television contracts without respect to the physical locations of its teams. Such a day still appears to be a ways away, however, as a league's presence in major media markets continues to drive the size of their television contracts. *See, e.g.*, Benjamin I. Leibovitz, *Avoiding the Sack: How Nebraska's Departure from the Big 12 Changed College Football and What Athletic Conferences Must Do to Prevent Defection in the Future*, 22 MARQ. SPORTS L. REV. 675, 682 (2012) (noting that the recent spate of conference realignment in college athletics has been driven by a desire for conferences to "tap into larger television markets" in order to increase their broadcast revenues).

125. *Cf.* Edelman, *How to Curb*, *supra* note 60, at 291 (noting the existing leagues have an "almost insurmountable lead" in "obtaining playing facilities").

126. *See* QUIRK & FORT, *supra* note 2, at 135 (finding that recently

communities will be unlikely to provide a new league with tax subsidies that are comparable to those enjoyed by the existing leagues[127]—especially those municipalities that have recently built a new stadium for an existing franchise in the dominant league—the entrant would need to either build its own new facilities or else refurbish existing stadiums that are no longer being used.[128] In either case, the rival would need a significant upfront infusion of capital to compete with the dominant league on a facilities basis.[129]

Third, a would-be rival would face the challenge of signing enough talented players to allow it to credibly claim major league status.[130] Many established players would undoubtedly be hesitant to join a new league given its uncertain long-term prospects, while others may simply prefer to remain with the established organization believing that it would provide the most

constructed stadiums for the existing monopoly leagues present any would-be rival with "an impossible hurdle" to overcome).

127. *See infra* Part III.A (noting that sports franchises have used the threat of relocation to force cities to build stadiums at taxpayer expense).

128. A third potential option would be for the rival league to seek access to use the existing league's stadiums. *See* Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 809–10 (1987) (discussing section 2 issues that are implicated when a rival league seeks access to a stadium used by an established league). There is some precedent for such a strategy, as the Court of Appeals for the District of Columbia remanded *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), for failure to instruct the jury on the "essential facility" doctrine, which could arguably require a sports franchise to share its facility with a rival franchise when creating another facility is impracticable. *Id.* at 992–93. While such an option might be feasible from a scheduling standpoint in professional football, it will prove less viable in the other sports, which feature much more frequent games. Moreover, such a strategy would undoubtedly entail a lengthy legal battle, and even then would provide a suboptimal solution given the inevitable scheduling difficulties, existing signage supporting the established team, etc.

129. *See* Andrew Zimbalist, *The Practical Significance of Baseball's Presumed Antitrust Exemption*, ENT. & SPORTS LAW., Spring 2004, at 1, 24 ("[A] new league would need hundreds of millions of dollars . . . to build new stadiums . . . .").

130. *See* Edelman, *How to Curb*, *supra* note 60, at 291 (noting the existing leagues possess an "almost insurmountable lead" in "signing superstar players").

challenging competition on the playing field. Meanwhile, for those players willing to entertain an offer from a new entrant, the rival league would need to outbid the established league for his services. This would once again require a significant infusion of capital as players in the existing organizations have been able to capture a large share of the leagues' ever-growing monopoly profits.[131] Indeed, with average salaries now in the two- to five-million-dollar range,[132] and star players receiving as much as $30 million per year,[133] any rival league would have to be extremely well financed to recruit a sufficient number of established players away from the dominant league in its sport.[134] Consequently, an emerging league seeking to compete in one of the four major U.S. sports would likely find it incredibly difficult to acquire the

---

131. *See* WEILER, *supra* note 54, at 327 (stating that players now receive a majority of the monopoly profits earned by the existing leagues).

132. *See* Monte Burke, *Average Player Salaries in the Four Major American Sports Leagues*, FORBES (Dec. 7, 2012), http://www.forbes.com/sites/monteburke/2012/12/07/average-player-salaries-in-the-four-major-american-sports-leagues/ (last visited Mar. 25, 2015) (reporting salary information) (on file with the Washington and Lee Law Review).

133. *See* Jon Heyman, *Miguel Cabrera's record $292M contract not as crazy as it seems*, CBSSPORTS.COM (Mar. 28, 2014, 9:55 AM), http://www.cbssports.com/mlb/writer/jon-heyman/24504279/cabreras-record-contract-for-292-million-isnt-as-crazy-as-it-seems (last visited Mar. 25, 2015) (noting that MLB star Miguel Cabrera will earn $30 million per season from the Detroit Tigers) (on file with the Washington and Lee Law Review).

134. Conversely, a new entrant could try to lure unsigned, up-and-coming players to its league. The feasibility of such a strategy would vary by sport. For instance, because both the NFL and NBA impose age restrictions on their incoming players, a rival league could potentially sign a significant number of major-league-ready prospects simply by recruiting them before they are able to sign with a team in the established league. *Cf.* Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy From a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL'Y 1, 32 n.99 (2008) ("The emergence of a rival professional sports league often impacts whether the dominant league attempts to maintain age/education policies."). However, this approach would likely require the rival league to wait several years to collect and develop enough talent to make a legitimate claim to major league status. Even then, many talented prospects may hesitate to sign with a new entrant, fearing that the decision would have adverse ramifications on their careers in the future should the new league collapse.

critical mass of talent necessary to legitimately declare itself a major league.

Finally, one last barrier to entry that any new rival would inevitably confront is obtaining a national television contract.[135] Unlike in decades past when ticket sales constituted the predominant source of a league's revenue, today as much as two-thirds of a league's income is derived from its television broadcast agreements.[136] While sports broadcasting is an increasingly valuable asset for television stations—offering nearly DVR-proof programming[137]—networks may nevertheless hesitate before committing hundreds of millions of dollars to an unproven venture, especially one that will likely struggle to acquire elite playing talent.[138] Thus, any new entrant in the professional sports industry will likely find itself facing a catch-22, unable to generate substantial television revenue until it signs a sufficient pool of talent but lacking the financial means to sign elite players without a significant television contract.[139]

For all these reasons, the odds that a new rival league will successfully emerge in this day and age to challenge the NFL, NBA, NHL, or MLB are exceedingly remote.[140] Without any such

---

135. *See* SCULLY, *supra* note 6, at 29 ("Access to television may be a necessary condition for the survival of a new league.").

136. *See* Michelle R. Hull, *Sports Leagues' New Social Media Policies: Enforcement Under Copyright Law and State Law*, 34 COLUM. J.L. & ARTS 457, 464 (2011) (reporting that the NFL earns two-thirds of its revenue from television, while MLB and the NBA each receive one-half of their income from their television deals).

137. *See* Symposium, *"Moneyball's" Impact on Business and Sports*, 19 VILL. SPORTS & ENT. L.J. 425, 457 (2012) (quoting television executive Phil Griffin as stating that sports programming is unique because most fans are unwilling to record and watch it later).

138. *See* Christian M. McBurney, Note, *The Legality of Sports Leagues' Restrictive Admissions Practices*, 60 N.Y.U. L. REV. 925, 941 n.100 (1985) (noting that rival leagues' perceived "second class" status makes it much "more difficult for the rival to attract national television contracts and press coverage").

139. *See* WEILER, *supra* note 54, at 328 (noting that new leagues face a "vicious circle" insofar as they "cannot get stars until they have lucrative television and stadium deals, and they cannot get those deals until they have the stars").

140. *See* Ross & Szymanski, *Open Competition*, *supra* note 2, at 645 (declaring that the formation of a new major league is not feasible).

credible challenge, the four major leagues have had neither the opportunity nor the need to engage in any sort of exclusionary conduct over the last thirty years and thus have not run afoul of section 2. Consequently, because the leagues do not presently violate the Sherman Act's antimonopolization provision, antitrust law is unable to effectively curtail their monopoly power.[141]

Moreover, even on those rare occasions in the past when a rival has challenged the established league in its sport, section 2 has provided little protection to the new entrant.[142] For example, the rival United States Football League (USFL) successfully litigated a section 2 monopolization case against the NFL in the mid-1980s, convincing a jury that the established league had engaged in unlawful exclusionary conduct by both attempting to co-opt potential USFL owners and preventing the new league from signing its players.[143] Despite siding with the rival league, the jury concluded that any resulting harm to the USFL was *de minimis*, awarding it only $1 in damages (an amount subsequently trebled to $3).[144]

Therefore, even if a new rival league were to emerge and one of the monopoly leagues were to engage in some form of exclusionary conduct, history suggests that the new entrant

141. *See* Piraino, *A Proposal*, *supra* note 34, at 892 (stating that courts have been unable to "effectively regulat[e] the leagues' abuses of monopoly power").

142. *See* Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751, 754 n.15 (1989) (stating that "Section 2 challenges . . . have been relatively rare and uniformly unsuccessful").

143. *See* U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1341 (2d Cir. 1988) ("The jury's finding of illegal monopolization of a market of major-league professional football was based upon evidence of NFL attempts to co-opt USFL owners, an NFL Supplemental Draft of USFL players, an NFL roster increase, and NFL conduct directed at particular USFL franchises.").

144. *See id.* at 1341, 1380 (affirming jury award on appeal). Similarly, in *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972), the rival World Hockey Association (WHA) sued the NHL under section 2. *Id.* at 467. Despite receiving a district court injunction restraining the NHL from continuing to interfere with its operations, most of the WHA's teams nevertheless collapsed within the span of a few seasons. *See* Marc Edelman, *Sports and the City: How to Curb Professional Sports Teams' Demands for Free Public Stadiums*, 6 RUTGERS J.L. & PUB. POL'Y 35, 49 n.69 (2008) (reporting that the WHA was bankrupt by 1979).

would be unlikely to receive any appreciable benefit from section 2. As a result, neither section 1 nor section 2 of the Sherman Act reliably protects the public from anticompetitive conduct by the four monopoly U.S. professional sports leagues.

III. Professional Sports Leagues Use Their Monopoly Power to Abuse the Public Interest with Little Legal Ramification

Given the difficulties in applying section 1 of the Sherman Act to professional sports leagues, and section 2's general inapplicability to most league conduct, the four U.S. monopoly leagues have been able to abuse the public interest with little legal ramification. Indeed, as discussed below, courts have been largely unable or unwilling to regulate league conduct in two critical areas: (1) league expansion (and, relatedly, stadium subsidies) and (2) television broadcasting.

A. League Expansion and Stadium Subsidies

The most notable area in which antitrust law has failed to protect the public interest and prevent leagues from exploiting their monopoly power is league expansion. Few decisions made by a professional sports league will have a greater impact on the public than the number of teams allowed to compete in the organization.[145] Most obviously, by increasing the number of teams in existence, a league will produce a greater number of games for fans to enjoy. More perniciously, however, by restricting the number of teams below the level that the market would bear, leagues can create an artificial shortage of franchises, allowing them to extract significant monopoly rents—often in the form of stadium subsidies—from the public.[146]

145. *See infra* notes 155–157 and accompanying text (contending that artificial scarcity of teams considerably increases the value of franchises).

146. *See, e.g.*, Haddock et al., *supra* note 4, at 5 (concluding that the leagues' control of expansion has enabled them to engage in rent-seeking by demanding stadium subsidies from municipalities).

Each professional sports league tightly controls the admission of new teams into its organization, typically requiring that any expansion be approved by three-fourths of league owners.[147] Determining the optimal size of a professional sports league is a delicate task, requiring a league to weigh the potential revenue and welfare gains that would result from the formation of a new team against the risk that expansion poses to overall fan interest in the league product and the continued viability of its existing teams.[148]

Over expansion can harm fan interest in several ways. First, because the number of elite players in any given sport is finite, leagues must guard against over expansion to avoid diluting their level of play to a point where it is no longer attractive to fans.[149] Second, any increase in the size of a league necessarily reduces each individual team's chances of winning the league title; if each franchise's championship odds drop too far, fans may lose interest in rooting for a team with only a minuscule chance of winning the overall championship competition.[150] Third, as more teams are added to the league, existing franchises will play fewer games

147. *See, e.g.*, Piraino, *A Proposal*, *supra* note 34, at 905 (noting that each of the "leagues' bylaws . . . requires a three-fourths vote of their members to approve relocation of an existing team or the granting of an expansion franchise").

148. *See* Ross, *Monopoly Sports*, *supra* note 7, at 661 ("It is difficult, if not impossible, to ascertain precisely the optimal number of franchises in major league sports."); Feldman, *Puzzling Persistence*, *supra* note 7, at 885 (contending that leagues "obviously [have] a legitimate interest in limiting the number of teams in the league—for example, teams must be economically viable and an excessive number of teams would dilute the talent level on each team"); Roberts, *Sports Leagues*, *supra* note 49, at 280 n.210 (listing reasons why a "league might oppose expanding league membership").

149. *See, e.g.*, SCULLY, *supra* note 6, at 23 (noting that "spreading a more or less fixed supply of star players over a greater number of teams" can dilute "the quality of play"). *But see* Piraino, *Antitrust Rationale*, *supra* note 48, at 1711 (arguing that fans desire parity within a league, not an absolute high level of play); Ross, *Monopoly Sports*, *supra* note 7, at 664 (contending that any decrease in playing quality would typically be offset by an increase in the number of fans able to enjoy the league's games postexpansion).

150. *See* Piraino, *Antitrust Rationale*, *supra* note 48, at 1712 (acknowledging that "[a]nother argument against league expansion is its supposed reduction in the percentage of teams with a chance to win a championship").

against one another, decreasing the frequency with which fans can watch traditional rivals meet on the playing field.[151]

Moreover, leagues must also restrict expansion to protect their existing host cities from becoming over saturated with franchises. While major metropolises like New York City and Los Angeles can profitably accommodate multiple teams in most sports, smaller communities like Salt Lake City, Cincinnati, Buffalo, and Jacksonville would likely struggle to support more than one team in any major professional sports league.[152] Therefore, by providing certain locales with too many teams, leagues would risk a destabilizing wave of team failures, wreaking havoc on their operations.

Nevertheless, despite these valid motives for rejecting a proposed expansion, the potential exists for leagues to restrict their size for more nefarious purposes. As previously discussed, even if an expansion proposal were expected to increase revenues league wide, and thus enhance consumer welfare, teams will still typically reject the proposal if their own share of league profits is expected to decline.[153] Thus, individual franchises will in many cases have a significant incentive to make economically inefficient decisions on behalf of the league to protect their own self-interest.[154]

Furthermore, by restricting the number of teams in a league below the level that the market can support, owners create an artificial scarcity of franchises, thereby increasing the value of

---

151. *See* DANIELSON, *supra* note 49, at 174 ("Adding teams to a league reduces the number of home games with established teams and traditional rivals, while adding games with new teams that are often poor drawing cards.").

152. *See* Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157, 218 (1984) [hereinafter Lazaroff, *Antitrust Implications*] (acknowledging that "[i]n some cases . . . only one team can be economically supported by a community").

153. *See supra* notes 50–53 and accompanying text (explaining that economically efficient proposals will be rejected by teams because increases in overall revenue for a league may not increase each team's individual revenue).

154. *See supra* notes 49–53 and accompanying text (arguing that teams vote against league expansion out of self-interest, even though league expansion could result in a net gain for the entire league).

their own existing clubs.[155] Indeed, professional sports franchises have consistently realized tremendous, well-above-market increases in value over the last few decades, sometimes appreciating by as much as 30% on an annual basis.[156] While several factors have undoubtedly contributed to this trend, restricting the number of franchises to a level below market demand has helped drive the value of professional sports teams ever higher, further incentivizing owners to reject expansion proposals.[157]

Finally, and perhaps most significantly, teams are motivated to maintain an artificial scarcity of franchises to extract significant public subsidies from their host communities.[158] Because there are more cities desiring franchises than teams available in a given league—and because the possibility of starting a new rival league is impractical[159]—municipalities must compete to attract or retain one of a finite number of existing clubs. Consequently, ever since the early 1950s,[160] professional sports franchises have used the threat of relocation to force cities to build new stadiums, or refurbish existing facilities, at taxpayer expense.[161] These public subsidies are the direct result of league

155. *See* Piraino, *Antitrust Rationale*, *supra* note 48, at 1698 (stating that owners can "drive up the price" of their franchises "[b]y keeping the supply of franchises artificially low").

156. *See* Piraino, *A Proposal*, *supra* note 34, at 916 (reporting that the value of an average NBA or NFL franchise increased approximately 30% annually during the 1980s).

157. *See supra* note 155 and accompanying text (discussing the creation of artificial scarcity).

158. *See, e.g.*, Ross & Szymanski, *Open Competition*, *supra* note 2, at 631 ("[L]eague members have an incentive to expand sub-optimally in order to provide clubs with a credible threat to move to economically viable open markets unless local taxpayers provide generous tax subsidies.").

159. *See* Mitten & Burton, *supra* note 119, at 95 (noting that "the rate of expansion has not been sufficient to satisfy the current demand of cities for major league professional teams"); *see also supra* notes 119–139 and accompanying text (discussing the impracticality of forming a new league).

160. *See* Edelman, *How to Curb*, *supra* note 60, at 285 (reporting that the start of "professional sports' transient era" began when the city of Milwaukee built a publicly financed stadium for baseball's Boston Braves in 1950).

161. *See* Glenn M. Wong, *Of Franchise Relocation, Expansion and*

under expansion.[162] If a sufficient number of teams existed, or if a relocating team could easily be replaced with an expansion franchise, cities would have no need to offer teams such lavish incentives.[163]

Cities are willing to compete to recruit or retain professional sports franchises because they desire the perceived reputational and (often illusory) economic benefits that teams are believed to provide to their host communities.[164] Indeed, the loss of a cherished sports franchise can inflict a substantial blow to local morale.[165] Local politicians, recognizing that their prospects for

---

Competition in Professional Team Sports: The Ultimate Political Football?, 9 SETON HALL LEGIS. J. 7, 43–44 (1985) (discussing different subsidy arrangements). The potential for a team to relocate to a new host community is no idle threat as franchises in the four major sports moved seventy-eight times from 1950 to 1982. Mitten & Burton, *supra* note 119, at 104. Moreover, that statistic fails to account for the number of teams that threatened to relocate but ultimately stayed put after its host community agreed to meet its subsidy demands. *See* QUIRK & FORT, *supra* note 2, at 127 (explaining that "various teams [have] threatened to move but did not" after receiving "new stadiums or arenas . . . [or] improvements to their existing stadiums or arenas").

162. *See* QUIRK & FORT, *supra* note 2, at 136 (arguing that leagues have expanded sufficiently enough to deter the entry of rival leagues "while still preserving enough vacant sites to make move threats believable," which often forces communities to build new stadiums).

163. *Cf.* John Beisner, *Sports Franchise Relocation: Competitive Markets and Taxpayer Protection*, 6 YALE L. & POL'Y REV. 429, 434 (1988) ("A teamless city may obtain a franchise through creation of a new league, expansion of an existing league, or acquisition of a franchise located in another city. The first two alternatives have proven to be ineffective . . . .").

164. *See* Piraino, *A Proposal*, *supra* note 34, at 913 ("Local governments are willing to invest substantial sums to attract teams, as they are desperate to obtain the status of a 'major league city.'"). While the reputational benefits provided by professional sports teams are difficult to assess empirically, economists have almost uniformly concluded that the direct economic benefits of a new stadium are practically nonexistent. *See* QUIRK & FORT, *supra* note 2, at 154 ("In independent studies of the impact of stadiums, there are almost no instances in which stadiums were shown to lead to a measurable increase in the economic well-being of a city."); Haddock et al., *supra* note 4, at 13–14 (reviewing the relevant economics literature).

165. *See, e.g.*, Mitten & Burton, *supra* note 119, at 105 ("The relocation of a major league professional sports team causes psychological distress and a sense of loss to the fans of the former host city."); Wong, *supra* note 161, at 11 ("The communities which house franchises invariably have significant monetary and emotional ties to teams which sport their name.").

re-election will be significantly weakened if a beloved team vacates the city on their watch, almost invariably cave in to their team's stadium demands.[166] Moreover, even if a critical mass of cities were willing to take a hard stand against teams' stadium-subsidy demands, the cities nevertheless face a classic prisoner's dilemma insofar as at least one other municipality will inevitably offer a franchise a favorable deal and thereby attract the team to its city.[167]

Consequently, teams have leveraged the artificial scarcity of professional sports franchises to extract substantial subsidies from local governments. From 1970 to 1999, government subsidies for new sports stadiums were estimated to total as much as $10.4 billion, along with another $1.4 billion in renovations to existing facilities.[168] This trend has only accelerated in the 2000s, with the NFL alone receiving $2.4 billion in stadium subsidies since 2001.[169] As a result, at one point as many as 65% of arenas and 87% of stadiums housing

---

166. *Cf.* Haddock et al., *supra* note 4, at 19 ("Strong civic interest in retaining or obtaining a team means that press reports on a politician's efforts (or lack of effort) will be extensive and exhaustive."). Admittedly, bad politics, rather than just monopoly power alone, may be partially to blame for local municipalities' continued inability to take a hard stand against teams' stadium-subsidy demands. Indeed, as public choice theory recognizes, "politicians, like other people, tend to promote their self-interest." Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give A Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1080 (1993).

167. *See* Marc Edelman, *The House that Taxpayers Built: Exploring the Rise in Publicly Funded Baseball Stadiums from 1953 Through the Present*, 16 VILL. SPORTS & ENT. L.J. 257, 258 n.6 (2009) [hereinafter Edelman, *House that Taxpayers Built*] ("The mayors of American cities are confronted with a prisoner's dilemma. . . . [I]f Mayor A is not willing to pay the price, Mayor B may think it is advantageous to open up the city's wallet.").

168. *See* Haddock et al., *supra* note 4, at 7 ("American governments spend astonishing sums constructing new sporting facilities for private professional sports teams. Between 1970 and the end of 1999, the tally in the United States was $10.4 billion.").

169. *See id.* ("The NFL alone has commanded public stadium subsidies of at least $2.4 billion since 2001.").

teams in the four major U.S. professional sports leagues were publicly owned.[170]

These facilities have been estimated to cost their host communities as much as $500 million per year, with approximately 70% to 80% of the total construction costs being borne by local taxpayers.[171] While such stadium subsidies will obviously have the most direct impact on citizens in the local communities footing the bill, the total cost of construction actually spreads much further. Because most stadium projects are financed using federally tax-exempt bonds, U.S. taxpayers effectively subsidize local communities' stadium construction efforts, costing the federal treasury as much as $120 million over the course of thirty years for just a single $300 million stadium.[172] Thus, in sum, municipal stadium subsidies to the NFL alone have been estimated to cost U.S. taxpayers as much as $1 billion per year.[173]

The opportunity costs attached to these subsidies are considerable. Instead of providing extra revenue to support local schools, social services, or even tax cuts, citizens instead provide corporate welfare to billionaire monopolist team owners.[174] For example, the city of Cincinnati is currently paying $33 million per

---

170. *See* SCULLY, *supra* note 6, at 24 ("Eighty-seven percent of the stadiums and sixty-five percent of the arenas are publically owned, and rent of the facilities is heavily subsidized by taxpayers.").

171. *See* Edelman, *House that Taxpayers Built*, *supra* note 167, at 257 ("Local governments pay on average between seventy and eighty percent of the costs of new stadium construction."); Piraino, *Antitrust Rationale*, *supra* note 48, at 1701 (reporting that "subsidies for professional sports teams currently drain $500 million annually from state and local governments").

172. *See* WEILER, *supra* note 54, at 264 ("[I]f the total facility costs $300 million and the bond term is thirty years, the federal revenues lost on the tax-free interest will be $60–$120 million . . . ."); Haddock et al., *supra* note 4, at 11 (discussing the use of federally tax-exempt municipal bonds to construct sports stadiums).

173. *See* Easterbrook, *supra* note 9 (estimating that "[a]nnualized, NFL stadium subsidies and tax favors add up to perhaps $1 billion").

174. *See* Roger I. Abrams, *Hardball in City Hall: Public Financing of Sports Stadiums*, 3 PACE INTELL. PROP. SPORTS & ENT. L.F. 164, 176 (2013) (suggesting that tax dollars could be better used for "public schools, transportation, housing, roads and infra-structure").

year in debt service and operating costs for two stadiums built in the early 2000s for MLB's Cincinnati Reds and the NFL's Cincinnati Bengals, an amount totaling more than one-fourth of the $119 million recently cut from the city's local school budget.[175] Similarly, the state of Minnesota recently approved an expenditure of $506 million for a new stadium for the NFL's Minnesota Vikings despite the fact that the state was facing a projected budget deficit of $1.1 billion.[176] In some cases, municipalities will even agree to build a new stadium for a team while still paying off the bonds for the old one.[177]

Consequently, professional sports teams have strong incentives to expand their leagues at a much slower rate than market forces would dictate.[178] The resulting artificial scarcity of teams not only increases the values of existing franchises but also enables teams to extract hundreds of millions of dollars in tax subsidies from their local communities, all while depriving fans of additional opportunities to watch their favorite sports.[179]

Unfortunately, the Sherman Act has been unable to prevent the monopoly sports leagues from artificially restricting their size.[180] Indeed, no league has ever been forced to add a new team under antitrust law as courts have consistently refused to order sports leagues to expand their membership.[181] For example, in

---

175. *See* Easterbrook, *supra* note 9 (reporting payments made by Hamilton County, Ohio to support Cincinnati's NFL and MLB teams).

176. *See id.* (noting that when the Vikings "were vaguely threatening to decamp to another state if they didn't get" a new stadium, the Minnesota legislature responded by "extract[ing] $506 million from taxpayers as a gift to the team").

177. *See* Haddock et al., *supra* note 4, at 9 ("[T]eams are often able to convince local politicians that their facility is obsolete before the government has even finished paying for it.").

178. *See* Ross, *Monopoly Sports*, *supra* note 7, at 656 ("Monopoly sports leagues have significant economic incentives to keep the number of franchises below the number that would exist in a free market.").

179. *See id.* at 650 ("Team owners use their significant advantage in bargaining power to extract subsidies from local treasuries.").

180. *See infra* notes 181–187 and accompanying text (discussing the Sherman Act's failure to thwart artificial size restriction).

181. *See* Piraino, *Antitrust Rationale*, *supra* note 48, at 1677–78 (observing that "owners have successfully conspired to keep the number of franchises

Mid-South Grizzlies v. National Football League,[182] a franchise in the defunct World Football League sought to gain admission into the NFL.[183] The Third Circuit Court of Appeals rejected the Grizzlies' claim, finding that the NFL's refusal to admit the team into its league did not violate the Sherman Act.[184] In particular, the court noted that the plaintiff had not alleged that the NFL hindered its ability to compete against the existing league but instead stressed that the Grizzlies merely sought to join the league as a copartner.[185] As a result, the court concluded that the NFL's decision was actually procompetitive insofar as it left Memphis unoccupied and thus a potential market for a future rival league to occupy.[186] Other courts considering the issue have employed similar logic,[187] and, as a result, federal antitrust law has failed to address the significant harm that league under-expansion has inflicted on the public.

Moreover, the entire notion of judicially mandated expansion is problematic in several respects.[188] First, courts are particularly poorly suited to determine whether a specific proposed expansion

---

substantially below that which would exist in a free market"). One trial court did order a sports league to expand under antitrust law but was later reversed on appeal under baseball's antitrust exemption. *See* State v. Milwaukee Braves, Inc., 144 N.W.2d 1, 7–8, 17 (Wis. 1966) (reversing a trial court decision requiring the MLB to replace the departed Milwaukee Braves under state antitrust law).

182. 720 F.2d 772 (3d Cir. 1983).

183. *Id.* at 776; *see also* Grow, *In Defense of*, *supra* note 31, at 224 (discussing the *Mid-South Grizzlies* case).

184. *See Mid-South Grizzlies*, 720 F.2d at 776 (stating that the "case does not present any issue of possible antitrust violation from the exclusion of potential competitors in the designated exclusive home territories").

185. *See id.* at 776–77 (highlighting that the Grizzlies "sought to participate" in the NFL and analyzing the complaint's deficiencies).

186. *See id.* at 786–88 (rejecting the Grizzlies' Sherman Act claims).

187. *See, e.g.*, Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 783 F.2d 1347, 1350 (9th Cir. 1986) (refusing to order the NHL to admit a former rival league team and affirming the trial court's finding that the NHL's decision to exclude "was procompetitive, rather than anti-competitive in its effect and hence not violative of the anti-trust laws" (internal quotation marks omitted)).

188. *See* Edelman, *How to Curb*, *supra* note 60, at 304 (concluding that court-ordered expansion "is a poor solution"); Mitten & Burton, *supra* note 119, at 125 n.417 (discussing the problems with judicially mandated expansion).

team would be financially viable, considering that the success of a franchise depends not only on quantifiable data like the host city's population and average income but also on less easily quantifiable factors such as the expected level of local fan interest and the effect of league-wide talent dilution.[189] And even if a court could be expected to reliably determine whether a proposed expansion team would be likely to succeed, the judiciary is nevertheless poorly positioned to decide which of several competing expansion proposals is the strongest.[190] Because a court would likely have only one proposed expansion site before it at a given time, it may be required to decide whether to order a league to expand to a particular market without knowing if other, more deserving sites exist.[191] This creates two related problems. First, because any court-ordered expansion would likely be limited, prospective owners will be forced to "race to the courthouse" to secure one of the few available expansion franchises.[192] Second, such suits will inevitably be filed in hometown courts, creating the possibility that a locally minded judge will force a league to expand into a city even though another location is objectively more deserving of the team.[193]

In fact, if anything, the application of antitrust law has exacerbated the stadium subsidy problem because courts have used section 1 of the Sherman Act to strike down league restrictions forbidding teams from relocating without league approval.[194] Most notably, in *Los Angeles Memorial Coliseum*

---

189. *See* Grow, *In Defense of*, *supra* note 31, at 225–26 (arguing that court-ordered expansion is an improper solution).

190. *See* Ross, *Monopoly Sports*, *supra* note 7, at 709–10 (observing that "[c]ourts cannot make [expansion] decisions in a vacuum").

191. *See* Grow, *In Defense of*, *supra* note 31, at 226 (contending that courts are ill-equipped to make expansion decisions).

192. *See* Ross, *Monopoly Sports*, *supra* note 7, at 710 ("Allowing those who happen to win the 'race to the courthouse' to prevail does not serve the public interest.").

193. *See* Grow, *In Defense of*, *supra* note 31, at 226 (asserting that hometown bias might affect a judge's ability to make expansion decisions).

194. *See* Nat'l Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562, 567–68 (9th Cir. 1987) (finding that "franchise movement restrictions are not invalid as a matter of law" and that a rule of reason analysis governs such

Commission v. National Football League,[195] the Ninth Circuit held that the NFL's policy requiring any franchise move to be approved by three-fourths of league owners constituted an illegal restraint of trade.[196] While these precedents do not completely foreclose a league's ability to lawfully reject a proposed franchise relocation,[197] they have nevertheless had a substantial chilling effect as leagues are now extremely hesitant to block a move for fear of incurring treble damages liability.[198] As a result, team owners know that they can often move their franchises without any serious risk of league interference, giving individual rogue owners even greater leverage to extract stadium subsidies from their home communities.[199]

Consequently, antitrust law is poorly suited to resolve the issue of professional sports league under-expansion. Instead, as discussed in Part V, an alternative regulatory solution is needed to alleviate the harmful impact that the artificial scarcity of professional sports teams has had on the public.[200]

---

restrictions); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1396–97 (9th Cir. 1984) (upholding jury's determination that the NFL's franchise-movement policy was an unreasonable restraint of trade).

195. 726 F.2d 1381 (9th Cir. 1984).

196. *See id.* at 1395–98 (analyzing the NFL's franchise-movement policy).

197. For example, the *Los Angeles Memorial Coliseum* court noted that a league could properly deny a proposed expansion if the rejection were expressly premised on factors such as protecting the loyalty of fans in the franchise's current host city, preserving natural rivalries, permitting municipalities the time to recoup their investments in local stadiums, and maintaining a league presence in major television markets. *Id.* at 1396–97.

198. *See* WEILER, *supra* note 54, at 253 (explaining that the fear of treble damages has stopped the NFL from preventing its teams from moving).

199. This is not to suggest that leagues should be given complete discretion to control franchise relocation. While a league does have a legitimate interest in regulating where its teams play, it cannot be expected to reliably protect the public interest from relocation threats.

200. *See infra* Part V (arguing that government regulation is needed).

B. Television Broadcasting

Television (and, increasingly, Internet) broadcasting has become the predominant means through which the public consumes professional sporting events. Whereas most games are only witnessed by 20,000 to 80,000 spectators in the stadium, millions regularly watch the action from the comfort of their own homes.[201] Consequently, monopoly sports leagues' restraints in the broadcasting market can have a significant detrimental impact on the public interest.[202]

Unfortunately, as with league expansion and stadium subsidies, antitrust law has also proven to be largely ineffective at protecting the public from sports leagues' anticompetitive broadcasting practices. In some cases, structural barriers prevent courts from curbing league behavior,[203] while at other times a lack of vigorous prosecution is to blame.[204] In any event, the end result is that leagues have been able to harm consumers with little legal ramification by engaging in two primary forms of anticompetitive conduct: (i) the exclusive, collective licensing of their teams' television broadcast rights[205] and (ii) the imposition of arcane television blackout rules.[206]

---

201. *See* Ariel Y. Bublick, Note, *Are You Ready for Some Football?: How Antitrust Laws Can Be Used to Break Up DirecTV's Exclusive Right to Telecast NFL's Sunday Ticket Package*, 64 FED. COMM. L.J. 223, 235–37 (2011) (discussing viewership of professional sports).

202. *See infra* Part III.B (explaining harm caused by leagues' broadcasting restraints).

203. *See infra* notes 231–232 and accompanying text (discussing the Sports Broadcasting Act's antitrust exemption of some league broadcasting policies).

204. *See infra* notes 234–240 and accompanying text (noting the DOJ and FTC's failure to initiate antitrust actions against the leagues).

205. *See infra* Part III.B.1 (describing collective broadcasting licensing practices).

206. *See infra* Part III.B.2 (discussing blackout restrictions).

1. Collective Broadcasting Licensing Practices

In a truly competitive marketplace, each individual franchise in a league would be free to license the broadcast rights to its games to television networks without restriction, thereby creating competition among teams to the benefit of broadcasters and the public at-large.[207] While the NBA, NHL, and MLB each permit their franchises to individually license their broadcast rights regionally, all four monopoly leagues exclusively sell their national television rights on a league-wide basis.[208] This cartelization has allowed the leagues to demand significantly higher broadcast fees than would be obtainable in a competitive market—a form of monopoly rent-seeking—while at the same time decreasing the number of games broadcast nationally.[209]

The experience of the National College Athletic Association (NCAA) provides instructive empirical evidence in this regard. Until the 1980s, the NCAA collectively negotiated a single television package on behalf of all of its football-playing member institutions.[210] Under this plan, only twenty-eight games could be televised per year with no individual team permitted to appear on television more than six times in a two-year period.[211] Despite the

---

207. *See* WEILER, *supra* note 54, at 310 (stating that "if individual teams [were forced to] compete with one another for a larger share of the national market for broadcasting . . . fans w[ould] then get the chance to experience more of the product at a smaller price per item"); Roberts, *Legality*, *supra* note 90, at 61 (pointing out that competition among teams in the television marketplace would "drive the price of the [broadcast] rights down").

208. *See* Grow, *In Defense of*, *supra* note 31, at 248–49 (discussing each league's broadcasting activities). The NFL only allows its teams to license the broadcast rights to preseason games within their region. *Id.* at 249 n.193.

209. *See, e.g.*, QUIRK & FORT, *supra* note 2, at 45 (explaining that when the NFL began negotiating television contracts on a league-wide basis, "this converted what was essentially a competitive television rights market into a monopolized one"); SCULLY, *supra* note 6, at 27 ("By pooling broadcast rights, the leagues eliminated interclub competition in their sale and increased their share of the rents relative to the networks' share.").

210. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 90–94 (1984) (summarizing the history of the NCAA's television plan).

211. *Id.* at 92–94.

limited number of games sold under the package, the NCAA was able to charge two networks a total of nearly $33 million per year for the broadcast rights.[212] Things changed markedly after the Supreme Court struck down the NCAA's collective broadcasting activities in 1984, however.[213] With conferences and teams now free to sign their own deals, the number of televised college football games grew exponentially.[214] At the same time, because schools and conferences were now competing against one another in the marketplace, broadcasters collectively paid half as much for the rights to televise a larger number of games than the NCAA had previously received for its collective package.[215]

Economists have predicted that the public would experience similar benefits if professional sports leagues allowed their teams to compete in the national broadcast marketplace.[216] Indeed, if leagues were prevented from selling their national television broadcast rights exclusively on a collective basis, and teams were forced to compete in the broadcast marketplace, one would expect to find that the number of games available to be viewed on national television would increase while the fees collected for these broadcast rights would decline.[217]

In fact, policymakers are increasingly recognizing that the fees sports leagues charge for their broadcast rights significantly raise the cost of cable television for all subscribers, sports fans

---

212. *Id.* at 93.

213. *See id.* at 120 (affirming the circuit court's decision finding that the NCAA's collective television licensing violated section 1 of the Sherman Act).

214. *See* QUIRK & FORT, *supra* note 2, at 45–46 (describing an "explosion in TV rights signings and in the number of college games on television" following the Supreme Court's decision).

215. *See id.* at 46 (noting that "the total value of the contracts negotiated by the various teams and conferences added up to only half of the $65 million that the NCAA had been able to obtain" from each of its network partners over a four-year period).

216. *See id.* (discussing the effects of the monopolistic market for the NFL's national television broadcast rights).

217. *See* Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 HASTINGS L.J. 501, 530 (2014) (summarizing the argument that individual bargaining would decrease the price of broadcast rights and increase the number of games available to consumers).

and nonfans alike.[218] For example, it has been estimated that every cable television subscriber in the country pays approximately $76 per year—or about 7% of the average annual cable bill—simply for the broadcasts rights for NFL football games, regardless of whether they ever watch a single play.[219] Consequently, the public has a legitimate interest in curbing the leagues' monopoly power in the sale of their broadcast rights.

In addition to selling national television rights exclusively on a collective basis, professional sports leagues also engage in other anticompetitive, league-wide broadcast policies. For instance, all four leagues collectively sell premium pay-per-view packages (e.g., MLB Extra Innings, MLB.tv (Internet), NFL Sunday Ticket, NBA League Pass, and NHL Center Ice) through which consumers purchase the right to watch nearly every league game, regardless of whether it is being broadcast on a local channel.[220] Each league prohibits its individual teams from offering competing services, forcing fans to purchase the right to view all league games and not just those featuring their favorite team.[221] This represents another example of monopoly rent-seeking as the leagues leverage their monopoly power to force consumers to pay higher prices for these pay-per-view packages than would be

218. *See* Todd Shields & Alex Sherman, *Cable Bills Focus of Congress Push for A La Carte Prices*, BLOOMBERG (May 14, 2013, 6:02 PM), http://www.bloomberg.com/news/2013-05-14/cable-bills-focus-of-congress-push-for-a-la-carte-prices.html (last visited Mar. 25, 2015) (noting that Senator John McCain proposed legislation to end bundling of cable television services in part to prevent consumers from having to pay for the sports network ESPN if they do not watch it) (on file with the Washington and Lee Law Review).

219. *See* Derek Thompson, *Mad About the Cost of TV? Blame Sports*, THE ATLANTIC (Apr. 2, 2013, 12:10 PM), http://www.theatlantic.com/business/archive/2013/04/mad-about-the-cost-of-tv-blame-sports/274575/ (last visited Mar. 25, 2015) (reporting the effect of the cost of broadcast rights on cable subscribers) (on file with the Washington and Lee Law Review).

220. *See* Ron Whitworth, Comment, *IP Video: Putting Control in the Hands of the Consumers*, 14 COMMLAW CONSPECTUS 207, 218 (2005) (identifying the pay-per-view services).

221. *See* Bublick, *supra* note 201, at 242–43 (noting that individual teams are unable to offer their own pay-per-view packages).

realized in a competitive market where each individual team sold the rights to view its games separately.[222]

Further compounding matters, since 1994 the NFL has exclusively licensed its Sunday Ticket pay-per-view service to DirecTV.[223] As a result, consumers who want to guarantee that they will be able to watch all of their favorite out-of-market team's games on television not only must pay for the right to watch every NFL game, but also must subscribe to DirecTV's television service to purchase the league's pay-per-view package.[224] However, because DirecTV is not available to fans living in many condominium or high-rise apartment buildings, some consumers have found themselves completely unable to watch their favorite team play.[225]

Finally, all four leagues have also created their own proprietary television networks (i.e., the NFL Network, MLB Network, NBA TV, and the NHL Network), in the process granting these stations the exclusive right to broadcast certain league games on a national basis.[226] Because the leagues generally charge cable companies high subscription rates to carry their networks, some cable providers have refused to subscribe to the channels,[227] and as a result consumers have at times been

---

222. *See id.* (characterizing the leagues' activities as collusion to prevent individual teams from competing in the pay-per-view market).

223. *See* Boliek, *supra* note 217, at 541 ("Since its inception in 1994, the Sunday Ticket is an exclusive contract by which the NFL has sold DirecTV certain exclusive broadcast rights.").

224. *See id.* (discussing the NFL's exclusive contract with DirecTV, which "allows a viewer to watch any of the NFL Sunday games").

225. *See* Bublick, *supra* note 201, at 239 (noting that apartment landlords often prohibit satellite dishes).

226. *See* Ethan Flatt, Note, *Solidifying the Defensive Line: The NFL Network's Current Position Under Antitrust Law and How It Can Be Improved*, 11 VAND. J. ENT. & TECH. L. 637, 640 n.13 (2009) (identifying the four league networks).

227. *See* Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating the Sherman Act*, 16 SPORTS LAW. J. 1, 5 (2009) (stating that some cable companies have refused to carry the NFL Network due to its excessive cost).

completely unable to watch a game involving their hometown team from the comfort of their own home.[228]

To date, antitrust law has failed to curb any of these anticompetitive broadcasting practices. Regarding the leagues' collectively negotiated national television agreements, any would-be litigant would have to overcome a significant structural barrier when challenging many of these contracts in court.[229] Specifically, the Sports Broadcasting Act of 1961 (SBA)[230] provides the four leagues with a limited antitrust exemption allowing them to pool the sale of their broadcasting rights to over-the-air networks such as ABC, CBS, NBC, and Fox (i.e., so-called "sponsored telecasting").[231] The SBA was originally passed at the behest of the NFL, after a federal district court enjoined the organization's initial attempts to enter a league-wide broadcasting agreement with CBS.[232]

While the SBA thus prevents litigants from contesting the leagues' collective national television broadcast agreements with the over-the-air networks, it does not apply to the leagues' similar contracts with cable stations like ESPN or the leagues' own proprietary networks.[233] Nevertheless, none of these arrangements have ever been significantly challenged under antitrust law.[234] Indeed, both the U.S. Department of Justice and the Federal Trade Commission have stated that, although sports

---

228. *See id.* at 3–4 (discussing the 2007 controversy involving games broadcast exclusively on the NFL Network).

229. *See infra* notes 230–232 and accompanying text (explaining the statutory provision exempting some league collective broadcasting contracts from antitrust scrutiny).

230. 15 U.S.C. § 1291 (2012).

231. *See id.* (providing an exemption for pooling certain broadcast rights).

232. *See* United States v. Nat'l Football League, 196 F. Supp. 445, 447 (E.D. Pa. 1961) (prohibiting performance of the NFL's agreement with CBS); *see also* Ross, *Monopoly Sports*, *supra* note 7, at 659 (recounting the history of the SBA).

233. *See* Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 301–02 (3d Cir. 1999) (finding that the SBA applies only to games on "free broadcast television").

234. *Cf.* Grow, *In Defense of*, *supra* note 31, at 249 (noting that the "leagues' agreements with cable networks have rarely been subject to antitrust scrutiny").

leagues' cable broadcast agreements are beyond the scope of the SBA, they do not warrant antitrust action by the agencies.[235]

In fact, the only instance in which the leagues' collective television broadcast practices have faced any significant challenge under the Sherman Act is with respect to their pay-per-view packages.[236] Specifically, litigants have contested the legality of both the NFL's exclusive license of its Sunday Ticket package to DirecTV[237] as well as the NBA's refusal to allow consumers to purchase the right to view individual out-of-market games through its pay-per-view service.[238] Unfortunately, in both cases the efforts ultimately proved unsuccessful, as the NFL was able to settle its case without being forced to make the Sunday Ticket package permanently available on a wider basis,[239] while the suit against the NBA was dismissed by the district court for lack of standing.[240]

Of course, the fact that the leagues' collective television broadcast activities have not been significantly challenged to date does not mean that they will continue to avoid vigorous prosecution in the future. Indeed, two such suits are currently pending against the NHL and MLB.[241] Nevertheless, such suits

---

235. *See* JEROLD J. DUQUETTE, REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST 95 (1999) (discussing the agencies' opinion that the SBA "does not cover cable television deals" but deciding that "existing league cable contracts did not warrant [agency] action").

236. *See infra* notes 237–240 and accompanying text (discussing challenges to pay-per-view packages).

237. *See Shaw*, 172 F.3d at 300–01 (summarizing the suit challenging the Sunday Ticket agreement with DirecTV).

238. *See* Kingray, Inc. v. Nat'l Basketball Ass'n, Inc., 188 F. Supp. 2d 1177, 1185 (S.D. Cal. 2002) (alleging that prohibiting "the sale of rights of any NBA game outside of the team's assigned geographic territory except through the 'NBA League Pass' is not reasonably necessary to achieve any legitimate business objective").

239. *See* Grow, *In Defense of*, *supra* note 31, at 250 (reporting that "the NFL settled [the] lawsuit challenging its exclusive license of the 'Sunday Ticket' television package to satellite provider DirecTV without having to agree to distribute the service more widely" (footnote omitted)).

240. *See Kingray*, 188 F. Supp. 2d at 1198 (granting defendants' motion to dismiss plaintiffs' Sherman Act claims).

241. *See* Complaint at 2, Garber v. Office of the Comm'r of Baseball, No. 12–

must overcome several potentially strong defenses supporting the leagues.[242] First, the leagues can contend that any fan attempting to challenge a collective broadcasting policy lacks the antitrust standing necessary to contest the practice.[243] Indeed, because league broadcast rights are usually sold directly from the league to a television network or cable provider, fans are merely indirect purchasers of the broadcasts, a classification that the Supreme Court has held lacks sufficient standing to sue under the Sherman Act.[244] Meanwhile, although the networks or cable companies would have antitrust standing to challenge these practices as direct purchasers, they have shown little inclination to contest the leagues' broadcast policies, likely to avoid the risk of antagonizing a potential future broadcast partner.[245]

Moreover, even if a plaintiff satisfied the antitrust standing requirement, the leagues would still be able to assert several potential procompetitive benefits in defense of their broadcasting practices under the rule of reason.[246] First, because the home

---

cv–3704 (SAS) (S.D.N.Y. May 9, 2012) (alleging that MLB's broadcast agreements "eliminate competition in the distribution of games over the Internet and television"); Complaint at 2, Laumann v. Nat'l Hockey League, No. 12–cv–1817 (SAS) (S.D.N.Y. Mar. 12, 2012) (contending that the NHL's broadcast agreements violate the Sherman Act).

242. *See infra* notes 243–251 (discussing possible defenses).

243. *See* Boliek, *supra* note 217, at 531 (stating that "plaintiff standing requirements have not been established in most cases" challenging league broadcasting activities).

244. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 728–36 (1977) (determining that indirect purchasers do not have standing to seek damages under federal antitrust laws); *see also* Kingray, Inc. v. Nat'l Basketball Ass'n, Inc., 188 F. Supp. 2d 1177, 1199 (S.D. Cal. 2002) (applying the indirect purchaser rule to reject an antitrust challenge brought against the NBA League Pass pay-per-view service); Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 485 (1990) [hereinafter Ross, *Antitrust Analysis*] (noting that "[s]ports fans do not pay directly to watch NFL football on television"). Fans would arguably qualify as direct purchasers of league Internet broadcast packages, however, as these services are sold directly to consumers from the leagues.

245. *Cf.* James Andrew Miller & Ken Belson, *N.F.L. Said to Have Pressured ESPN*, N.Y. TIMES, Aug. 24, 2013, at D1 (reporting that ESPN pulled out of its partnership with PBS to produce the critical documentary "League of Denial" after the NFL objected to the network's involvement).

246. *See* Ross & Szymanski, *Antitrust and Inefficient*, *supra* note 53, at 239

team owns the broadcast rights to any game played in its stadium at common law,[247] the leagues could assert that league-wide, collective licensing of broadcasts allows teams to overcome the significant transaction costs that would be entailed should franchises be forced to negotiate with each other to individually license the rights to their own road games.[248] Thus, the leagues can contend that, at least in some cases, their collective broadcast agreements may actually increase the number of games available to consumers and therefore do not violate the Sherman Act.[249] Second, the leagues can argue that by pooling their television rights they enhance competitive balance among their franchises by splitting all league-wide television revenue equally among the teams.[250] Finally, the leagues can assert that their collective broadcast agreements help ensure that games involving a greater diversity of teams are shown on national television.[251] Whether these alleged benefits justify the elimination of competition between a league's teams in the television marketplace can, of course, be debated; at a minimum, though, they render the success of any potential antitrust challenge uncertain.

Therefore, even though one federal court has previously concluded that the monopoly sports leagues' cartelization of

("[A]ny rights sales by a club-run league constitutes an agreement among competing clubs to jointly sell valuable rights, which is subject to rule of reason analysis . . . .").

247. *See* Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490, 492 (W.D. Pa. 1938) (noting that a team has "the exclusive right to broadcast play-by-play descriptions of the games played" at its home field).

248. *See* Ross & Szymanski, *Antitrust and Inefficient*, *supra* note 53, at 218 (explaining that "club-run leagues forego attractive business opportunities because they are unable to overcome the significant transactions costs involved in agreeing on how to distribute the proceeds from the opportunity").

249. *See* Ross, *Antitrust Analysis*, *supra* note 244, at 478 (contending that the key antitrust issue in league broadcasting cases "is whether viewership is lower because of the challenged contract than it would be if that contract were enjoined").

250. *See* SCULLY, *supra* note 6, at 27–28 (stating that national, league-wide broadcast agreements help leagues alleviate revenue disparities between large and small market teams).

251. *See id.* at 28 (noting that "[w]ith the rise of national rights and league pooling of these rights, fans see a wider array of games").

national television broadcast rights violates the Sherman Act,[252] such activity today is either immune from, or rarely contested under, federal antitrust law.[253] Consequently, the existing legal regime has failed to satisfactorily protect the public interest from the harmful effects of sports leagues' collective television broadcasting practices.

2. Blackout Restrictions

In addition to eliminating competition in the national television broadcast market, sports leagues also injure the public by imposing arcane and anticompetitive television blackout policies that prevent games from being broadcast in particular markets.[254] Of these restraints, the NFL's blackout rule has historically generated the most criticism.[255] Specifically, between 1973 and 2011, the NFL refused to allow any game that was not sold out at least seventy-two hours in advance to be televised in the home team's city[256] (prior to that time, every game was blacked out in the host team's market regardless of ticket availability).[257] As a result, in some years as many as 25%–30% of the league's games were blacked out in their home market, depriving fans of the opportunity to watch their local team play

---

252. *See* United States v. Nat'l Football League, 196 F. Supp. 445, 447 (E.D. Pa. 1961) (finding that the NFL's two-year exclusive broadcasting contract with CBS violated the Sherman Act).

253. *See supra* notes 207–252 and accompanying text (analyzing judicial treatment of leagues' collective broadcasting licensing practices).

254. *See, e.g.*, Sonali Chitre, *Technology and Copyright Law—Illuminating the NFL's 'Blackout' Rule in Game Broadcasting*, 33 HASTINGS COMM. & ENT L.J. 97, 98 (2010) ("A 'blackout' blocks certain programs from being broadcast in a particular market.").

255. *See id.* at 99 (finding that the NFL's "blackout rule has been widely criticized").

256. *See id.* at 98–99 (explaining the NFL's blackout policy).

257. *See, e.g.*, Ray L. Waters, *21st Century Corporate Mediathletics: How Did We Get to Slamball?*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 1 n.3 (2003) (declaring that "[t]he NFL had a policy requiring TV blackouts within a 75-mile radius until 1973").

on television.[258] Although the NFL has justified this measure on the basis of protecting the home team's ticket revenue, critics argue that the policy is especially injurious to lower- and middle-income fans who cannot afford to pay the ever escalating price to attend a game in person.[259] Bowing to public pressure, the league initially agreed to relax its rules in 2012—by only blacking out games where the home team had failed to sell at least 85% percent of available tickets three days before kickoff[260]—before temporarily suspending the rule in its entirety for the 2015 season.[261]

While the NFL is the only league that has imposed a blackout in the home team's market based on ticket sales, the NBA, NHL, and MLB each employ blackout policies of their own with respect to their television and Internet pay-per-view services discussed above.[262] Specifically, consumers residing within a team's designated broadcast territory cannot watch that club's games through the pay-per-view packages but instead must watch the game on whichever local television station, if any, is broadcasting it.[263]

---

258. *See NFL eases local TV blackout restrictions for upcoming season*, NFL.COM (July 26, 2012, 8:14 PM), http://www.nfl.com/news/story/09000d5d82a406ee/article/nfl-eases-local-tv-blackout-restrictions-for-upcoming-season (last visited Mar. 25, 2015) (reporting that "15 to 20 years ago . . . 25 to 30 percent of games were routinely blacked out") (on file with the Washington and Lee Law Review).

259. *See* Bublick, *supra* note 201, at 231 (noting that the NFL has argued that blackouts are necessary to "ensure that every team, including the less talented ones, would be able to build a strong fan base and generate revenue").

260. *See NFL eases local TV blackout restrictions for upcoming season*, *supra* note 258 (announcing change in blackout rule).

261. *See NFL to suspend TV blackout policy*, ESPN.COM (Mar. 24, 2015), http://espn.go.com/nfl/story/_/id/12545081/nfl-suspend-tv-blackout-policy-2015-owners-vote (last visited Apr. 2, 2015) (reporting that NFL "teams voted for a one-year suspension of the long-standing blackout policy for the [2015] preseason and regular season") (on file with the Washington and Lee Law Review).

262. *See supra* note 220 and accompanying text (discussing other leagues' pay-per-view services); *see also* Chitre, *supra* note 254, at 98 n.8 (explaining that the other leagues' blackout polices "are not based on attendance").

263. *See, e.g.*, Bublick, *supra* note 201, at 238 (noting that the NFL's "blackout rule still applies to Sunday Ticket subscribers").

While consumers subscribing to a league's television pay-per-view package will often receive the network that is airing the blacked out game, this is not always the case. Indeed, in some cases the league blackout territories extend to regions in which a game is unavailable to be viewed on a fan's local cable service. For instance, MLB notoriously blacks out games from its MLB Extra Innings service hundreds of miles from a home team's ballpark, even if the game is unavailable on local television.[264] Under this policy, for example, residents of Iowa are unable to watch any game involving the Chicago Cubs, Chicago White Sox, Kansas City Royals, Milwaukee Brewers, Minnesota Twins, or St. Louis Cardinals, potentially subjecting as many as six of the fifteen MLB games played on any given day to blackout.[265]

Meanwhile, other consumers may not subscribe to cable television at all, instead preferring to watch their favorite team play via the league's Internet broadcast service. Because the league blackout policies typically also extend to their Internet pay-per-view packages,[266] however, fans residing in their team's designated broadcast market cannot watch their favorite local team play via the Internet, but instead must subscribe to cable to watch the games.[267] Such restrictions will only become more

---

264. *See* Grow, *In Defense of*, *supra* note 31, at 250 n.203 (stating that "MLB maintains blackout policies preventing the telecasting of various MLB games in certain cities at particular times").

265. *See* Wendy Thurm, *MLB Blackout Policy Under Attack in the Courts*, FANGRAPHS, http://www.fangraphs.com/blogs/mlb-blackout-policy-under-attack-in-the-courts/ (last updated Jan. 22, 2013) (last visited Mar. 25, 2015) (featuring MLB's blackout map indicating that fans living in Iowa are blacked out from viewing games involving six teams) (on file with the Washington and Lee Law Review). Similarly, fans in Las Vegas are unable to watch any game involving the Arizona Diamondbacks, Los Angeles Angels, Los Angeles Dodgers, Oakland Athletics, San Francisco Giants, or San Diego Padres. *Id.*

266. *See* Sascha D. Meinrath, James W. Losey & Victor W. Pickard, *Digital Feudalism: Enclosures and Erasures From Digital Rights Management to the Digital Divide*, 19 COMMLAW CONSPECTUS 423, 448 (2011) (discussing MLB's use of blackouts with respect to its MLB.tv Internet service).

267. *See* Stephen Dixon, *A Channel Worth Changing? The Individual Regional Sports Network: Proliferation, Profits, Parity, and the Potential Administrative and Antitrust Issues That Could Follow*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 302, 312 n.32 (2013) (stating that MLB uses its blackout policies to force fans to subscribe to cable networks carrying its games).

onerous in the future as society increasingly consumes its entertainment via Internet broadcast rather than traditional over-the-air and cable television.

If the leagues operated in a truly competitive marketplace, with multiple competing leagues in each sport battling for television contracts and fan attention, then market forces would likely prevent the leagues from imposing such overly burdensome blackout restrictions. Unfortunately, as with the leagues' collective television broadcasting agreements, antitrust law has also failed to provide the public with any meaningful relief from the monopoly leagues' blackout policies. Indeed, in the only reported decision to date, the Eastern District of Pennsylvania actually affirmed an NFL rule preventing other teams' games from being broadcast into a home team's market on the day it was hosting a game.[268] Although the district court acknowledged that such a policy technically violated section 1 of the Sherman Act, it nevertheless believed the rule was necessary to protect the home team's attendance and thereby to prevent "disastrous financial effects" from afflicting the league.[269]

This policy was codified in the SBA.[270] Section 1292 of the Act expressly authorizes the leagues to blackout games from network television "within the home territory of a member club of the league on a day when such club is playing a game at home."[271] Although both Congress and the Federal Communication Commission (FCC) have recently questioned this policy, any attempts to repeal this portion of the SBA have been unsuccessful

---

268. *See* United States v. Nat'l Football League, 116 F. Supp. 319, 325–26 (E.D. Pa. 1953) (affirming a blackout rule and noting that "[r]easonable protection of home game attendance is essential to the very existence of the individual clubs").

269. *See id.* at 326 ("The purposes of the Sherman Act certainly will not be served by prohibiting [the] clubs, particularly the weaker clubs, from protecting their home gate receipts . . . .").

270. *See* 15 U.S.C. § 1292 (2012) (providing limited protection to leagues' local telecasting restrictions).

271. *Id.*

to date.[272] Consequently, at a minimum, the NFL's blackout rules are largely immune from antitrust challenge under the SBA.

Meanwhile, although the SBA does not shield the other leagues' blackout restrictions as applied to their pay-per-view services, these rules have been employed for years without being struck down under the Sherman Act.[273] Moreover, none of the recent congressional or FCC initiatives would significantly curb the use of blackouts for purposes of pay-per-view cable or Internet broadcasts.[274] Thus, antitrust law also appears unlikely to provide consumers with any significant relief from league television blackouts.

As a result, the U.S. monopoly sports leagues have been able to impose anticompetitive broadcasting practices on the public with little legal consequence.[275] Because television has become the primary medium through which fans watch and enjoy sporting events, the leagues' unchecked monopoly power in this area has

---

272. The FCC recently voted to abolish its regulations supporting the NFL's blackout restrictions as applied to cable and satellite television providers. *See FCC votes to drop blackout rule*, ESPN.COM (Oct. 1, 2014, 10:22 AM), http://espn.go.com/nfl/story/_/id/11617725/fcc-votes-drop-sports-blackouts-nfl-says-change (last visited Mar. 25, 2015) (noting FCC's decision to eliminate the "outdated and unnecessary" rule) (on file with the Washington and Lee Law Review). However, this change does not prevent the league from continuing to enforce its blackout policy with respect to the over-the-air networks. *See* John Breech, *FCC looking to eliminate sports blackout rule*, CBSSPORTS.COM (Dec. 19, 2013, 2:08 PM), http://www.cbssports.com/nfl/eye-on-football/24381034/fcc-looking-to-eliminate-sports-blackout-rule (last visited Mar. 25, 2015) (discussing how leagues "still have the right to negotiate blackouts into [their] television contract[s]") (on file with the Washington and Lee Law Review).

273. *See supra* notes 262–269 and accompanying text (discussing the leagues' blackout rules and noting that antitrust law has provided little relief).

274. For example, Senators John McCain (R-AZ) and Richard Blumenthal (D-CT) recently proposed the Furthering Access and Networks for Sports (FANS) Act. *See* S. 1721, 113th Cong. 1 (2013) (amending the SBA). Although the FANS Act would amend the SBA to address the NFL's blackout provision, it would not prevent the other leagues from employing blackouts with respect to their cable or Internet pay-per-view services. *See id.* § 3 (amending blackout restriction with respect to local telecasts).

275. *See supra* notes 207–274 and accompanying text (discussing the failure of antitrust law to remedy anticompetitive effects of collective broadcasting practices and blackout rules).

had a significant adverse impact on consumer welfare.[276] Unfortunately, given the insufficiencies of federal antitrust law, this trend appears likely to continue barring the imposition of an alternative regulatory solution.

IV. Proposed Free Market Solutions Are Impractical and Insufficient

Recognizing the potential for sports leagues to abuse their monopoly power, several commentators have proposed free market mechanisms through which they believe the anticompetitive harms inflicted by monopoly sports leagues can be alleviated.[277] These scholars contend that market-based solutions are preferable to avoid the undesirable imposition of government regulation on the sports industry.[278] However, neither of the two primary alternative solutions proposed in the existing literature—divestiture or promotion and relegation—are feasible substitutes for government regulation.[279] Indeed, both options are incredibly

---

276. *See supra* notes 205–206 and accompanying text (describing harm to consumers caused by broadcasting licensing practices); *supra* notes 254–259 and accompanying text (explaining harm to consumers caused by television blackout rules); *supra* notes 262–267 and accompanying text (noting harm to consumers caused by pay-per-view blackout rules).

277. *See* Haddock et al., *supra* note 4, at 23–33 (advocating for the implementation of a promotion and relegation system in U.S. professional sports leagues); Ross, *Monopoly Sports*, supra note 7, at 733–48 (stating the case for splitting up the existing monopoly sports leagues).

278. *See, e.g.*, Ross, *Monopoly Sports*, *supra* note 7, at 702 ("Regulation is a poor means of addressing the problems monopoly sports leagues cause.").

279. In addition to these two proposals, one article has contended that the existing monopoly leagues should be reorganized as single corporations, with a central entity—rather than individual teams—controlling all league operations and decisions. *See* Ross & Szymanski, *Antitrust and Inefficient*, *supra* note 53, at 222–36 (proposing a single entity solution). While this solution would help curb the ability of individual, self-interested teams to reject proposals that would benefit the league as a whole, it would do little to curb the leagues' monopoly power in the realm of television broadcasting or prevent leagues from demanding stadium subsidies. *See supra* notes 47–49 and accompanying text (discussing teams' tendencies to make self-interested decisions that are economically inefficient for the league).

unlikely to ever be enacted and, in any event, would likely fail to fully protect the public from the monopoly sports leagues absent the very sort of government regulation the proposals seek to avoid.

A. Divestiture

Some commentators, most notably Professor Stephen Ross, have suggested that, rather than regulate the monopoly sports leagues, government should instead divide them into two or more competing leagues.[280] Such a solution, these scholars contend, would correct the abuses discussed above by eliminating the existing leagues' monopoly control over their respective sport.[281] Instead of one league possessing the power to arbitrarily hold its number of teams at a level below market demand, a divestiture would create several competing leagues, each of which would theoretically rush to occupy any un- or underserved market before it was taken by one of its rivals.[282] This, in turn, would shift the current supply and demand equilibrium for professional sports teams, reducing the bargaining power that leagues currently hold over municipalities. Consequently, proponents of divestiture assert that cities would no longer be forced to build teams lavish new facilities at public expense but would instead potentially see multiple teams competing for the right to establish a franchise in a particular town.[283] Meanwhile, the existence of multiple competing leagues would also bring competition to the broadcast market,

---

280. *See* QUIRK & FORT, *supra* note 2, at 177 ("[T]he appropriate step to take is for the Justice Department to file suit under the antitrust laws to break up the existing monopoly leagues into several independent competing leagues . . . ."); Ross, *Monopoly Sports*, *supra* note 7, at 646 ("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.").

281. *See* QUIRK & FORT, *supra* note 2, at 176–77 (discussing the most effective way to "correct monopoly abuses").

282. *See id.* at 179 ("[C]ompetition would certainly lead to an expansion in the number of cities possessing major league sports teams.").

283. *See id.* at 180 (stating that "leagues would compete with one another for desirable locations" resulting in "multiple bidders for the stadium services provided by any host city").

freeing broadcasters from being forced to compete to air the games produced by a single monopoly organization.[284]

At first glance, divestiture may seem like an attractive solution. Such a proposal would, in theory, obviate the need for continuing governmental oversight of the sports industry, letting market forces regulate the leagues.[285] In reality, however, divestiture is neither a realistic nor feasible solution to the problem of monopoly sports leagues.

As an initial matter, such a plan is highly unlikely to ever be adopted. Given the popularity of the existing sports leagues, Congress would face significant backlash if it were to impose such an extreme restructuring of the industry's existing industrial organization.[286] Meanwhile, the judiciary also appears unlikely to enforce such a remedy as the barriers to entry in each sport foreclose the possibility of a rival emerging to challenge the existing leagues' monopolies in court under the Sherman Act.[287] Even then, a judge would undoubtedly hesitate to order such an extreme remedy in light of the fact that Congress has, in several instances, legislatively sanctioned the leagues' monopoly power.[288]

---

284. *See id.* ("[C]ompetition among leagues for national TV contracts would drastically reduce or eliminate the monopoly profits from such contracts currently enjoyed by leagues.").

285. *See* Ross, *Monopoly Sports*, *supra* note 7, at 646 ("The competitive market resulting from the divestiture will correct the harms that the monopoly sports leagues inflict on taxpayers and fans.").

286. *Cf.* Mitten & Burton, *supra* note 119, at 127 ("A single major professional league may be a 'better quality entertainment product' that optimally satisfies consumer demand.").

287. *See* Ross, *Monopoly Sports*, *supra* note 7, at 754 (admitting that "[i]f gambling on judicial decisions were legal, the odds-makers would make those betting on a divestiture of professional baseball or football through antitrust litigation decided underdogs"). Instead, Professor Ross has suggested that courts could order a divestiture of the leagues by retroactively applying section 2 of the Sherman Act to the leagues' decades-old exclusionary acts. *See* Ross, *Antitrust Options*, *supra* note 50, at 163 (stating that, because "there is no statute of limitations on suits for injunctive relief," a court could rely on conduct occurring "several decades ago" when ordering a divestiture). Because the adversely affected parties no longer exist, however, any such suit would have to come from the U. S. government, which has shown no inclination to challenge the monopoly sports leagues.

288. In addition to the SBA, Congress has also blessed the formation of a

Setting aside the question of whether a divestiture is at all likely, even if such a plan were to be implemented it is unlikely to be the panacea that its proponents suggest. First, any divestiture would require the nearly impossible task of initially allocating the existing teams among the competing leagues on an equitable basis to ensure that each of the new organizations started off on even financial footing. Because the largest media markets in the country typically only have one or two teams in each sport, however, a divestiture would risk placing whichever new league(s) that lacked an existing presence in these cities at a significant disadvantage with respect to both initial fan interest and potential television revenues.[289]

More significantly, though, even if the existing leagues could be divided in an equitable manner, it is doubtful that prolonged competition between multiple independent leagues would ultimately prove sustainable.[290] Indeed, as both economists and legal commentators have noted over the years, professional sports leagues today appear to operate in many respects as natural monopolies (that is, an industry where a single firm can supply the entire market's demand more efficiently than can competing firms).[291] While such circumstances typically arise in the case of

---

monopoly professional football league. *See supra* notes 231–232 and *infra* notes 332–334 and accompanying text (discussing the impact of the SBA and other legislative authorization for sports monopolies).

289. *See* Neale, *supra* note 16, at 10 (noting that competing leagues would have to "field teams in exactly the same cities (and with exactly the same appeal to historic loyalties)" to be on equal economic footing).

290. *See id.* at 6 ("As one surveys the history and present state of the sporting trades one must admit the possibility . . . that as a matter of observation there appears to be a strong tendency towards a single league . . . ."); Weistart, *supra* note 14, at 1070 ("The tendencies toward monopolization are unmistakable in the various professional sports.").

291. *See* WEILER, *supra* note 54, at 330 (noting "the arguably *natural* monopoly status of any major league sport"); Neale, *supra* note 16, at 4 (stating that from an economics perspective, "the theoretical conclusion is clear: each professional sport is a natural monopoly"); Piraino, *A Proposal*, *supra* note 34, at 899 ("[L]eagues should be viewed as 'natural monopolies' which have gained their market dominance by establishing the most efficient means of delivering their products to consumers."); *see also* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969) [hereinafter Posner, *Natural Monopoly*] ("If the entire demand within a relevant market can be

utilities, where the construction of multiple competing power grids or sewer systems would be economically inefficient,[292] the nearly 150-year history of professional sports leagues in the United States suggests that the industry is also destined for a perpetual monopoly state.[293] Throughout this time, a series of new leagues have emerged to compete with the dominant league in the sport,[294] but only one such challenger has ever survived: baseball's American League.[295] Even in that case, however, the American League closely aligned its operations with the existing National League in 1903, effectively reestablishing monopoly control over the sport.[296]

While various factors have undoubtedly contributed to each individual rival league's demise,[297] one consistent theme emerging from these periods of competition is a substantial increase in player salaries as the two competing leagues bid against one

---

satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly . . . .").

292. *See* Christopher Megaw, *Reviving Essential Facilities to Prevent REMS Abuses*, 47 COLUM. J.L. & SOC. PROBS. 103, 130 (2013) ("Public utilities are a classic example of natural monopoly because of the high cost of developing a distribution network . . . .").

293. *See* Quirk, *supra* note 16, at 64 ("In professional sports, monopoly control of the sport is the typical situation.").

294. *See, e.g.*, *id.* (showing that historically whenever "competitive leagues arise . . . these challenges invariably lead to merger and return to a monopoly position"); Roberts, *Sports Leagues*, *supra* note 49, at 256 n.134 (stating that none of the rival leagues formed since World War II have survived for more than a few seasons).

295. *See* Jacob F. Lamme, Comment, *The Twelve Year Rain Delay: Why a Change in Leadership Will Benefit the Game of Baseball*, 68 ALB. L. REV. 155, 159 (2004) ("The American League, the most successful of these rival leagues, was able to threaten the financial position of the National League by looting its talent.").

296. Beginning in 1903, the American League and National League consolidated their operations under the control of a three-member tribunal known as the "National Commission." *See id.* at 160 (discussing the remonopolization of professional baseball).

297. Such factors can include incompetent management, poor financing, or unlucky downturns in the national economy. *See, e.g.*, Ross, *Monopoly Sports*, *supra* note 7, at 720–23 (discussing historical factors causing the collapse of various rival leagues).

another to sign and retain the best talent.[298] Although clearly beneficial to the players, this competition has historically pushed labor costs to a point where one of the leagues was no longer financially viable.[299] The failing league has thus either been forced to merge with the dominant league or else go out of business.[300] In either case, monopoly conditions have inevitably been restored.

To be sure, Congress has also helped contribute to the leagues' monopoly power through its legislative sanction of certain aspects of that power.[301] Nevertheless, there are strong reasons to believe that, unlike most other industries, perpetual competition among multiple leagues in a single sport will ultimately prove to be unsustainable. The reason for this is relatively simple: fans prefer to watch the best players compete, and as a result, whichever league has the greatest collection of talent will inevitably be

---

298. *See* Jamie P.A. Shulman, *The NHL Joins In: An Update on Sports Agent Regulation in Professional Team Sports*, 4 SPORTS LAW. J. 181, 183 (1997) (stating that "in the 1970s and 1980s, the NHL, NFL, and NBA faced competition from rival leagues which resulted in increased player bargaining power and salaries").

299. *See* Rosenbaum, *supra* note 128, at 797 (explaining that "[b]idding wars and attendant salary increases" have historically resulted in "ruinous competition" between established and rival sports leagues). Professor Ross has characterized this escalation as evidence of exclusionary conduct by the established leagues hoping to drive the rival out of business. Ross, *Monopoly Sports*, *supra* note 7, at 728. However, such competition is better understood as a natural side effect of rivalry in the sports industry. *See infra* notes 302–304 and accompanying text (discussing the pressure for sports leagues to acquire the most talented players).

300. *See* Neale, *supra* note 16, at 6–7 (reporting that history shows that competing leagues will either reform a monopoly or go bankrupt); Rosenbaum, *supra* note 128, at 766 ("[T]he history of rival league competition has led to either ruinous consequences for the least established challenger, or the ultimate merger between the two leagues."). In fact, there is good reason to believe that most rivals do not wish to compete permanently with the dominant league but rather hope to eventually join the existing monopoly. *See* Roger G. Noll, *Alternatives in Sports Policy*, *in* GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 35, at 423 [hereinafter Noll, *Alternatives in Sports*] (noting that the interests of an astute rival "lie in gaining membership in a restored cartel, which can then reinstitute its restrictive practices").

301. *See infra* notes 332–334 and accompanying text (discussing Congress's willingness to grant leagues limited antitrust immunity).

viewed as providing the superior product.[302] As soon as one league gains such an advantage, it will then leverage that success to acquire an even greater share of the elite talent pool, eventually establishing itself as the only true "major" league in its sport.[303] Indeed, nowhere in the world have two competing major leagues in a nation's favored sport been able to coexist for any appreciable length of time.[304]

Therefore, divestiture appears unlikely to provide a lasting solution to the problem of monopoly sports leagues. Indeed, even the proponents of divestiture acknowledge that the competing organizations would need to continue to coordinate their activities in several respects post-breakup.[305] For example, most proponents concede that the leagues would need to join forces to produce a season-ending playoff tournament to crown a single champion in each sport.[306] Some would even go further, allowing the leagues to schedule interleague games during the regular season.[307]

While such coordinated activity may seem modest at first, it is likely to become more involved than the proponents of divestiture tend to acknowledge. For instance, any jointly scheduled regular or postseason interleague competition would require the rival leagues to collectively agree on a television broadcast agreement.[308] Thus, divestiture alone is unlikely to fully alleviate the broadcast-related

---

302. *See* Haddock et al., *supra* note 4, at 59 (observing that there is a "natural desire of sports fans to compare the best against the best").

303. *See* Edelman, *How to Curb*, *supra* note 60, at 301 (stating that "in a multi-league model, one league eventually gains a comparative advantage and drives the others out of business"); Mitten & Burton, *supra* note 119, at 93 (finding that "eventually, fans will prefer the product of one league over that of another, thereby causing the demise of the disfavored league").

304. *See* WEILER, *supra* note 54, at 330 (discussing the outcome of increased competition in sports).

305. *See* Ross, *Monopoly Sports*, *supra* note 7, at 743 (stating that divestiture would bring about "a new challenge: regulating cooperation *between* the competing leagues").

306. *See id.* at 723 (conceding that "[r]ival leagues . . . could agree jointly to produce a Super Bowl or a World Series").

307. *See id.* at 723–24 (acknowledging that "competing leagues could establish inter-league play if it were popular and demanded by fans").

308. *See supra* notes 246–248 and accompanying text (discussing the need for interclub television broadcasting agreements).

harms inflicted by the existing monopoly sports leagues, at least with respect to the most valuable programming (i.e., the postseason championship competition).[309] Moreover, the leagues would likely need to adopt some common labor restraints, such as a salary cap and entry-player draft, to ensure that one organization did not become overly dominant on the playing field.

Consequently, while divestiture appears in theory to be a sound, free-market solution to curb the anticompetitive practices of monopoly sports leagues, in practice it is unlikely to provide lasting relief to the public. Instead, a divestiture would likely either result in one dominant league eventually reestablishing monopoly control in each sport, or else it would require relatively significant coordination between the competing leagues, thereby undermining many of the purported benefits of introducing competition to the industry.

B. Promotion and Relegation

Recognizing that divestiture is unlikely to provide a realistic and sustainable solution to the problem of monopoly sports leagues, some commentators have contended that the industry should instead be forced to adopt a concept employed in European soccer leagues: promotion and relegation.[310] Specifically, in leagues like the English Premier League, membership in the sport's elite organization is not fixed but instead changes on a regular basis as the best minor league teams are promoted to replace the worst performing major league teams (who are themselves relegated to a lower level of competition).[311] Because this same promotion and relegation system is implemented throughout England's many

---

309. *See* Daniel C. Glazer, *Can't Anybody Here Run This Game? The Past, Present and Future of Major League Baseball*, 9 SETON HALL J. SPORT L. 339, 415 (1999) (noting that playoff games typically receive higher television ratings than regular season telecasts).

310. *See generally* Haddock et al., *supra* note 4; Ross, *Antitrust Options*, *supra* note 50; Ross & Szymanski, *Open Competition*, *supra* note 2.

311. *See, e.g.*, Edelman & Doyle, *supra* note 38, at 408 (discussing the operational structure of European soccer leagues).

tiers of professional play, a small-town team beginning in the lowest classification of play could conceivably one day earn the right to be promoted all the way to the Premier League.[312] Thus, unlike the "closed" sports league model employed by the U.S. leagues[313]—in which league membership remains static from year to year—a promotion and relegation system provides new teams with the potential opportunity to one day compete at the major league level, while at the same time incentivizing the worst performing teams to improve or else face demotion to a lower level of play.[314]

Proponents of the promotion and relegation model argue that implementing such a system in the United States would not only increase fan enjoyment—making the race to avoid relegation almost as entertaining as the chase to qualify for the playoffs[315]—but also curb the ability of teams to demand significant public stadium subsidies from their host cities.[316] In particular, these scholars contend that, rather than compete to acquire or retain one of a fixed number of existing professional teams, in a promotion and relegation system cities desiring a major league franchise would instead simply form a new team with the hope of one day achieving promotion to the highest level of competition.[317] Existing

312. *See* Haddock et al., *supra* note 4, at 24 (explaining that each team, even those "in the lower tiers is endowed with the potential to improve and progress, perhaps even to the Premier League").

313. *See* Ross, *Antitrust Options*, *supra* note 50, at 165 (describing "North American sports leagues [as being] closed" insofar as "membership of the league is controlled by existing members").

314. *See id.* at 166–67 (stating that the threat of relegation "would increase the incentive for current major league clubs to" improve "to avoid relegation").

315. *See id.* at 167 (stating that promotion and relegation would allow fans to follow the race "among the lesser teams in the league to avoid relegation").

316. *See* Haddock et al., *supra* note 4, at 59 (concluding that "there is every reason to believe that a system of promotion and relegation would . . . substantially reduce, if not eliminate, the stadium rent-seeking problem").

317. *See* Ross & Szymanski, *Open Competition*, *supra* note 2, at 629 (finding that "a club's threat to relocate without tax subsidies [would be] diluted by the possibility that the team itself may be relegated and, more importantly, by the creation of alternative entry routes for cities that do not possess a major league team").

teams would thus, in theory, lose their leverage over municipalities, decreasing the level of public subsidization of the sports industry.[318]

As with divestiture, the imposition of a promotion and relegation system seems at first glance like an attractive solution to the problem of monopoly sports leagues. However, like divestiture, a promotion and relegation system is also incredibly unlikely to be implemented in the United States. As an initial matter, even though such a solution would appear less drastic than a divestiture of the existing leagues, Congress is still unlikely to mandate that the leagues adopt such a system given the political risks involved.[319] Indeed, considering 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—especially one imported from European soccer, no less—would likely generate significant public backlash among many of the nation's sports fans. Meanwhile, the implementation of such a system is even less likely to come from the judiciary. Even if a victorious section 2 case could be brought against the leagues, divestiture would provide a more natural remedy than would the judicial implementation of a promotion and relegation system.[320]

Moreover, even if a court or Congress were willing to impose promotion and relegation on the existing leagues, the initial

318. *See id.* (contending that "the ability of teams to extract subsidies" under a promotion and relegation model would be "either reduced or eliminated altogether"). Even in Britain, however, the government has occasionally devoted public funds to renovate unsafe stadiums. *See* Haddock et al., *supra* note 4, at 17 ("[O]ver the past fifteen years the British government has allocated significant funds to renovate stadiums not just in England but throughout Great Britain.").

319. *See* Ross, *Antitrust Options*, *supra* note 50, at 171 (conceding that a promotion and relegation system "would face opposition [in Congress] from monopoly sports league owners and some risk-averse fans fearful that their team might be relegated").

320. Divestiture has historically been used to address anticompetitive conduct by monopoly firms. *See* Thomas W. Hazlett, *Modular Confines of Mobile Networks: Are iPhones iPhony?*, 19 SUP. CT. ECON. REV. 67, 74–75 (2011) (discussing the divestiture of the American Telegraph & Telephone Company following a successful prosecution under section 2).

transaction costs in implementing such a system would be significant.[321] While European soccer would provide a working model of how the concept could be implemented in the United States, that model would undoubtedly have to be modified to accommodate the differences between the European and American sports leagues. For example, annual changes in the membership of each league would not only affect the geographically based divisional structure employed by all four monopoly leagues but would also have significant implications on the leagues' existing and future television contracts (whose value depends in large part on the precise roster of media markets represented within a particular league). Neither of these concerns is as present in the largely single-nation based European leagues given their smaller geographic footprint.

Additionally, while both professional baseball and hockey already have existing, multi-tiered minor league systems in place that could accommodate a promotion and relegation model, the same cannot be said for professional football or basketball.[322] Indeed, both the NFL and NBA rely to a large extent on our nation's colleges and universities to develop future professional talent. These college teams are numerous and, in many cases, already have strong and devoted fan followings, undermining the economic viability of a multi-tiered system of professional minor leagues in football and basketball. Thus, it is questionable whether enough demand would exist in these sports to support a sufficient series of new professional minor leagues.

Furthermore, even if such a system were to be implemented, it too would likely require governmental regulation. Indeed, the existing teams in each major league would have a strong incentive

---

321. *See* Haddock et al., *supra* note 4, at 60 (conceding that the "transitional costs of moving from the current system" to a promotion and relegation model could be viewed as a disadvantage).

322. Admittedly, the NBA has a seventeen-team Development League that could provide part of the framework for a promotion and relegation system in professional basketball. *See* Grow, *In Defense of*, *supra* note 31, at 256 n.234 (describing the NBA's Development League). However, additional levels of play would need to be created to have an effective, European-style promotion system for professional basketball in the United States.

to construct any promotion system in such a manner that would make it extremely difficult, if not impossible, to displace a current team at the major league level.[323] Consequently, the government would inevitably need to intervene and design the rules governing promotion and relegation to ensure that the system served its policy objectives.

Finally, and perhaps most significantly, promotion and relegation would not alleviate all of the harms inflicted on the public by the U.S. monopoly sports leagues. While the level of municipal stadium subsidies would likely decline,[324] promotion and relegation would not curb the leagues' monopoly power in the broadcasting market as television networks would still be forced to negotiate with a single monopoly major league in each sport. Consequently, barring additional government intervention, the existing leagues would continue to engage in the anticompetitive television broadcast practices discussed above.

Therefore, promotion and relegation is, at best, a partial solution to the problem of unregulated monopoly sports leagues. Even then, such a system would likely necessitate some of the very same government intervention that its proponents wish to avoid. Consequently, an alternative solution is needed.

V. Government Regulation of the Monopoly Professional Sports Leagues Is Needed

As this Article has established, the four major U.S. professional sports leagues routinely use their monopoly power to impose various anticompetitive restraints on the public.[325] Moreover, due to assorted structural or conceptual barriers, federal antitrust law—the primary existing source of regulation governing the leagues—has failed to adequately protect consumers from

---

323. *See* Haddock et al., *supra* note 4, at 23 (characterizing America's closed sports league structure as "deeply rooted").

324. *See supra* notes 312–314 and accompanying text (discussing the likely fate of subsidies under a promotion and relegation model).

325. *See supra* Part III (discussing the monopoly power of professional sports leagues).

these practices.[326] Consequently, this Article asserts that the creation of a federal regulatory authority to supervise the professional sports industry is both necessary and warranted to safeguard the public interest.[327]

Scholars have traditionally recognized that government regulation offers a sound method of protecting consumers from natural monopolies, as the introduction of competition into such industries will typically prove to be economically counterproductive.[328] Although the sports industry may not meet the classical economic definition of a natural monopoly, its historic gravitation towards the formation of monopoly sports leagues is both incontrovertible and, apparently, inevitable.[329] Furthermore, in light of the many barriers to entry existing in the industry,[330] the chance that a new league forms organically to challenge the existing leagues appears exceedingly unlikely. Thus, barring a highly unlikely government intervention of a far more radical nature—along the lines of the unsatisfactory divestiture or

---

326. *See supra* Part II (discussing the failures of antitrust law in regulating professional sports leagues).

327. Congress clearly has the constitutional authority to subject the professional sports leagues to government regulation under its interstate commerce powers. *See, e.g.*, Mitten & Burton, *supra* note 119, at 130–31 ("Pursuant to its authority to regulate interstate commerce, Congress may govern the conduct of the members of national professional sports leagues.").

328. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 363 (6th ed. 2003) ("The law's traditional answer to the problem of natural monopoly was public utility or common carrier regulation."); *see also* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1364 (1998) (stating that regulatory agencies have tended to focus on "market segments that have natural monopoly characteristics" in recent years). While some have contested the appropriateness of subjecting natural monopolies to governmental regulation, *see, e.g.*, Posner, *Natural Monopoly*, *supra* note 291, it is warranted in this case given the many harms inflicted on the public by the monopoly sports leagues and the lack of viable market-based alternatives. *See supra* Part III (discussing the harms from professional sports monopolies).

329. *See supra* notes 291–304 and accompanying text (discussing the historical trend of monopolization in sports leagues).

330. *See supra* notes 119–140 and accompanying text (summarizing the market forces that act as barriers to entry in the sports industry).

promotion and relegation proposals discussed above[331]—government regulation of the professional sports industry is warranted to curb the leagues' anticompetitive tendencies.

Indeed, government regulation is particularly justified here because Congress shoulders some of the blame for the formation and the perpetuation of the existing sports league monopolies.[332] Not only did Congress grant all four leagues the legal right to negotiate collective television agreements on behalf of their teams in the SBA, thereby eliminating competition between individual franchises in the broadcast market,[333] but it also expressly sanctioned the formation of a single monopoly professional football league in the mid-1960s.[334]

The idea of a regulatory agency for the professional sports industry is not new. As far back as 1972, Congress debated a proposal to create a Federal Sports Commission to regulate the major sports leagues.[335] The proposed agency's power would have

---

331. *See supra* Part IV (discussing alternative proposals to government regulation of monopolies).

332. *See* QUIRK & FORT, *supra* note 2, at 168 (observing that Congress has consistently supported the leagues' monopoly power); *see also* Ross, *Monopoly Sports*, *supra* note 7, at 645 (asserting that when Congress suspends the "application of the antitrust laws for particular industries, some form of government regulation designed to protect consumers . . . almost always accompanies such exemptions. [MLB] and the NFL are glaring exceptions to this practice.").

333. *See supra* notes 230–232 and accompanying text (discussing the passage of the SBA). The SBA's grant of monopoly power is all the more worrisome given that the legislation was passed without any significant congressional deliberation. *See* WEILER, *supra* note 54, at 336 (noting that the SBA was passed "without any serious reflection or debate").

334. Specifically, after several years of vigorous—and arguably destructive—competition between the rival American Football League and NFL in the 1960s, the two leagues jointly petitioned Congress asking for the legislative authorization to merge their operations, thereby restoring monopoly conditions to the sport. Congress agreed—in exchange for the formation of new expansion teams located in the districts of several influential legislators—and, as a result, the NFL's monopoly status has never been seriously threatened again. *See* Grow, *In Defense of*, *supra* note 31, at 269 (reporting legislation providing antitrust exemption); Grauer, *supra* note 2, at 42 (discussing Congress's approval of the AFL–NFL merger); Piraino, *A Proposal*, *supra* note 34, at 898 n.37 (reporting that the AFL and NFL competed from 1960 to 1967).

335. *See* DANIELSON, *supra* note 49, at 291 ("Nothing came of legislation

been limited to regulating four areas: (i) the leagues' television blackout restrictions; (ii) the sale of professional sports teams; (iii) the leagues' entry draft procedures; and (iv) limitations on competition between teams for players (i.e., the so-called "reserve clause").[336] After the proposed Commission failed to gain traction in the 1970s, the idea largely disappeared from the on-going policy debate.[337]

The time has come for the government to take a more active role in regulating the professional sports industry. If anything, it is surprising that the leagues have been able to operate free from government intervention for so long given the current scope of their multibillion dollar operations,[338] their anticompetitive tendencies,[339] and their significant reliance on government subsidies.[340] Indeed, other nations have subjected their professional sports leagues' expansion decisions,[341] internal rules and regulations,[342] and even ticket pricing to government

---

introduced in 1972 to establish a Federal Sports Commission empowered to regulate the sale of teams, transfer of franchise, territorial restrictions, and broadcast rights . . . ."); Noll, *Alternatives in Sports*, *supra* note 300, at 423–24 (discussing the advantages and disadvantages of the 1972 proposal).

336. *See* Rivkin, *supra* note 35, at 409 n.68 (summarizing the proposed agency's authority); *see also* Grow*, In Defense Of*, *supra* note 31, at 240 ("The reserve clause was a provision formerly included in all baseball player contracts that precluded players from negotiating future contracts with anyone but their then-current employer.").

337. One notable exception comes from leading sports economist Professor Andrew Zimbalist, who has proposed a federal regulatory body to oversee the MLB. *See* Andrew Zimbalist, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 182–86 (1992).

338. *See* Szymanski, *supra* note 2 (reporting estimated market value of major sports leagues to be $67 billion).

339. *See supra* Part III (discussing leagues' anticompetitive conduct).

340. *See supra* notes 168–173 and accompanying text (discussing subsidies for stadiums).

341. *See* 2 AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS 870 (1997) (reporting that the creation of expansion franchises in the Dominican Republic's winter baseball league is regulated by the government).

342. *See id.* at 1251–52 (noting that Greece's Sports Secretariat has oversight authority over Greek professional sports leagues' internal rules and regulations); *see also id.* at 990–91 (observing that Venezuela's National Sports Institute similarly has the authority to regulate the nation's professional sports).

regulatory oversight.[343]

The federal government is best positioned to address the U.S. monopoly sports leagues' anticompetitive practices. Rather than regulating the industry through piecemeal legislation, this Article asserts that the creation of a specialized agency—or, alternatively, a regulatory body placed within an existing agency—can best align the activities of the leagues with the public interest, while at the same time taking into account the industry's unique economic characteristics.[344] Unlike the judiciary, which will typically have only a single challenged restraint before it at a given time, an expert agency can develop a better appreciation for the entire framework of a sports league's operations. Thus, the agency will be better suited to appraise the need for a particular league practice and, if necessary, understand how to best amend it to protect consumer welfare.

While the scope of such a regulatory authority's responsibility could, of course, be as broad or narrow as Congress chooses, the foregoing analysis has shown that, at a minimum, the agency should have the authority to regulate the professional sports leagues' (i) expansion and relocation policies and (ii) broadcast activities.[345] First, the regulatory body should have the authority to conduct periodic reviews of each league's rate of expansion to determine whether the leagues have adequately satisfied the existing level of demand in the marketplace.[346] As noted above, economic self-interest will often motivate teams to artificially

---

343. *See id.* at 1252 (stating that Greece subjects professional sports teams' ticket pricing decisions to government regulation); *see also* Luca Barani, *The Regulation of Sport in the European Union: Courts and Markets*, *in* THE REGULATION OF SPORT IN THE EUROPEAN UNION 107, 110 tbl. 6.1 (Barbara Bogusz et al. eds., 2007) (describing both France and Spain as adopting an "interventionist" approach to government regulation of the professional sports industry).

344. *See supra* notes 60–77 and accompanying text (discussing the industry's unique economic characteristics).

345. *See supra* Part III (discussing league expansion and television broadcasting).

346. *See* Weistart, *supra* note 14, at 1037 (suggesting that "normal market forces will not insure that an optimal number of franchises will be established," which justifies regulation).

restrict the number of franchises in a league below the level that the market would otherwise bear.[347] At the same time, over expansion can spread the existing player talent pool too thin across a league, lowering its quality of play to an unacceptable level while also decreasing each individual team's chances of winning a championship and thereby lessening fan interest.[348]

By developing expertise in each league's operations, a regulatory authority would be better equipped than the judiciary (or, from the public's perspective, the self-interested leagues themselves) to reliably conduct this delicate balancing act and ensure that the public interest is protected.[349] Should the regulators conclude that the formation of additional teams is warranted, they could then either select the new markets themselves or direct the league to choose the requisite number of expansion sites under regulatory supervision. Similarly, the regulatory authority could both monitor the league's imposition of an expansion fee (or set the appropriate compensation itself) and supervise its implementation of an expansion draft allowing the new teams to acquire existing players, thereby ensuring that the new franchises are admitted on an equitable basis.[350]

While a more accurate calibration of the number of teams in a league to the overall demand for franchises will go a long way towards reducing the leagues' bargaining leverage over cities, Congress should also give the regulatory body the authority to regulate franchise relocation to fully address the stadium subsidy issue. Indeed, because the demand for teams will likely always outstrip the number of franchises that a league can reasonably

---

347. *See supra* notes 155–179 and accompanying text (discussing the economic incentives for artificial franchise scarcity).

348. *See supra* notes 149–154 and accompanying text (discussing the harms of over expansion).

349. *Cf.* John C. Dodge, *The Baseball Monopoly as Public Utility: Is It Time for Regulation?*, 13 ENT. & SPORTS LAW. 3, 6 (1995) (observing that utility regulators have decades of experience deciding franchising issues like expansion and relocation).

350. *Cf.* DANIELSON, *supra* note 49, at 198 (noting that expansion teams have historically played "poorly in their early years because established organizations have been unwilling to make available sufficient talent to permit new clubs to field competitive teams").

support, cities will continue to see teams use the threat of relocation to extract valuable stadium concessions, even if the leagues are forced to expand.[351] Moreover, league expansion and relocation decisions will often go hand in hand, with the most just outcome in many cases being to reject a team's proposed relocation bid while promptly awarding the unserved city an expansion franchise.[352] This allows the unrepresented market to get the team it has been seeking while at the same time letting the existing host city maintain its historic allegiance to its current club.

This is not to suggest that the regulatory authority should always prevent a franchise from moving to a new city as circumstances will inevitably arise where, due to significant demographic changes, a new market will have significantly greater demand for a team than its current host community.[353] Indeed, during a series of congressional hearings examining the relocation issue in the 1980s, some legislators proposed establishing set criteria governing when a professional sports team could relocate.[354] Rather than categorically rejecting most relocation bids, the regulators should instead evaluate such proposals by weighing a variety of factors, including: (i) the club's financial losses, if any, in its existing market; (ii) the inadequacy of the

---

351. *See* Piraino, *Antitrust Rationale*, *supra* note 48, at 1717 (acknowledging that "[a]t some point, each professional sports league will reach a capacity beyond which it cannot effectively expand").

352. *See* Grow, *In Defense of*, *supra* note 31, at 237 (explaining that a replacement team does not fully alleviate the harm inflicted on a city after its existing team relocates); *see also* Wong, *supra* note 161, at 79 (observing that "expansion and relocation are intimately tied together").

353. *See* Arthur T. Johnson, *The Sports Franchise Relocation Issue and Public Policy Responses*, *in* GOVERNMENT AND SPORT, *supra* note 19, at 219, 235 (suggesting that "to freeze the status quo with regard to the distribution of professional sports franchises" would disadvantage "those cities without sports franchises but that desire a team"); Wong, *supra* note 161, at 20 n.57 (quoting Senator Frank Lautenberg as observing that relocation may be necessary to address "changing markets and changing population").

354. STEPHEN R. LOWE, THE KID ON THE SANDLOT: CONGRESS AND PROFESSIONAL SPORTS 1910–1992, at 124 (Douglas Noverr & Lawrence Ziewacz eds., 1995) (discussing a proposal by Senator Arlen Specter that would have "set up criteria for team movements within professional football, such as proof that the team had lost money for three consecutive years and that the playing facilities were inadequate").

team's current stadium or arena; (iii) the level of fan support in both the team's current and proposed future host cities (including both municipalities' population and income demographics); (iv) the current host city's remaining debt obligations on the team's existing stadium; and (v) the effect that the relocation would have on the league's existing rivalries and geographic distribution of teams.[355] Through such a calculus, the regulatory body will be best positioned to determine whether a proposed relocation is truly in the public interest or rather would simply serve to advance the franchise owner's short-term profit motives.

Second, the regulatory body should also be given the authority to regulate the monopoly leagues' broadcasting practices. Unlike expansion and relocation, which would require continued agency supervision of the industry, any oversight of the leagues' broadcasting activities would be more limited. Indeed, upon conducting an initial analysis of the extent to which the industry's current broadcasting practices harm the public, the regulatory authority could issue a set of regulations to guide leagues' future activities in this area.[356] Once in place, regulators would merely need to monitor the leagues' compliance, a process that should be relatively unobtrusive given the public nature of the broadcasting practices and the relatively lengthy duration of many broadcast agreements.

Although the exact policy prescriptions that should be adopted in this area are beyond the scope of this Article, the regulatory body should nevertheless be instructed to conduct a thorough review of both the leagues' collective broadcast licensing activities as well as their imposition of blackouts. In both cases, regulators should consider not only the harm the practices inflict on the

---

355. *See, e.g.*, Lazaroff, *Antitrust Implications*, *supra* note 152, at 219 (discussing relevant factors in a relocation decision); Quirk, *supra* note 16, at 57 (discussing reasons for ten franchise moves in baseball); Ross, *Monopoly Sports*, *supra* note 7, at 704 n.264 (discussing regulatory proposals set forth by members of Congress).

356. In addition, the regulatory body would be positioned to prevent the leagues from entering broadcast agreements that injure the public without necessarily violating antitrust law. *See* Boliek, *supra* note 217, at 547–48 (noting that an agreement to exclusively broadcast the Super Bowl on DirecTV might not violate the Sherman Act but would significantly harm consumers).

public but also any beneficial justifications for the restrictions. While such an evaluation would, of course, be similar to a rule-of-reason analysis under antitrust law,[357] a regulatory authority would be better positioned than the judiciary to fully appreciate the role that such restraints play in the overall league framework, as well as to tailor specific policy solutions to best advance the public interest. For instance, with respect to the leagues' collective television licensing, if regulators determine that consumers would be better served by having teams compete for broadcast agreements, they could work with the leagues to devise revenue sharing mechanisms to ensure that individual teams did not parlay advantages in national television revenues into perpetual superiority on the playing field.[358] Left to their own devices, the leagues may never reach a suitable agreement on such matters due to the significant transaction costs involved.[359]

While this Article has focused on the harms inflicted by monopoly sports leagues in the areas of league expansion and television broadcasting, Congress could also grant the proposed regulatory body authority over other facets of the industry. For example, scholars have noted that various league trademark licensing and labor practices may also harm the public.[360] Although a comprehensive discussion of these issues is beyond the scope of this Article, Congress could reasonably determine that

---

357. *See supra* note 80 and accompanying text (discussing the rule of reason).

358. *See* SCULLY, *supra* note 6, at 27–28 (explaining that disparities in television revenue can promote "inequality on the playing field").

359. *Cf.* Ross & Szymanski, *Antitrust and Inefficient*, *supra* note 53, at 229 (noting that "[t]ransaction costs [may] inhibit club-run leagues from maximizing profits from the sale of broadcast and internet rights" as owners could be "unable to agree among themselves on how to divide the proceeds").

360. *See, e.g.*, 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, 554 (2010) (stating that "[a]ccording to one court" league-imposed, draft-eligibility age restrictions harm "consumers who may otherwise prefer to attend games featuring the excluded players"); Mitten, *supra* note 84, at 930 (asserting that exclusive, league-wide trademark licensing "likely increases retail prices to the detriment of consumer welfare").

these activities—or others—should also be subject to regulatory oversight.

Despite the benefits that a federal sports regulatory authority would provide to the public, several likely objections to the creation of such an entity can be anticipated. First, critics may assert that such a proposal is unlikely ever to be passed by Congress. Given the general deregulatory spirit that continues to permeate Washington, the odds are admittedly slim that Congress would agree in the near future to create a new government office to regulate an industry with the social capital of the major professional sports leagues. This is especially true given that the leagues would undoubtedly lobby vigorously against the creation of an administrative body possessing the authority to regulate their expansion and broadcasting activities.[361]

These lobbying efforts could be offset to some degree. First, Congress could rally other well-organized constituencies behind the cause. For instance, television networks would stand to benefit from increased competition in the leagues' broadcasting activities and therefore may be willing to support the effort to subject the sports industry to governmental oversight. Moreover, Congress could also attempt to temper the leagues' opposition by offering them some benefits as part of the legislation. For example, in exchange for acquiescing to government regulation, the leagues could be given targeted or complete immunity from private antitrust lawsuits. Indeed, with a federal regulatory authority in place, the need for a private right of action against the sports leagues would be largely obviated. By extending to the leagues additional antitrust immunity, they would no longer face the prospect of defending their practices in what often proves to be unpredictable, expensive litigation. Such a concession would even benefit the antitrust-exempt MLB, solidifying the league's oft-criticized antitrust immunity.[362]

---

361. *See* McCann, *supra* note 61, at 780 (asserting that the leagues "are well-positioned to exert disproportionate influence on congressional decisionmaking"); *cf.* DANIELSON, *supra* note 49, at 98 (discussing the "substantial political influence of team owners, leagues, and their corporate allies").

362. *See supra* note 31 and accompanying text (discussing the ever-present

Nevertheless, the odds that such legislation would be passed in the short-term are not great. One can envision a day in the not too distant future, though, when federal regulation of the professional sports industry could gain more traction. Because most sports facilities have an estimated lifespan of thirty to forty years, many existing stadiums will be due for replacement or significant renovation beginning in the 2020s.[363] Commentators have speculated that this will set off another wave of extravagant subsidy demands by the professional sports leagues.[364] In light of the budgetary challenges currently afflicting all levels of government, the leagues' request for lavish new stadiums built at taxpayer expense could generate greater public backlash than in previous decades. If such demands are accompanied by the relocation of several communities' cherished franchises, the public outcry over the leagues' unchecked monopoly power could potentially reach the point that federal regulation becomes more plausible.

Second, critics will likely assert that federal intervention in the immensely popular professional sports industry is generally undesirable.[365] For example, one such commentator has argued that "the history of regulatory commissions is not one which instills overwhelming confidence in such a device as a protector of the interests of the general public."[366] This is a legitimate concern. Unfortunately, while federal regulation may not be ideal, in this case it represents the only plausible alternative to the leagues' continued abuse of their unregulated monopoly power. Indeed, because new entry by a rival firm is highly unlikely,[367] and because

risk that MLB's antitrust exemption will be revoked).

363. *See* QUIRK & FORT, *supra* note 2, at 147 (stating that stadiums and arenas have "a life expectancy of twenty-five to forty years").

364. *See* WEILER, *supra* note 54, at 276 (predicting that "Americans will experience (probably in the 2020s) yet another wave of stadium/arena construction").

365. *See, e.g.*, Ross, *Monopoly Sports*, *supra* note 7, at 702 ("Regulation is a poor means of addressing the problems monopoly sports leagues cause.").

366. Quirk, *supra* note 16, at 65.

367. *See supra* notes 119–139 and accompanying text (discussing barriers to entrance into industry).

proposed free market mechanisms to counteract the sports leagues' monopoly power are not viable,[368] government regulation offers the only means through which the anticompetitive tendencies of the professional sports industry can be reliably curbed. Nevertheless, Congress can help quell fears that heavy-handed government regulation will ruin a tremendously popular industry by narrowly limiting the scope of the proposed regulatory body's authority along the lines discussed above,[369] thereby ensuring that any government interference with the leagues is no greater than necessary to curb their anticompetitive conduct.

Finally, a common criticism of any specialized agency is that it will be subject to regulatory capture by the supervised industry and therefore ultimately prove unable to protect the public interest effectively.[370] In other words, agencies are often predisposed to favor the firms they supervise because bureaucrats frequently come from, or one day hope to work for, the regulated industry.[371] Commentators have contended that any regulatory authority governing the professional sports industry would be especially prone to capture by both team owners and the players' unions, who would be strongly motivated to lobby the agency to secure favorable treatment.[372] While regulatory capture is a risk for any specialized agency, scholars have nevertheless recognized that its effects can be minimized through principles of sound agency

---

368. *See supra* Part IV and accompanying text (discussing alternative reform proposals).

369. *See supra* note 346 and accompanying text (discussing potential powers of a federal regulatory body).

370. *See, e.g.*, Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q. J. ECON. 1089 (1991) (discussing regulatory capture).

371. *See, e.g.*, Brett McDonnell, *Dampening Financial Regulatory Cycles*, 65 FLA. L. REV. 1597, 1610–11 (2013) (identifying the "variety of mechanisms [that] cause regulators to favor the industry they are regulating"); Posner, *Natural Monopoly*, *supra* note 291, at 624 ("Because regulatory commissions are of necessity intimately involved in the affairs of a particular industry, the regulators and their staffs are exposed to strong interest-group pressures.").

372. *See* Ross, *Monopoly Sports*, *supra* note 7, at 703 (contending that team owners would "have strong incentives to organize and lobby for regulations that serve their interests").

design, such as by insulating agency officials from the threat of removal by the legislative or executive branches, and by providing the agency with dedicated sources of funding independent from the political process.[373] Moreover, even if the proposed sports regulatory body were to be captured to some extent, it would still be preferable to the status quo, in which the leagues exploit their monopoly power free from practically any effective governmental oversight.

Therefore, despite the anticipated criticisms of subjecting the professional sports industry to federal regulation, the creation of a federal regulatory body for the sports industry appears to be the best means through which to protect the public from the anticompetitive practices of the U.S. monopoly sports leagues.

VI. Conclusion

This Article has presented the case for federal regulation of the professional sports industry. Because antitrust law has failed to effectively regulate the industry, four monopoly sports leagues have been able to use their largely unregulated monopoly power to injure the public in a variety of ways. With alternative, proposed market-based solutions to this problem appearing unrealistic and ineffective, this Article has concluded that the formation of a federal sports regulatory body offers the best means for ensuring that the professional sports industry does not continue to harm the public in the future, while simultaneously imposing minimal disruption on an extremely popular industry.

373. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16, 42–45 (2010) (considering mechanisms to improve agency independence); *see also* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2013) (compiling proposals on the prevention of regulatory capture).